**UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

# VARIATIONS IN THE ADOPTION OF CHILDREN: AFRICAN VERSUS WESTERN JURISPRUDENCE

**A Mini-Thesis Submitted in Fulfilment of the Requirements for the Degree of Master of Laws (LLM)**

**By**

**Kelebogile Magan Aplane**

**Student no: 4282971**

**Supervisor: Professor Anthony C. Diala**

## DECLARATION OF AUTHENTICITY

I, **Kelebogile Magan Aplane** of student number **4282971** declare that the thesis titled **'Variations in the Adoption of Children: African versus Western Jurisprudence'** 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.

K.M APLANE

This mini-thesis has been submitted for examination with my approval as Supervisor.

Professor Anthony C Diala

29 August 2023

**ACKNOWLEDGEMENTS**

I would like to thank my supervisor, Professor Anthony Diala, for his dedication and patience in providing me with guidance throughout the writing process. No amount of words will be able to convey my sincere gratitude to him.

I can also not forget the important contribution made by my mentor, Mr T.G. Nkosi, a seasonal lecturer at the School of Law at the University of the Witwatersrand and a senior attorney at the Socio-Economic Rights Institute (SERI), a non-profit human rights organization, who took time from his very demanding workload to help me shape the course of this study. I remain indebted to him for selflessly dedicating his time to lending me a hand whenever I needed it.

Special thanks to my parents, for motivating me when I felt like giving up. I dedicate this thesis to my mother and my late maternal grandparents who taught me to be a proud African who advocates for our culture and protection of our traditional practices.

I would like to thank my friends Zamantungwa Khumalo Mbeki, Vuyo Mntonintshi, Aphelele Mtwecu, and Ntombi-zodwa Maphosa for encouraging me to pursue a Master's Degree in law. I also acknowledge the support of my friends and some family members for showing an interest in my progress. The writing process was frustrating, and I am grateful to all who made the burden lighter.

## ABSTRACT

During the colonial era, South Africa's indigenous normative order was subjugated by European laws, which led to a distortion of indigenous laws and the perception that Western jurisprudence was the supreme law. However, the validity of the imposed European laws is vitiated by the use of violence on indigenous people through colonisation. Indeed, this is the basis on which common law (Roman-Dutch law and Roman law) was imposed on South Africa. As a result, customary law has been subordinated and denigrated through colonial legislation, which relegated it, through the repugnancy clause, to be inferior to the common law.

The beginning of the new democratic order brought radical changes in the legal order. South Africa moved from parliamentary sovereignty to constitutional supremacy. The advent of the new democratic order introduced a new legal framework, wherein customary law is recognised as a source of law. Moreover, the Constitution entrenched the right to culture and tradition. The Constitutional Court promoted the application of customary law where it is applicable and promoted its development. However, the legislative regulations on child adoption are silent on customary law adoption of children.

This study reveals the position of customary law adoptions under South African law. It finds that the Children's Act 38 of 2005 does not accommodate customary law adoptions of children. Furthermore, the difference between African and Western jurisprudence leads to a dichotomy wherein the South African legal system finds itself having to consider the existence and co-existence of two legal orders (African and Western) in relation to child adoption. This study recommends the statutory recognition of customary law adoption through legislative reform and the use of the theory of re-indigenisation to harmonise the principle of the best interest of the child. Furthermore, adoption law reform is critical because child adoption is potentially life-changing and customary law is a source of law that is constitutionally protected in South Africa.

## Keywords

Customary law adoption

Children's Act

South Africa

Adoption legal framework

African jurisprudence

Western jurisprudence

Adoption law reform.

## ACRONYMS

| | |
|---|---|
| AD: | Appellate Division |
| ACRWC: | African Convention on the Rights and Welfare of the Child |
| BAA: | Black Administration Act |
| BCLR: | Butterworth Constitutional Law Reports |
| CC: | Constitutional Court |
| CRC: | Convention on the Rights of the Child |
| ED(S): | Editor(s) |
| JHC: | Johannesburg High Court |
| NAC: | Native Appeal Court |
| PARA(S): | Paragraph(s) |
| PER/PELJ: | Potchefstroomse Elektroniese Regstydskrif / Potchefstroom Electronic Law Journal |
| SA: | South Africa |
| SALC: | South African Law Commission |
| SALJ: | South African Law Journal |
| SAJHR: | South African Journal on Human Rights |
| SCA: | Supreme Court of Appeal |
| T: | Transvaal Provincial Division |
| V: | Versus |
| ZACC: | South African Constitutional Court |

## TABLE OF CONTENTS

**PAGE**

Declaration of Authenticity……..i
Acknowledgements…… ii
Abstract…….....iii
Keywords…….iv
Acronyms……v
Table of Contents……vi

**Chapter 1: INTRODUCTION**

1.1 Research Background……1
1.2 Research Problem……..3
1.3 Research Questions……...3
1.4 Research Methodology……..4
1.5 Research objectives……4
1.6 Motivation for the research……5
1.7 Structure……...6

**Chapter 2: HISTORICAL OVERVIEW OF ADOPTION OF BLACK AFRICAN CHILDREN IN SOUTH AFRICA**

2.1 Introduction……..8
2.2 Definition of Child Adoption……...8
2.3 History of Child Adoption in South Africa……9
2.3.1 Roman Law Adoption Practices……...9
2.3.2 Roman-Dutch Law Adoption Practices…… 11
2.3.3 Customary Law Adoptions…… 11
2.3.4 Circumstances in which Customary Law Adoptions may be used…….. 13
2.4 History of Adoption Based on Legislation in South Africa…… 14
2.4.1 Introduction…… 14

2.4.2 Adoption of Children Act 25 of 1923…….. 14
2.4.3 Children's Act 31 of 1937…… 15
2.4.4 Children's Act 33 of 1960…… 15
2.4.5 Child Care Act 74 of 1983……15
2.4.6 Children's Act 38 of 2005……16
2.5 Conclusion…….. 17

**Chapter 3: CUSTOMARY LAW ADOPTIONS IN SOUTH AFRICA**

3.1 Introduction……19
3.2 Difference between Indigenous Law and Customary Law……19
3.3 Customary Law in the Colonial Era……20
3.4 Customary Law in the Constitutional Era……..23
3.5 Forms of Cultural Adoption……..28
3.6 Customary Law Adoption Procedure in South Africa……..30
3.6.1 The Function of Rituals in Customary Law Adoption……32
3.7 Recognition of Customary Law Adoptions in South Africa Case Law Analyses……32
3.7.1 *Zibi v Zibi*……33
3.7.2 *Kewana v Santam Insurance Co Ltd*……...33
3.7.3 *Metiso v Padongelukfonds*……...33
3.7.4 *Motsepe v Khoza*……...34
3.7.5 *Maswanganye v Baloyi N.O and Another*……..34
3.8 Conclusion……....35

**Chapter 4: LEGAL FRAMEWORK IN SOUTH AFRICA**

4.1 Introduction……37
4.2 Analyses of the Legal Framework of South Africa……..38
4.2.1 Statutory Vis-A-Vis Customary Law Adoption……38
4.3 Best Interests of the Child Principle……...43
4.3.1 Observations about International Instruments on Adoption……44

4.3.2 Analyses of Judicial Interpretation Of the Best Interest of the Child Principle……45
4.4 The Best Interests of the Child Under Customary Law……48
4.5 Towards the Reconciliation of the 'Paramountcy' Principle……..49
4.6 Conclusion…… 51

**Chapter 5: CONCLUSIONS AND RECOMMENDATIONS**

5.1 Introduction…… 53
5.2 The Difference between African and Western Jurisprudence……53
5.2.1 African Jurisprudence……...53
5.2.2 Western Jurisprudence……55
5.3 The Conflict between
African and Western Jurisprudence……56
5.4 Summary of Significant Observations of the Study……...58
5.4.1 Chapter One……...58
5.4.2 Chapter Two……...59
5.4.3 Chapter Three……59
5.4.4 Chapter Four……..61
5.4.5 Chapter Five……...61
5.5 Recommendations for Parliament……..61
5.6 Recommendations for South African Law Commission……..62
5.7 Recommendations for the Judiciary……62
5.8 Recommendation for the Commission
for the Promotion and Protection of the
Rights of Cultural, Religious and Linguistic Communities……63
5.9 Conclusion…… 64

**Bibliography**

Books……..66
Chapters in Books……66

Journal Articles……..66
Case Law……69
Legislation……..70
Law Commission Papers……..70
Theses…… 70
Treaties……...70
Online
Material……...71
Internet Sites……..71

# CHAPTER ONE

# INTRODUCTION

## 1.1 Research Background

Customary law as a legal system that regulates relations between black African people has been isolated, disdained, and derided as barbaric.[1] In fact, its recognition in the courts has been subjected to conformity with the common law.[2] The terms cultural adoption and customary law adoption are used interchangeably in the paper.

The Children's Act 38 of 2005 (hereinafter referred to as the Children's Act), is silent on customary law adoption of children. It also appears to exclude the cultural adoption of children, as it has no provisions concerning customary law adoption. The Children's Act's focal point is on the rights of people to be considered as the soon-to-be adoptive parents in terms of section 21; this creates legal and practical challenges for people who adopted children culturally.[3]

Additionally, section 23 of the Children's Act provides that if any individual wishes to care for the child and has access to the child, that individual must apply to the High Court to obtain an order to that effect. Furthermore, section 24 of the Children's Act states that if a person wants to be a child's guardian, they must apply to the High Court. At no point does it recognise the customary law adoption process as part of the existing procedure to adopt a child.

[1] Ndima DD 'Reconceiving African Jurisprudence in a Post-Imperial Society: The Role of Ubuntu in Constitutional Adjudication' (2015) 48 *Comparative and International Law Journal of Southern Africa* 361-63. See also Marius P 'a 'Black Thing': Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *SAJHR* 373: Marius noted "Particularly evident from both colonial and post-colonial legal discourse is the 'devaluative' ideology underlying decisions on African culture and customary law, both of which have come to be associated with a communal, primitive and uncivilised way of living." See also *Van Breda and Others Appellants v Jacobs and Others Respondents* 1921 AD 330.

[2] Bekker JC 'Commentary on the impact of the Children's Act on Selected Aspects of the Custody and Care of the African Children in South Africa' (2008) 29 *Obiter* 395.

[3] Bekker JC (2008) 401.

Section 239 of the Children's Act, then provides the procedure on how to bring about the adoption application. The Children's Act creates an impression that children adopted in terms of customary laws are excluded from the Act because they fail to comply with the judicial procedures prescribed in terms of the Act.[4] In terms of the Children's Act, adopted children are those who have complied with the provisions of sections 239 and 228, that is, those whom a person made an application to the court and an adoption order was granted. The Children's Act also recognises a child adopted in terms of interracial adoption (not relevant to this research).

The South African Children's Act does not recognise customary law adoptions and for as long as it does not recognise customary law adoptions, it cannot be said to be properly responding to the children's rights in relation to a socially, legally, and transforming democratic country. However, there are a few cases where the common law has recognised these adoptions in loss of support cases. There is a silence of customary law adoptions in the Children's Act.

Adoption in terms of customary law and tradition does not have to involve the courts to validate them. Adoption of a child in African customary law is done by people related to the child biologically and in certain instances, a child can be adopted by people not related to him/her.[5] The validity of the customary law adoption of a child depends on the agreement by the family members, a ritual being performed in public, and the adoption process reported to the traditional leader.[6] The importance of reporting the adoption process to the traditional leader or the adoption process being done in public signifies the child has formally been transferred to another family.[7] There are different types of customary adoptions, and black African people practice customary law adoption of children in various circumstances and for different reasons.

[4] Bekker JC (2008) 400.
[5] Maithufi TP 'Metiso v Road Accident Fund case no 44588/2000 (T): Adoption according to customary law' (2001) 34 De Jure 391,394.
[6] Maithufi 2001 De Jure 391-2.
[7] Maithufi 2001 De Jure 392.

In South Africa, customary law adoption of children has been the basis of support for many children who have lost their parents due to the HIV AIDS epidemic.[8]

## 1.2 Research Problem

In varying ways, customary and indigenous law practices have been suppressed in this country since the arrival of the Dutch in 1652 when the natives of this land were subjected to discriminatory laws, degradation and conquest. The dawn of a new South Africa brought about tension wherein the South African legal system found itself having to consider the existence and co-existence of two legal orders (African and Western) in relation to child adoption.[9] In this study, indigenous African laws and the colonially imposed legal order are referred to as African jurisprudence and Western jurisprudence. The tension between them was deepened by the Constitution itself which, in section 211(3), states that 'courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.[10]

Section 211(3) is curious; in that it directs courts to apply customary law when that law is applicable. However, it does so with conditions. These conditions are that customary law is subject to the Constitution and legislative prescripts that deal with customary law. The existence of the conditions has the effect of, or maybe taken to mean that the position of customary law has not changed from what it was before the dawn of the new South Africa. In the area of child adoptions, the two jurisprudences may very well remain alive and in operation.

## 1.3 Research Questions

(a) What is the position of customary law adoptions under South African law?

(b) What is the difference between African and Western requirements for adoption?

(c) What are the variations in the adoptions of children?

---

[8] 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) para 3.3.2.3 42.

[9] Earlier, South Africa was a parliament sovereign. Under parliament sovereignty, the courts have no power to challenge laws made by Parliament. Whether these laws are arbitrary or fair, it does not matter as courts must just apply them. See Botha C *Statutory Interpretation: An introduction to Students* 5 ed (2012) 12-3.

[10] Constitution of the Republic of South Africa of 1996.

(d) In what ways can the Children's Act incorporate customary law adoptions?

## 1.4 Research Methodology

The research is a qualitative, desktop exploratory study. A desktop approach is followed in this study, which focuses on legislative prescripts, case law and secondary sources of law. This study assesses the provisions of the Children's Act, with the existing customary law procedures regulating customary law adoptions of children. Legislative authority for evaluating children's rights, the adoption process in the Children's Act and the Constitution also determine the status of customary law adoption. Furthermore, case law, journal articles and textbooks are used to analyse the status of customary law adoptions and children's rights.

The study compares the different adoption processes followed in South Africa, which requires a textual study of the Children's Act and an analysis of adoption practices in customary law.[11] The research investigates the relationship between customary law adoptions and the Children's Act.

## 1.5 Research objectives

This research aims to develop customary law to be on the same level as the civil law of South Africa. Furthermore, it seeks to discover the processes followed when a child is adopted in terms of customary law since these processes are not in the Children's Act. As such this study seeks to contribute to the knowledge and understanding of how South Africa is currently managing the adoption process of children. The main aim of this study is to fill the gap in the Children's Act regarding child adoption and instigate legislative reform aimed at addressing this omission.

This study argues that customary law adoption processes of children are within the ambit of the Constitution and customary law adoption practices are protected by the

[11] The value of comparative study is to assure that the law reforms are "substantive and real, and not just theoretical and rhetorical" such as the best interests (or welfare) test, according to Norrie 2002 SALJ 623 at 624, which ostensibly gives paramountcy to children's rights (rhetoric found in the new Children's Acts of Scotland, England and Australia), while the reality is that paramountcy belongs to parents.

Constitution.[12] I will be drawing attention to the silence of the Children's Act on customary law adoption in terms of our indigenous laws.

This research is significant because it proposes legislative reform to bring about the recognition of customary law adoption of children. People who practice customary law adoption of children will be protected for practising their customs as the Constitution promotes. This research will enable an understanding of how South Africa is currently managing the adoption process of children and whether lasting solutions are being found to promote the best interest of the child principle.

### 1.6 Motivation for the research

It is without a doubt that the perceptions that were once created about customary law in our country have been challenged and re-challenged. The winds of change have blown, and it is time to re-evaluate the position of customary law adoption of children in South Africa. The silence of the Children's Act on customary law adoption of children is deafening. Customary law is a legal order that applies to most black African people in Africa.[13] African jurisprudence and Western jurisprudence are two jurisprudences belonging to two different philosophies and have always carried unequal levels of priority in the society with more emphasis being placed on Western jurisprudence; thus, silencing the role of African jurisprudence in so far as many societal issues are concerned, particularly the main issue of the study which is child adoption.



[12] Section 211 (3) of the Constitution provides:

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

Section 30 of the Constitution provides: "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

Section 28(2) of the Constitution provides: "A child's best interests are of paramount importance in every matter concerning the child".

Section 39(2) of the Constitution provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

[13] 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.

The majority of children in South Africa living in rural areas and their families practice customary law, and they are subjected to poverty and gender inequalities due to socio-economic disparities and class position.[14] Customary law adoption of children has been a solution to eradicate child-headed homes. Customary law has been practised before colonisation and it is an integral part of the South African law.[15] Despite this, customary law adoption of children is not recognised by the Children's Act which regulates the adoption of children in South Africa.

This is important because most black people practising customary law do not have money to go to courts to validate their practice and customs. The legislative reform will bring about recognition of customary law adoption of children. People, who practice customary law adoption of children will be protected for practising their customs and culture as the constitution promotes.

## 1.7 Structure

*Chapter One: Introduction*

This chapter introduces the study by setting out the background, research problem, and research questions which provide a framework for this study. Furthermore, it outlines the research methodology used in this study. In addition, it contains the objectives of the study and explains the importance of this study.

*Chapter Two: Historical Background of Child Adoption in South Africa*

This chapter defines child adoption. It outlines the historical overview of child adoption in South Africa with the focal point on how the laws developed over time with regard to child adoption in South Africa.

*Chapter Three:* Customary *Adoption Procedure in South Africa*

[14] Mbambo B 'An Exploratory Study on the Interplay Between African Customary Law and Practices and Children's Protection Rights in South Africa' (2011) 8.
[15] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) 478.

This chapter provides a synopsis of the status of customary law before colonisation and an outline through the colonial lenses during the apartheid era and also in the constitutional dispensation. Additionally, the difference between indigenous law and customary law is outlined. This chapter also discusses the forms and procedures followed when adopting a child in terms of customary law. Furthermore, this section investigates how customary law adoptions are recognised, and how their validity is determined by analysing case law.

*Chapter Four: Legal Framework on Child Adoption in South Africa*

This chapter analyses the legal framework in South Africa when it comes to adoption in terms of civil law and customary adoption. Additionally, it also takes into account the prospect of bridging the paramountcy doctrine and the customary law approach to the best interest of the child principle under customary law.

*Chapter Five: Conclusion and Recommendations*

In conclusion, this chapter discusses the difference between African and Western jurisprudence and the conflict thereof. Additionally, this final chapter provides observations about the study's findings and recommendations.

## CHAPTER TWO

## HISTORICAL OVERVIEW OF THE ADOPTION OF BLACK AFRICAN CHILDREN IN SOUTH AFRICA

### 2.1 Introduction

This section aims to explore the historical development of child adoption in South Africa. The adoption of children has taken various forms since time immemorial. South Africa is a country that was subjected to foreign domination. The indigenous people of South Africa find themselves in a situation where initially their laws (indigenous law) were not recognised and were later regulated by the laws of the former minority government.

Customary law has existed in South Africa longer than any other law and is the law that was originally applicable in this country.[1] Due to the colonisation of South Africa, the South African legal system developed as a result of the transplanted European laws, the majority of which are rooted in imperial traditions.[2] Therefore, due to colonisation and the imposition of Roman law and Roman-Dutch law on South Africa's legal system, they form part of our common law.

This section will begin with a definition of adoption and a summary of the regulation of adoption in Roman law and Roman-Dutch law. Additionally, it will proceed with the customary law system and then the South African legislative history of adoption is discussed.

### 2.2 Definition of Child Adoption

Banard et al, define adoption as "*a formal procedure in, which parental power over a child is terminated and vested in the adoptive parent*".[3] In *Robb v Mealey Executor*, it

[1] Ferreira S Interracial and Intercultural Adoption: A South African Legal Perspective (unpublished doctoral thesis, University of South Africa, 2009) 20.
[2] Diala AC 'Peacebuilding and the Interface of State Law and Indigenous Market Laws in Southern Nigeria' 2020 (64) *Journal of African Law* 2.
[3] Barnard, Cronjé & Olivier *The South African Law of Persons and Family Law* 3 ed (1994) 279.

was held that adoption establishes a legal relationship because it involves a person taking over the rights and responsibilities of the natural parent of a child.[4]

## 2.3 History of Child Adoption in South Africa

### 2.3.1 *Roman Law Adoption Practices*

Rome built itself into a world powerhouse, and the development of the country coincided with the development of adoption.[5] The first form of adoption during the Roman times was, *adrogatio* which emerged during the Law of Twelve Tables period.[6]

Roman law practices trace their origins to the history of the Roman people.[7] The form of adoption in ancient Roman law was dynastic, and its purpose was to serve the interests of the family and parents; for carrying their names on to the next generation.[8] However, with the rule of Justinian, there rose philanthropic adoption, of which its eminence took into account the interest of the child adopted.[9]

Ferreira notes that adoption in Roman law could happen in two ways, namely: through *Adrogatio* and *Adoptio*.[10] The distinction between these two forms of adoption was different in 'both form and function'.[11] In *Adrogatio*, a self-sufficient person was adopted and their relationship with their family was cancelled.[12] The adopted person and his family would be put under the control of their father who adopted (*Adrogator*) them.[13] An investigation process was conducted, to evaluate if it is in the interest of the child for *adrogatio* to take effect,[14] and consent from the adopted child was

[4] *Robb v Mealey Executor* (1899) 16 SC 133–136.
[5] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 422.
[6] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 422.
[7] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 14.
[8] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 15.
[9] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 15. See also Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 423.
[10] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 15.
[11] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 15. See also Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 424.
[12] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 15.
[13] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 15.
[14] Van Zyl DH History and Principles of Roman Private Law (1983) 93.

required.[15] A thorough investigation and consent were essential because the estate of the adopted child fell under the authority of the adoptive father.[16]

Moreover, women were not allowed to adopt in classical law times because they were not considered to have authority over their children.[17] Women and children under puberty could not be adopted through the process of *adrogatio*.[18] Furthermore, a father could not adopt his daughter born out of wedlock.[19]

Van der Walt submits that *Adoptio* developed later after *adrogatio*, and it was established on some principles of the Twelve Tables and *ius civile*.[20] *Adoptio* was a type of adoption where a child, not an independent person was adopted.[21] *Adoptio* took effect in two phases. The first phase is where the father could sell his child three times to a proposed adoptive father (a confidant).[22] The real father would sell the child to the confidant, and the adopter would later release the child to return to his real father.[23] The first preliminary sale of the child was described as *mancipatio*,[24] which means the formal transfer of the son from the father to the confidant.[25] The second phase of the sale is when the confidant releases the boy to his real father.[26] The third phase is when the confidant formally claims the child from the natural father. The claim by the confidant that the son is his child from the real father is an act of adoption.[27] Additionally, the third sale cancelled the relationship between the real father and the adopted child (*patria potestas* ended).[28]



[15] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 425.
[16] Van Zyl DH History and Principles of Roman Private Law (1983) 93. See also Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 424-5.
[17] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 16.
[18] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 15-6.
[19] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 16.
[20] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 427.
[21] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 427.
[22] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 427.
[23] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 427.
[24] Van Zyl DH History and Principles of Roman Private Law (1983) 94.
[25] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter 428.*
[26] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter 427.*
[27] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter 427-28*
[28] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 427.

However, during the reign of Justinian, this type of adoption was abrogated.[29] The sale of a child as a form of adoption was abolished and adoption procedures were substantially amended.[30] The new form of adoption required that the (adopter) and the child to be adopted appear before the court.[31] The natural father was required to express his intention to give up his child for adoption, and the adopter would express his intention to adopt the son as his own before the court.[32] For a person to adopt a child, they ought to have reached the age of maturity, which was prescribed to be 18 years old.[33]

### 2.3.2 *Roman-Dutch Law Adoption Practices*

In Roman-Dutch law, child adoption was not practised. The Roman law principles of adoption were never integrated into Roman-Dutch law.[34] In Roman-Dutch law, parental authority could not be bestowed on another person. However, informal adoption did take place, but the adopted child could not inherit from the adoptive parent, and adoption had no legal effect on the adopted child.[35] The adoption process was not formally recognised in Western European countries.[36]

South Africa's legal system is based on Roman-Dutch principles, but it has also been influenced by English legal principles.[37]

### 2.3.3 *Customary Law Adoptions*

> "We do have our own traditional adoption system. We didn't have to sign a paper to say I was going to adopt this child. It was our tradition and way of life to accept others as our own. When there was an orphan, the orphan was taken and had parents. We learned to share that humble house where bannock and tea was our food and that is how we lived. I didn't have to have steak. We didn't have to have a bed. We lay on

[29] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 428.
[30] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 428. See also Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 16.
[31] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 428.
[32] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 428.
[33] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 428.
[34] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 429.
[35] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 429.
[36] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 18.
[37] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 19.

> mother earth. Our bodies were strong. We were straight. We ate. We breathed in the fresh air."[38]

The practice of cultural adoption, or customary law adoption, is a well-established institution that is widely practiced by a number of Black African people of various cultures and traditions in South Africa. Cultural adoption forms an integral part of their culture, traditions, and customary law.[39] By way of example, one form of customary law adoption is '*oe gapa le namane*', and it is an old age practice that has been used by various people from different cultures and traditions in South Africa.[40] However, there are surprisingly few reports on cultural adoption from an anthropological and sociological outlook in the South African context.[41]

According to Bennet, customary law adoption of children is not an established system of customary law.[42] Moore & Himonga, like Bennet, contend that adoption does not occur in customary law, and any effort to try to compare child adoption with other customary law care arrangements should be avoided since the concept of controlling child care arrangements will work contrary to the idea that every child belongs to the larger family and not just biological parents.[43] However, Ferreira contends that there is proof that the cultural adoption of a child in customary law exists.[44] Furthermore, Maithufi relies on Bekker to prove that customary law adoption of a child exists in terms of customary law.[45]



However, there is evidence that suggests that customary law adoptions of children have long been existing. For example, in numerous case laws, cultural adoption of children has been taken into account in the context of African customary law and has

[38] Keewatin D an Indigenous Perspective on Custom Adoption (unpublished Master of Social Work thesis, University of Manitoba, 2004) 8.
[39] Keewatin D an Indigenous Perspective on Custom Adoption (unpublished Master of Social Work thesis, University of Manitoba, 2004) 20-1.
[40] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 344.
[41] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 344. See also Himonga C *Family Law in Zambia* (2011) 192.
[42] Bennett TW Human Rights and African Customary Law under the South African Constitution (1995) 107.
[43] Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 63.
[44] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 21.
[45] Maithufi IP 'Metiso v Road Accident Fund no 44588/2001: Recent case law' 2001 De Jure 391.

been affirmed as valid and legal by South African courts.[46] For instance, in *Maneli v Maneli,* the parties entered into a customary marriage and thereafter married each other in community of property; however, the parties had no children born out of this marriage.[47] In January 1997, the parties decided to adopt an eight-month-old female child in terms of Xhosa customary law, whose parents were deceased.[48] The parties performed Xhosa traditional rites and rituals when the child was adopted and the child was taken into the parties' home.[49] After the customary law adoption, the parties approached the Westonaria Department of Home Affairs and registered the infant "as their own child".[50]

The court recognised that customary law adoption of a child establishes a parental obligation on adoptive parents.[51] Put differently, customary law adoptions are concluded without judicial orders validating them.[52] Adoption in terms of customary law is a private agreement involving just the families involved.[53] Before colonisation, women's rights to custody of their children were restricted, this is primarily due to the patrilineal nature of most African communities.[54]

Therefore, customary law adoptions of children have always been practiced amongst black African people, and they do not require validation from courts to be recognised.

### 2.3.4 *Circumstances in which Customary Law Adoptions may be used*

Customary law adoption of children is an answer desired by the head of the family with no heirs or male child who wants the family name to be transferred from one generation to another.[55] If the family head does not have male children, he may adopt a male child with the intent of making the child his heir, sometimes he may adopt

[46] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 346.
[47] *Maneli v Maneli* [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ) at para 2.
[48] *Maneli v Maneli* [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ) at para 3.
[49] *Maneli v Maneli* [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ) at para 4.
[50] *Maneli v Maneli* [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ) at para 6.
[51] *Maneli v Maneli* [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ). See *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) at 1150. See also *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (TkA) at 776.
[52] *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T).
[53] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 21.
[54] Diala AC & Kangwa B 'Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa' (2019) 52 *De Jure Law Journal* 198.
[55] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 22.

because the biological parents are unable to take care of the child.[56] The father/family head will often attempt to get the son from his relatives, inside his family group.[57] Additionally, when the adoptive parents cannot have children of their own, they may adopt a child. Furthermore, when a child loses his/her parent/s through death the child can be adopted in terms of customary law.

## 2.4 History of Adoption Based on Legislation in South Africa

### 2.4.1 *Introduction*

Ferreira reports that it is quite plausible that the South African legislative framework was influenced by English law when the first adoption legislation was enacted.[58] Before 1923, adoption was not recognised as an act that creates a legal relationship between an adoptive parent and a child in South Africa.[59] In terms of common law informal adoption of children in South Africa took place, but it had no legal effect, as it was not legally recognised.[60] A person would adopt a child by either entering into an adoption agreement or by creating a testamentary provision in their will.[61] The first legislation to regulate the adoption process in South Africa was enacted in 1923 and it's called the Adoption of Children Act 25 of 1923.

### 2.4.2 Adoption of *Children Act 25 of 1923*

This Act was enacted on 30 June 1923 and came into force on 1 January 1924.[62] Its main objective was to formulate legal provisions to regulate and formalise adoption and to cancel the relationship between the child and the biological parents.[63] The adoption of a child had to be validated by the magistrate, provided the best interests of the child were taken into account.[64] The legislation promoted adoption to be legally

[56] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 23.
[57] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 23.
[58] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 18. See Also Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 430.
[59] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 430.
[60] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 430. See also *Robb v Mealey's Executor* (1899) 16 SC 133 at 136.
[61] *Edwards v Fleming* 1909 TH 232, *Robb v Mealey's Executor* (1899) 16 SC 133 at 136 and; *Fibinger v Botha* (1905-1910) 11 HCG at 97.
[62] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 431.
[63]Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 26. See also Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 431-432.
[64] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) Ferreira 26.

binding when adoption was in the best interest of the child. Then the magistrate was empowered to validate the adoption process.[65] Before an adoption can be validated, the adopting family must prove to the magistrate that they can take care of the child.[66] This Act made no provisions for customary law adoption of children.

### 2.4.3 *Children's Act 31 of 1937*

The Children's Act[67] repealed the Adoption of Children Act 25 of 1923.[68] The Act was ratified on 13 May 1937 and came into force on 18 May 1937.[69] Van der Walt notes the objective of the Children's Act, was broader as it had established Children's courts, and it did not only deal with child adoption.[70] Chapter VII of the Act dealt with child adoption. Child adoption was enforced with a court order made by the children's court, of the district in which the adopted child resided.[71] Furthermore, the Act required that the children's court must be satisfied that the adoptive parents are fit and proper to be awarded custody of the child.[72] Additionally, section 69(2)(c) requires the adoption to serve the welfare needs of the child and it should be in the best interest of the child.

### 2.4.4 *Children's Act 33 of 1960*

The Children's Act 33 of 1960 repealed the Children's Act 31 of 1937.[73] This Act came into force on 14 April 1960.[74] Section 1 defined a child as any individual, including an infant that is under the age of 18. Significantly this Act, defined a black person and it had limitations on the adoption of children according to different groupings in South Africa, such as race.[75] Chapter VII of this Act dealt with the adoption of children. This Act had no provisions for customary law adoptions.

### 2.4.5 *Child Care Act 74 of 1983*

[65] Children Act 25 of 1923 section 4(1).
[66] Children Act 25 of 1923 section 4(1)(c).
[67] 31 of 1937.
[68] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 27.
[69] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 27.
[70] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 433.
[71] Section 69 (1) of the Children's Act 31 of 1937
[72] Section 69(2)(b) of the Children's Act 31 of 1937.
[73] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 28.
[74] Ferreira S (unpublished doctoral thesis, University of South Africa, 2009) 28.
[75] [75] Van der Walt G 'The History of the Law of Adoption in South Africa' (2014) 35 *Obiter* 434-5.

The primary aim of the Child Care Act[76] was to regulate child adoption in South Africa. Section 17-27 of the Act provided the requirements and procedure to adopt a child. Section 18(4) provided the essential requirements that need to be complied with before the court granted the adoption order. Additionally, section 19 prescribed circumstances when consent can be provided, and the act also provided the effect of the adoption order.[77] Section 21 of the Act provided that an adoption order is rescindable. This Act made no provisions for customary law adoption of children. However, it defined marriage and recognised marriage concluded in terms of customary law.[78]

### 2.4.6 *Children's Act 38 of 2005*

The Children's Act is different from the previous laws because it is broad in context, and it deals with children's rights and regulates adoption and intercountry adoption. The main objective of the Children's Act is to give effect to the constitutional rights of children, provide care and protect their well-being.[79] Chapter 15 (sections 228-253) sets out the legislative framework for adoption in South Africa to date. Section 228 defines adoption and section 230 prescribes circumstances when a child can be adopted. The Children's Act also prescribes who may adopt a child,[80] and which requirements must be complied with.[81] A notice requesting consent for adoption from the parent/guardian must be served by the sheriff to the parents/guardian.[82] A formal adoption application to the Children's Court must be launched,[83] and a social worker must draw a report containing the following information:

(a) personal information of the child and whether the child is eligible to be adopted as prescribed by section 230;[84]

(b) whether the adoption is in the child's best interest; and[85]

(c) medical report of the child.[86]

[76] 74 of 1983, this Act came into effect on 1 February 1987.
[77] Section 20 Child Care Act 74 of 1983.
[78] Section 1 Child Care Act 74 of 1983.
[79] Section 2(a)-(i) Children's Act 38 of 2005.
[80] Section 231 Children's Act 38 of 2005.
[81] Section 232-237 Children's Act 38 of 2005.
[82] Section 238 Children's Act 38 of 2005.
[83] Section 239(1)(a) Children's Act 2005.
[84] Section 239(1)(b)(i) Children's Act 2005.
[85] Section 239(1)(b)(ii) Children's Act 2005.
[86] Section 239(1)(b)(iii) Children's Act 2005.

The social worker report compiled in terms of section 231(2)(d)[87] and the letter from the head of the Department of Social Development endorsing the adoption must be annexed to the adoption application.[88] Furthermore, the Children's Act prescribes the factors that a court must consider before granting an adoption order.[89] Chapter 16(sections 254-2730) deals with inter-country child adoption.[90] The Children's Act does not refer to the cultural adoption of children. However, it recognises that a father who has paid damages in terms of customary law can consent as a parent to the adoption application of his child.[91]

These Acts mentioned above recognise child adoption as a legally protected practice that changes the status of the child and creates obligations for the adoptive parents. However, even though customary law adoption is an old practice that is as old as humankind, these Acts still failed to recognise child adoption in terms of customary law. These Acts show there is a vacuum in the legislative prescripts that still needs to be filled. The status quo shows that the position of customary law adoption of children is excluded from the legislative framework, and as a result, this must be rectified.

## 2.5 Conclusion

The main aim of this chapter is to evaluate the history of adoption and analyse the adoption legal framework regulating child adoption in South Africa. The definition of adoption was highlighted. During Roman times, two types of adoption existed: *adrogatio* and *adoptio*. Under *adrogatio*, an independent person over the age of majority could be adopted. *Adoptio* meant a minor child could be adopted by the head of the family. In the Roman-Dutch Law period, there were no traces in historical records of legal principles that dealt with adoption. Adoption was not recognised during the Roman-Dutch Law. Adoption in Roman-Dutch Law was informally practised. However, an adopted child could not inherit from the adoptive parents. Various authors argued that customary law adoption is not a developed system in South Africa.

[87] Section 239(1)(c) Children's Act 2005.
[88] Section 239(1)(d) Children's Act 2005.
[89] Section 240(1) -(2) Children's Act 2005.
[90] This chapter is not relevant to this study.
[91] Section 236(4)(c) Children's Act 38 of 2005.

However, evidence from various case laws illustrated that customary law adoptions have existed since time immemorial, and some legal scholars disagreed with the position that customary law adoption is not an established system.

In *Robb v Mealey's Executor,* the court held that the was no legislation regulating adoption in the Cape Union and the first time adoption was formally regulated was when the Adoption of Children Act 25 of 1923 was enacted.[92] This case illustrates that child adoptions were not regulated in South Africa until the enactment of the Adoption of Children Act 25 of 1923. However, informal child adoption took place. This Act ensured that adoption was an acceptable procedure establishing a reciprocal relationship between the parent and the child. This Act was repealed by the Children's Act 31 of 1937, which developed the law by establishing Children's Courts. The legal framework developed until the Children's Act 38 of 2005 was enacted which, is broad because it is constitutionally mandated and promotes the best interest of the child. The legal framework that developed over time never recognised nor referred to customary law adoption of children. Even the current legislative prescript, the Children's Act, is silent on customary law adoption. In the next chapter, I proceed to investigate the status of customary law as a source of law. Additionally, I evaluate the customary law adoption procedure and evaluate if customary law adoption is recognised by our courts.



[92] (1899) 16 SC 133 at 136.

## CHAPTER THREE: CUSTOMARY LAW ADOPTIONS IN SOUTH AFRICA

### 3.1 Introduction

In pre-colonial society, indigenous law reigned supreme over the people of South Africa.[1] It was part of their culture, and they followed it as a normative system.[2] Indigenous laws are precolonial rules that are transmitted orally by elderly persons of the family or community, which people follow in their traditional forms.[3] Indigenous people were organised in close kinship, and the communities, in collaboration with the traditional leaders, were active in all spheres of life.[4] Thus, in this communal setting, 'communal interests prevailed over individual interest'.[5] Indigenous laws are not written down. The variation between indigenous law and customary law has to be evaluated through this historical lens.

### 3.2 Difference between Indigenous Law and Customary Law

In distinguishing between indigenous law and customary law, we ought to consider colonisation, which brought about the imposition of European laws on South Africa and the modification of indigenous laws through legislation.[6] The South African legal system developed as a result of the transplanted European laws, the majority of which are rooted in imperial traditions.[7] During colonisation, the Europeans subjugated countries that resisted their rule, plundered their natural and human resources, dispossessed people of their lands, and forced their laws and morals on the indigenous people with little regard for their existing legal systems.[8] Due to colonial



[1] Ndima DD 'The African Law of the 21st Century in South Africa' 2003 (36) *The Comparative and International Law Journal of Southern Africa* 330.
[2] Ndima DD 'The African Law of the 21st Century in South Africa' 2003 (36) *The Comparative and International Law Journal of Southern Africa* 330. See also Diala AC 'Peacebuilding and the Interface of State Law and Indigenous Market Laws in Southern Nigeria' 2020 (64) *Journal of African Law* 6.
[3] Diala AC & Kangwa B 'Rethinking the Interface between Customary Law and Constitutionalism in Sub-Saharan Africa' (2019) 52 *De Jure Law Journal* 197 at para 2.4.
[4] Diala AC 'The Concept of Living Customary Law: A Critique' 2017 (49) *Journal of Legal Pluralism and Unofficial Law* 4-5.
[5] Diala AC 'The Concept of Living Customary Law: A Critique' 2017 (49) *Journal of Legal Pluralism and Unofficial Law* 5.
[6] Diala AC 'Curriculum Decolonisation and Revisionist Pedagogy of African Customary Law' 2019 (22) *PER / PELJ* 11-3.
[7] Diala AC 'Peacebuilding and the Interface of State Law and Indigenous Market Laws in Southern Nigeria' 2020 (64) *Journal of African Law* 2.
[8] Diala AC 'Our Laws Are Better Than Yours: The Future of Legal Pluralism in South Africa' 2019 (26) *Revista General de Derecho Público Comparado* 6.

rule and legal transplant onto indigenous laws, indigenous laws were subjected to the repugnancy clause.[9] As a result, indigenous laws changed, leading to the emergence of hybrid norms that manifested in the categorisation of customary laws.[10] Therefore, simply put, 'indigenous laws are remnants of the precolonial norms that people observe in their ancient forms; customary laws are adaptations of indigenous norms to socioeconomic changes.'[11] Customary laws are adaptable to socioeconomic changes.[12]

### 3.3 Customary law in the colonial era

In 1652, when the European colonisers arrived in the Cape, they introduced a foreign legal order.[13] In South Africa, a quasi-dual legal system was applicable. Although the colonial administration did not recognise customary law as the law, it was utilised by the colonial courts in certain circumstances.[14] The Europeans made indigenous law a subordinate law, whereas common law was regarded as superior law, despite indigenous law being the first normative order of the indigenous people. Over time indigenous laws changed leading to the establishment of customary laws.

Thus, the introduction of foreign policies and legislation. These foreign policies and legislation undermined traditional authorities, for example, the enactment of the Native Succession Act.[15] This posed a problem because the colonial policies and legislation affected indigenous law negatively.[16]



[9] Diala AC 'Our Laws Are Better Than Yours: The Future of Legal Pluralism in South Africa' 2019 (26) *Revista General de Derecho Público Comparado* 7.
[10] Diala AC 'Our Laws Are Better Than Yours: The Future of Legal Pluralism in South Africa' 2019 (26) *Revista General de Derecho Público Comparado* 8-9 and 12-3. See also Diala AC 'The Concept of Living Customary Law: A Critique' 2017 (49) *Journal of Legal Pluralism and Unofficial Law* 5.
[11] Diala AC & Kangwa B 'Rethinking the Interface between Customary Law and Constitutionalism in Sub-Saharan Africa' (2019) 52 *De Jure Law Journal* 191. See also Diala AC 'Legal Pluralism and the Future of Personal Family Laws in Africa' 2021 (35) *International Journal of Law, Policy and the Family* 1.
[12] Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 62. See also Diala AC 'A Butterfly that thinks itself a bird: The identity of Customary Courts in Nigeria' 2019 (51) *The Journal of Legal Pluralism and Unofficial Law* 385.
[13] Diala AC 'Our Laws Are Better than Yours: The Future of Legal Pluralism in South Africa 2019(26) *Revista General de Derecho Público Comparado* 4-5.
[14] TW Bennet Customary Law in South (2004) 36.
[15] 10 of 1854. See also Diala AC 'Neoliberal Influences on Legal Pluralist Marriage Reforms in Africa' 2022 (9) *Journal of International and Comparative Law* 85.
[16] Diala AC 'Neoliberal Influences on Legal Pluralist Marriage Reforms in Africa' 2022 (9) *Journal of International and Comparative Law* 84.

Furthermore, to continue with the agenda of the modification of customary law and its subordination to Eurocentric laws, a culmination of policy and legislation was enacted.[17] This consolidated the set-up of a separate legal system from customary and the interrelation of inequality between customary law and common law. To emphasise this point Ngcobo J, in his majority judgment demonstrated the iniquitous philosophy in the BAA as follows:

> "Residential segregation was the cornerstone of the apartheid policy. This policy was aimed at creating separate "countries" for Africans within South Africa. The Natives Land Act, 27 of 1913 and the Native Trust and Land Act, 18 of 1936 together set apart 13% of South Africa's land for occupation by the African majority. The other races were to occupy the remaining 87% of the land. Africans were precluded from owning and occupying land outside the areas reserved for them by these statutes. The Native Administration Act, 38 of 1927 appointed the Governor-General (later referred to as the State President) as "supreme chief" of all Africans. It gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called "white areas" into the areas reserved for them. These removals resulted in untold suffering. This geographical plan of segregation was described as forming part of "a colossal social experiment and a long term policy."[18] (footnotes omitted)

It is noteworthy from the reading of the above paragraph that it is safe to conclude that the BAA also provided guidelines as to how to interpret and apply customary law through the repugnancy clause to conform with common law. Ultimately, at that time, the only sources of law recognised by academics and legal practitioners were common law and legislation, as there has never been equivalence between the transplanted Eurocentric laws and indigenous laws.

The categorisation of customary law developed, and there emerged 'official customary law', which had elements of patriarchy as recognised or reinforced by colonial

[17] Native Administration Act 38 which later became Black Administration Act 1927 (BAA).
[18] *Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government* [2000] ZACC 2; 2000 (4) BCLR 347; 2001 (1) SA 500 at para 41.

authorities in colonial courts.[19] Official customary law can be regarded as the result of colonial efforts to subject customary law to Western legal criteria. Customary law was misinterpreted and distorted by legislation.[20] The indigenous courts presided over by traditional leaders applied customary law in matters concerning black Africans only while the European-styled courts applied a dual system of common law and customary law. The enactment of the Law of Evidence Amendment Act[21] brought minimal change. Customary law was given recognition even though its application was limited, as it only applied to issues related to black Africans. Thus, customary law was still viewed as subject to the common law.[22]

The Law of Evidence Amendment Act provided as follows:

> '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 . . . '[23]

By way of example, the above section was bolstered by the Supreme Court of Appeal in *Thibela v Minister van Wet en Orde*,[24] wherein the Court applied section 1(1) of the Law of Evidence Amendment Act by accepting expert evidence regarding the *o e gapa le namane*. The issue before the Court was whether the deceased husband had adopted the widow's son while he was still alive.[25] Theoretically, the enactment of the Law of Evidence Amendment Act was superficial and palliative because customary law was still subordinate to common law and was subjected to Eurocentric standards and public policy.[26]



[19] Diala AC 'Neoliberal Influences on Legal Pluralist Marriage Reforms in Africa' 2022 (9) *Journal of International and Comparative Law* 85.
[20] Ndima DD (unpublished doctoral thesis, University of South Africa, 2013) 17(1.4)(c).
[21] 45 of 1988.
[22] Bennett TW *Customary Law in South Africa* (2004) 42. See also Diala AC 'Neoliberal Influences on Legal Pluralist Marriage Reforms in Africa' 2022 (9) *Journal of International and Comparative Law* 87.
[23] Section 1(1) of Law of Evidence Amendment Act 45 of 1988.
[24] 1995 3 SA 147 (SCA).
[25] *Thibela v Minister Van Wet en Order* 1995 3 SA 147 (SCA).
[26] *Daniels v Campbell NO* 2004 (7) BCLR 735 (CC), 2004 (5) SA 331 (CC) at para 74, the Court noted the following: "True to their worldview, the judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition . . is inequality, arbitrariness, intolerance and inequity."

Therefore, the application of the repugnancy clause distorted customary law because customary law was denigrated to a subordinate status in the South African legal order. The development of "official customary law'' was to subordinate customary law to common law through legislation that authorised the courts to rescind those customs that resonated with African values and African jurisprudence.

The impact of this approach was unpleasant because the jurisprudence generated by the common law processes adopted the division and classification principles of the latter system.[27] Furthermore, the consequences of the colonial regime were the development of a dual legal system in South Africa, in which common law applied to every person while customary law applied only to black people. In addition, conflict emerged between the 'official customary law,' a version of customary law that was applied by the judiciary and legal practitioners, and the "living customary law," a version that was applied by black African law adherents in social practice.

The development of "official customary law" came into existence because of the use of the repugnancy clause to encourage adherence to Western jurisprudence and cultivate 'contempt for the African thought system', which was to be suppressed because of its presumed inferiority.[28] As a result, "official" customary law was distorted, as the indigenous laws, 'principles, concepts and doctrines' were interpreted in accordance with Eurocentric standards.[29]

Ultimately, the colonial administration denigrated customary law, weakened the moral fibre of its adherents, and resulted in the consolidation of colonial authority over the affairs of black Africans.[30] At the end of the colonial regime in 1994, official customary law had changed beyond recognition; however, the dawn of the new constitutional era brought about transformative circumstances to resurrect the system and develop it in terms of the Constitution.

### 3.4 Customary Law in the Constitutional Era

[27] Roederer C 'Traditional Chinese Jurisprudence and its relevance to South African legal thought' in Roederer C & Moellendorf D *Jurisprudence* (2004) 499-531.
[28] Ndima DD (unpublished doctoral thesis, University of South Africa, 2013) 129.
[29] Ndima DD (unpublished doctoral thesis, University of South Africa, 2013) 129.
[30] Ndima DD (unpublished doctoral thesis, University of South Africa, 2013) 130.

This section examines the status of customary law in the post-apartheid era. It reflects on some of the implications and effects of the Constitution, legislation, and the Constitutional Court decisions regarding customary law.

Customary law is defined as the 'customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of these people.[31] However, this definition is not the official definition as it is limited to the Recognition of Customary Marriages Act[32] (RCMA). Its roots can be traced back to the agrarian settings of traditional communities in South Africa, though it was not codified at the time.[33] Customary law is an essential component of South African law, and before colonisation, it was referred to as indigenous law.[34] The source of customary law is tradition and social practices that members of a community accept as binding to them.[35]

> "Customary laws and protocols are central to the very identity of many local communities. These laws and protocols concern many aspects of their life. They can define rights and responsibilities on important aspects of their life, culture, use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage, and many other matters. Customary practices of inheritance impact directly on the right to culture (of course excluding rules which treat people unequally or which limit other rights in a way which is unreasonable and goes against the spirit of the rest of the fundamental rights). In many traditional communities in a rural setting, a majority of the people identify with customary laws of inheritance and conduct their lives in conformity with them."[36]



The status *quo* of customary law and its application under the new democratic framework plagued both the courts and the Constitution's negotiators at the inception of the dawn of a new South Africa. Ultimately, the writers of the Constitution and the

[31] Recognition of Customary Marriages Act 120 of 1998 Section 1(ii).
[32] 120 of 1998.
[33] Bennet TW Customary Law in South Africa (2004) 2. See also Diala AC 'Legal Pluralism and the Future of Personal Family Laws in Africa (2021) 35 *International Journal of Law, Policy and the Family* 2.
[34] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at 478.
[35] Bennet TW Customary Law in South Africa (2004) 128.
[36] Mujuz JD 'Reconciling customary law and cultural practices with human rights in Uganda' (2021) 42 *Obiter* 240.

Constitutional Court recognised the status of customary law and the responsibilities of traditional leaders in terms of customary law.[37]

The Constitution is the supreme law and every law is subject to it.[38] The Constitution recognised customary law as a source of law through the inclusion of provisions about customary law,[39] cultural rights,[40] and recognition of traditional leadership.[41] To adhere to the Constitutional mandate of the promotion and protection of cultural rights, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities was established. The mandate of the Commission is the promotion, the protection of the rights of culture in communities and to recommend the recognition of traditional councils.

However, this change brought a new challenge with regard to the interpretation and application of customary law. Courts were confronted with various customary law disputes, such as the question of 'living' vs. 'official' customary law. There was a period when indigenous law was hotly debated amongst legal scholars which led to the categorisation of customary law as 'living' and 'official' customary law.[42] Consequently, legal scholars define living customary law as the rules that govern people's lives and official customary law as that version of customary law that is written down and is found in textbooks, case law and legislation.[43]

The first case that the Constitutional Court had to deal with this issue of 'living' vs 'official' customary law was in the *Bhe*[44] case. The Court stated that where an 'indigenous law' rule deviates from the spirit, purport and objective of the Bill of Rights,

[37] *Certification of the Constitution of the Republic of South Africa*, [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).
[38] Section 2 of the Constitution of the Republic of South Africa. See also Certification of the Constitution of the Republic of South Africa, [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).
[39] Constitution of Republic of South Africa Section 211.
[40] Constitution of Republic of South Africa Section 30 -1.
[41] Constitution of Republic of South Africa Section 211 -12.
[42] Diala AC 'Legal Pluralism and the Future of Personal Family Laws in Africa' 2021 (35) *International Journal of Law, Policy and the Family* 4.
[43] Diala AC 'Curriculum Decolonisation and Revisionist Pedagogy of African Customary Law' 2019 (22) *PER / PELJ* 5. See also Diala AC 'Legal Pluralism and the Future of Personal Family Laws in Africa' 2021 (35) *International Journal of Law, Policy and the Family* 9-13.
[44] *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

the Court must remedy the said deviation. As a result, the Court has solidified its position.[45] Additionally, the issue of customary law's development is still debatable since some people think that judicial intervention and the codification of customary law will make it fluid and incompatible with its natural form.[46] However, the Court did not resolve this issue. Rather, it held that customary law is subject to the Constitution and its interpretation will depend on societal shifts, legislative prescripts, and legal interpretation.[47]

In the *Shilubana* case, the issue before the Court was whether Ms Shilubana had a right to succeed her father to become the chief of the Valoyi Community in Limpopo.[48] The Court held that "customary law is by its nature a constantly "evolving system."[49] In conclusion, the Court held that traditional rulers had the power to develop customary law.[50] This case illustrates that customary law is subject to the Constitution and it must be recognised. Additionally, living customary law was distorted, and was never allowed to "evolve". Therefore, it is permissible to allow traditional leaders to develop customary law.

Furthermore, in *Gumede v President of the Republic of South Africa*, the court bolstered the point that it is compulsory for all courts not to only apply customary law but to also develop it.[51] In terms of section 211(3) of the Constitution, courts are obligated to apply customary law.[52] This means customary law is now constitutionally entrenched, and customary law has the same stature as the English common law and



[45] *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 215.
[46] *Certification of the Constitution of the Republic of South Africa*, [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 200.
[47] *Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 197. See also *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC), where the court held that like all other laws, customary law must be consistent with the Constitution. Customary law, just like any other law, its status must be respect.
[48] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).
[49] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) at para 45.
[50] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) at para 89.
[51] [2008] ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC).
[52] Section 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."

Roman-Dutch law.[53] As a result, judicial officers should not develop indigenous laws because those who practice them are the best qualified to do so.[54]

Ferreira noted that in South Africa, black Africans are the majority, unlike in other countries. Furthermore, the black African people in South Africa adhere to customary law.[55] She contended that the significance of customary law adoption cannot be downplayed.[56]

Customary laws are not written down, and they are not easy to find as they are often given orally by the elders in the family or traditional leaders.[57] Children and black African family members are compromised, as they are unable to afford the expensive litigation process to challenge the constitutional validity of the Children's Act, which excludes the customary law adoption of children. The Constitutional recognition of customary law is important because customary law governs all aspects of personal and family life, including issues concerning children such as care, contact, maintenance, guardianship, and initiation.[58] The Constitutional recognition of customary law plays a significant role because the Constitution recognises adoption in terms of customary law, and it protects and promotes cultural rights.

In the new constitutional dispensation, courts were confronted with the new issue of the interpretation and application of customary law. Courts were confronted with various customary law disputes, such as the question of 'living' vs 'official' customary law. As a result, in numerous case laws, the Constitutional Court developed customary law in *Gumede, Shilubana*, and *Bhe*. This is important as it shows that the Constitutional Court recognises customary law as a source of law, and its application and development are important as customary law is applicable to most African people. Therefore, just like customary law was developed to be in line with the Constitution,

[53] Bennett in Bekker et al Legal Pluralism 17. See also *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) at 926.
[54] Diala AC 'Neoliberal Influences on Legal Pluralist Marriage Reforms in Africa' 2022 (9) *Journal of International and Comparative Law* 100.
[55] Ferreira S Interracial and Intercultural Adoption (unpublished LLD dissertation, 2009) 4.
[56] Ferreira S Interracial and Intercultural Adoption (unpublished LLD dissertation, 2009) 4.
[57] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) 479. See also Bekker JC *Seymour's Customary Law in Southern Africa* 5 ed (1989) 11.
[58] Moore E & Himonga C 'Living Customary Law and Families in South Africa' 2018 *Children, Families and the State* 62.

the silence on customary law adoptions in the Children's Act must be addressed to protect the best interests of the children adopted in terms of customary law and promote and protect customary law adoptions of children.

As illustrated above, it is, therefore, important to have a better understanding of the history of the South African legal system, and the historical framework of the development of customary law to understand what is the position of customary law adoptions in South Africa. Additionally, this helps us understand how the South African legal system finds itself in the debacle of having to consider the existence of two legal systems in relation to child adoption. Customary law is an important legal system as it is applied by most black African people.[59] I proceed to investigate child adoption in terms of customary law.

### 3.5 Forms of Cultural Adoption

There are various forms of customary law adoptions, classified according to the persons involved in the adoption of the child or children, such as the biological father of the child, siblings of the mother or father, prospective husbands, relatives, and non-relative members. Due to the close-knit and communal nature of African societies, there is an overlap between customary law adoption and guardianship.

The first form of customary law adoption is called "marrying a child."[60] In Sesotho, Sepedi, and Setswana, it is known as *go nyala ngwana,* and in *Nguni* (Zulu, Xhosa, Swati, Venda, and Tsonga), it's called *ukubogadi ingani, nwana ukhou leliwa nga khotsi, or kobogadi nwana.*[61] The biological father of a child born out of wedlock can adopt the child by paying *lobola* for the child.[62] The father negotiates with the mother's family, but the mother is not part of the marriage; only the child or children are. If the

[59] *Maneli v Maneli* [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ) para 27.
[60] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 347.
[61] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 347.
[62] 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* 9.

mother consents to the adoption, then the father pays the *lobola* as a sign of adopting the child and making the child an integral part of his family group.[63]

Additionally, another form of customary law adoption is *oe gapa le namane*, which is normally practised amongst the Basotho, Batswana, and Bapedi communities.[64] In the African societies of Basotho, Batswana, and Bapedi, during *Lobola* negotiations, if a woman has a child or children from her previous relationship(s), the prospective husband's family will be informed that the woman has a child or children. The husband's family will then be asked if they wish to marry the woman and her child or only the woman. If the man's family elects to marry the woman and the child, it is known as *oe gapa le namane,* meaning "to take the child born of another man into your marriage with its mother".[65] Once the *tlhale* or *bogadi* has been paid then *oe gapa le namane* is concluded.[66] The payment of tlhale or *bogadi* signifies the completion of customary marriage and adoption.[67] Thus, the child or children can take the surname of their new father. Furthermore, a ritual is done to recognise the marriage and adoption but, more significantly, to inform the ancestors of marriage and adoption. This ceremony entails the slaughter of livestock.[68]



[63] 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* 9.

[64] 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* 10.

[65] 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* 11. Monye emphasised the point by quoting as follows:
"when negotiating Bogadi (lobola) the family of the bride would ask the family of the groom whether they know that the person they sought to marry has a child. The question is put as 'a lo itse fa sego sa metsi seo le sebatlang . . .? in this regard the groom's family would give their answer. If the answer indicates that they are aware and want to O e gapa le namane they would then reply yes and offer to go roka sego sa metsi. The process of go roka sego sa metsi means that they would pay a certain amount of money referred to as tlhale." See Also ML v KG [2013] ZAGPJHC 87 at para 17.

[66] 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* 11. See also Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 348.

[67] *Thibela v Minister Van Wet en Orde* 1995 3 SA 147 (SCA) at para 150A–B.

[68] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 349.

The third type of customary law adoption is following the death of the child's father or mother, the father/mother's sibling may adopt the child.[69] A couple without a child can also adopt a child whose parents have passed away.[70] In African communities that practice polygamy, when either the second or third wife has passed away, the first wife and the husband may agree that if the first wife adopts the children of the late sister wife, then the husband need not marry again. This is commonly practised by Zulu communities. Having discussed the different types of adoption under customary law, the next section presents a detailed discussion of the procedure followed when adopting a child in South African societies.

### 3.6 Customary Law Adoption Procedure in South Africa

In South Africa, there are four ethnic groups into which black people are divided.[71] First is the Nguni group, which consists of Zulu, Xhosa, Ndebele, and Swazi. Second, Sotho, which consists of Basotho, Tswana, and Bapedi; third, Shangaan-Tsonga; and lastly, Venda.[72] Therefore, customary law adoptions are not uniform across all ethnic groups in South Africa. However, some common customs and norms are similar in all ethnic groups with regard to customary law adoption of children. Below I will discuss the common requirements that are similar in all ethnic groups.

Under customary law, adoptions of children are in accordance with the traditional practices and rites of the tribes of the indigenous people. These traditional practices and rites are always developing as they change with the practices and customs of a particular clan. Customary law adoption is different from statutory adoption; however, the process has the same legal effect as statutory adoption.[73] There is an African belief in African communities that a child is not only the child of the biological parents and that 'it takes a village to raise the child' because each person in the traditional community gives a communal approach to child protection and childcare to each

[69] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 347. See also *Metiso v Padongelukfonds* 2001 3 SA 1142 (T), the deceased had adopted two of his late brother's children.
[70] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 347.
[71] https://www.sahistory.org.za/article/race-and-ethnicity-south-africa.
[72] https://www.sahistory.org.za/article/race-and-ethnicity-south-africa.
[73] Maithufi 2001 De Jure 394.

child.[74] This is the cornerstone of customary adoption, which has assisted in minimising child-headed homes as a result of the HIV and AIDS pandemic, which left many children orphans.[75]

Cultural (customary law) adoption is a private agreement involving just the families involved. In terms of customary law, the procedure and the conditions that are taken into cognisance is that members of the family are called into a gathering, wherein the adoption procedure and subsequent agreements are to take place.[76] Adoptive parents and the adopted child's relatives are both involved in the adoption process and they should agree that adoption should take place.[77] Upon the agreement between the two families about the customary law adoption of the child, a traditional leader or his representative must be informed.[78] The importance of reporting to the traditional leader is to inform the traditional leader that the child has been transferred from one family to the other family.[79] The validity of customary law adoption lies in the agreement between these families.[80] A traditional ritual will be conducted, which involves the slaughtering of livestock to inform the ancestors of the cultural adoption and signify cultural adoption has taken place.[81] When a child is adopted, he or she becomes, for all intents and purposes, the child of the adoptive parent(s).[82]

In conclusion, the validity of customary law adoption depends on the following requirements being met: the first is the agreement about customary adoption between the adoptive parents of the child to be adopted and the biological family of the child. Second, the adoption process must be done in public in the presence of both families, and the adoption process must be reported to the traditional leadership; finally, a traditional ceremony must be performed.[83]

[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) 10.
[75] 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.
[76] Maithufi 2001 De Jure 391.
[77] Maithufi 2001 De Jure 391.
[78] Maithufi 2001 De Jure 391.
[79] Maithufi 2001 De Jure 391.
[80] Maithufi 2001 De Jure 392.
[81] Maithufi 2001 De Jure 392.
[82] Maithufi 2001 De Jure 392.
[83] *Maswanganye v Baloyi N.O and Another* [2015] ZAGPPHC 917 at paras 13-4.

Adoption is commonly done between blood relatives, although it is also not rare amongst non-relatives.[84] In terms of African beliefs, adopting a child from a different lineage can be challenging. This is because it is commonly believed by black African people that a child is protected by ancestral spirits, and if a child is adopted by a family other than his blood relatives or family, the ancestors will be angry.[85] As a result, the child might suffer some illness that cannot be cured by Western medication, or the child may not be successful in life.[86] Thus, mostly in African communities, cultural adoption of a child happens among family members.

### *3.6.1 The Function of Rituals in Customary Law Adoption*

Rituals are traditional practices and rites that are used to validate the developments and transitions that take place in the family.[87] Rituals are vital in society since they legitimise emergent changes and developments, maintain order, and introduce new developments to the ancestors of African people.[88] In terms of African tradition, the execution of rituals is always accompanied by the slaughtering of livestock to invite the ancestors and God through the spilling of their blood.[89] Thus, it is important that after a child has been adopted livestock must be slaughtered. In *Maneli v Maneli,* it was held that the purpose of the Xhosa cultural adoption ceremony was to demonstrate that the adoptive parents officially took on parental responsibility for the minor child.[90] In *Kewana v Santam Insurance Co Ltd* and *Metiso v Padongeluksfonds,* the court made it clear that when determining the validity of customary law adoption, the cultural adoption ought to be done in public, and it described publicity as the traditional ceremony which is symbolic. Additionally, an adoption agreement between the families is not enough.

---

[84] Maithufi 2001 De Jure 392.
[85] Blackie D 'Fact Sheet on child abandonment research in South Africa' *National Adoption Coalition* 20 May 2014 available at http://www.adoptioncoalitionsa.org/report. (accessed 2 April 2022) at page 6.
[86] Blackie D 'Fact Sheet on child abandonment research in South Africa' *National Adoption Coalition* 20 May 2014 available at http://www.adoptioncoalitionsa.org/report. (accessed 2 April 2022) at page 6.
[87] Ndima DD (unpublished doctoral thesis, University of South Africa, 2013) 77.
[88] *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (Tk), various traditional Xhosa rituals were executed and that signified cultural adoption of the child. The court found that a child adopted according to customary law is entitled to compensation for loss of support emanating from the negligent killing of such Child's adoptive parent.
[89] Ndima DD (unpublished doctoral thesis, University of South Africa, 2013) 77.
[90] *Maneli v Maneli* [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ) at para 5.

In the next section of this chapter, I analyse a selection of case law that recognised child adoption under customary law in South Africa.

## 3.7 Recognition of customary law adoptions in South Africa - Case law analyses

In the majority of cases, the issue of customary law adoption of children came up as a supplementary issue to the main issue for determination. In the sub-sections below, I will be analysing the court's recognition of customary law adoption of children and the analysis will be limited to case law.

### 3.7.1 *Zibi v Zibi*

In *Zibi v Zibi*, the court stated that it is not essential to comply with the legislative provisions of adoption in the Children's Act.[91] In essence, the customary law adoption procedure does not have to conform to the requirements of the Child Care Act to be valid.[92]

### 3.7.2 *Kewana v Santam Insurance Co Ltd*[93]

The court was called again to decide whether the customary law adoption procedure should also include some of the requirements prescribed by the Child Care Act,[94] and the court declared that the Children's Act,[95] which regulated child adoption before the Child Care Act, did not modify or replace customary law adoption of children.[96]

### 3.7.3 *Metiso v Padongelukfonds*

In *Metiso v Padongelukfonds,* the main issue for determination was whether there was a legal duty to maintain the children whom the deceased adopted in terms of customary law and as an auxiliary issue, the court had to determine if customary law

[91] 1952 (2) NAC 167 (S) at 170.
[92] *Zibi v Zibi* 1952 NAC 167 (S) at 170. See also Maithufi 2001 De Jure 394.
[93] 1993 (4) SA 771 (TkA).
[94] 74 of 1983.
[95] 33 of 1960.
[96] *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (TkA) At 776.

adoption was performed.[97] The deceased's late brother was married to a woman who abandoned her children after her husband died. The deceased then adopted two of his late brother's minor children in terms of customary law. The court noted that the mother of the two minor children did not consent to the adoption, and efforts were made to locate her, but they proved unsuccessful. As a result, the court concluded that customary law adoption was established, and it was declared valid even though the mother did not consent to the adoption.[98]

### 3.7.4 *Motsepe v Khoza*[99]

The issue before the court was maintenance and whether the respondent has a legal obligation to maintain children who are not his biological children.[100] The applicant relied on the principle of "*O e gapa le namane*", as a defence to claim maintenance of the two minor children.[101] The court concluded that the applicant had proved her case, and indeed when the respondent married the applicant, he also adopted the minor child culturally.[102] The "*O e gapa le namane*" requirement has been satisfied.[103]

### 3.7.5 *Maswanganye v Baloyi N.O and Another*[104]

At the heart of the application before the court was whether the applicant had been culturally adopted by the deceased, and whether she qualified to inherit from the deceased's estate as the sole heir.[105] The court relied on *Kewana v Santam Insurance Co Ltd and Metiso v Padongeluksfonds,*[106] and held:

> 'It seems to me from the authorities that the element of publicity is central to the process of customary adoption. In both *Kewana* and *Metiso,* that aspect seems to have weighed heavily with the courts in concluding that there had been customary adoption. Prof. Maithufi gave expert evidence in *Metiso,* and confirmed his views as reflected in the preceding paragraph. The requirement of publicity appears to be in the form of a small,

[97] *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T).
[98] *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) at 1150.
[99] *Motsepe v Khoza* (unreported case number 15078/2012, South Gauteng High Court, 8 April 2013).
[100] *Motsepe v Khoza* (para 3).
[101] *Motsepe v Khoza* (para 9).
[102] *Motsepe v Khoza* (para 17).
[103] *Motsepe v Khoza* (para 15).
[104] [2015] ZAGPPHC 917.
[105] *Maswanganye v Baloyi N.O and Another* [2015] ZAGPPHC 917 para 1.
[106] *Maswanganye v Baloyi N.O and Another* [2015] ZAGPPHC 917 para 9.

> if symbolic, ceremony to mark the occasion. This is not surprising. Adoption is a significant and life-altering development for all concerned - the child, its natural parent(s), as well as its adoptive parent(s).'[107]

The court held that the applicant failed to prove that she was adopted in terms of customary law, as the requirements for a valid customary law adoption were not met.[108] From the above cases, it is clear that the courts recognise the cultural adoption of children. These various case laws bolstered the fact that the customary law adoption of children is an established system. However, the issue of the validity of customary law adoption is an auxiliary issue in most cases. The four cases above indicate that parents have a legal duty to maintain their children in terms of the Maintenance Act.[109]

### 3.8 Conclusion

Before colonisation, indigenous law was the supreme law that governed the indigenous people of South Africa. There is a difference between indigenous laws and customary law. The variation between indigenous law and customary law must be evaluated through this historical lens. During colonisation, the Western imperialists colonised this country, imposed their laws on African people, and dispossessed them of their productive land. The indigenous people's culture and traditional practices were destroyed, and the European culture and laws dominated. Customary law was subjected to the repugnancy clause, which was inferior to the imposed laws.

The dawn of a new South Africa arrived, and the Constitution of the Republic of South Africa was drafted. The Constitution is the supreme law and any act or conduct that conflicts with it is invalid.[110] Customary law is recognised as an independent source of law by the South African Constitution. The Constitution recognises cultural rights and, traditional leadership. A Commission for the Protection of Cultural Rights was established to promote and protect the rights of culture in communities.

[107] *Maswanganye v Baloyi N.O and Another* [2015] ZAGPPHC 917 para 13.
[108] *Maswanganye v Baloyi N.O and Another* 2015] ZAGPPHC 917 para 22.
[109] Act No 99 of 1998.
[110] Section 2 of the Constitution of the Republic of South Africa.

Due to the categorisation of 'living' and 'official' customary law by scholars, the Constitutional Court had to deal with the issue of 'living' vs 'official' customary law. By way of example, the first case the Court dealt with this issue was in the *Bhe Case.* In *Shilubana, Gumede, and Bhe*, the Constitutional Court developed customary law to be in alignment with the values of the new Constitutional dispensation.

It is submitted that the historical framework of the development of customary law assists in providing a clear image of the status of customary law and why today there is a debacle of having to consider the existence of two legal systems in relation to child adoption. Under customary law, child adoption takes place in various forms, and it is important to perform rituals to introduce the child to the ancestors and protect the child's well-being. Customary law adoption is a valid procedure to adopt a child in terms of traditional customs and practices. The requirements of a valid customary law adoption procedure must be adhered to.

Customary law adoption of a child is an important aspect of black African people's culture and traditions. Its recognition and significance within their culture are clearly highlighted in various case laws such as the *Zibi*, *Kewana*, *Metiso*, *Motsepe*, *Maswanganye and Thibela* mentioned above. However, case law shows that South African courts recognise customary law adoptions under specific circumstances such as in maintenance claims.

## CHAPTER FOUR: LEGAL FRAMEWORK OF CUSTOMARY LAW ADOPTIONS IN SOUTH AFRICA

### 4.1 Introduction

According to Karl Marx, the dominant ideas that rule in society are those of the ruling elite, including the law.[1] South Africa's legal framework comprises a dual legal regime that incorporates Roman-Dutch law and the English common law, which are applicable to everyone, and customary law, which is applicable mostly in matters of private law.[2] Rautenbach contends that South Africa's legal system demonstrates that deep legal pluralism exists in the country.[3] However, Diala argues that South Africa's legal system is a manifestation of adaptive legal pluralism, and adaptive legal pluralism takes into account the influence of globalisation on the normative orders in this country.[4] Adaptive legal pluralism views the interplay of legal orders in sub-Saharan Africa "as essentially imitative."[5] He emphasises that "a striking feature of this interaction is how law reforms mould indigenous norms into universalist images of the rights to dignity, equality, and non-discrimination."[6] I agree with Diala's contentions that, indeed, South Africa's legal system is a manifestation of adaptive legal pluralism. He clearly considers the effect of the historical materialism of this country, notably the effects of colonisation and globalisation.[7] Rautenbach's description is short-legged as it fails to sufficiently consider the effects of globalisation.



[1] Karl Marx 'The German Ideology Part I: Feuerbach. Opposition of the Materialist and Idealist Outlook B. The Illusion of the Epoch' available at *https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01b.htm* (accessed 11 July 2023).

[2] Rautenbach C 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 60 *Journal of Legal Pluralism and Unofficial Law* 144. See also Bekker JC 'Commentary on the Impact of the Children's Act on Selected Aspects of the Custody and Care of African Children in South Africa' (2008) 29 *Obiter* 396.

[3] Rautenbach C 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 60 *Journal of Legal Pluralism and Unofficial Law* 145.

[4] Diala AC 'Legal Pluralism and the Future of Personal Family Laws in Africa'(2021) 35 *International Journal of Law, Policy and the Family* 2.

[5] Diala AC 'Legal Pluralism and the Future of Personal Family Laws in Africa'(2021) 35 *International Journal of Law, Policy and the Family* 2.

[6] Diala AC 'Legal Pluralism and the Future of Personal Family Laws in Africa'(2021) 35 *International Journal of Law, Policy and the Family* 2.

[7] Diala AC 'Legal Pluralism and the Future of Personal Family Laws in Africa'(2021) 35 *International Journal of Law, Policy and the Family* 3-14.

South Africa's legal system is pluralistic, and in pluralistic legal systems, states frequently try to control unwritten legal systems such as customary law in order to ensure adherence to the main legal system.[8]

South Africa's pluralistic legal system presents a difficulty because it has Western and customary laws coexisting side by side.[9] To provide a comprehensive understanding of the South African legal framework on child adoption, this chapter analyses the legal framework affecting customary law adoptions and evaluates the interpretation and application of the best interest of the child principle. In so doing, it uses the Constitution and the Children's Act as benchmarks. Subsequently, it explores whether the interpretation of the best interest of the child as articulated in the Constitution may be merged with the interpretation in terms of customary law. Additionally, to present a balanced view, the chapter examines the difference between African jurisprudence and Western jurisprudence and the conflict thereof.

## 4.2 Analyses of the Legal Framework of South Africa

This section analyses the legal framework and evaluates the relevant provisions of the Constitution and the Children's Act as the primary sources of law that strongly influence child adoption in South Africa.

### 4.2.1 *Statutory Vis-A-Vis Customary Law Adoption*

Section 15(3) of the Constitution provides as follows:

> '(a) This section does not prevent legislation recognising—
>
> (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
>
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

[8] Osman F 'the Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' (2019) 22 *PER / PELJ* 2.

[9] Rautenbach C 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 60 *Journal of Legal Pluralism and Unofficial Law* 145. See also Rautenbach C and Matthee J 'Common Law Crimes and Indigenous Customs: Dealing with the Issues in South African Law' (2010) 61 *Journal of Legal Pluralism and Unofficial Law* 109.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.'[10]

Section 30 of the Constitution provides:

'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.'

Section 31 of the Constitution reads:

'(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'

The Constitution of South Africa validates the significance of customary law, as it includes the right to culture, tradition, and customary law provided in sections 15(3),30 and 31 of the Constitution. These provisions recognise that a statute can be enacted to recognise systems of personal or family law under any tradition.[11] In addition, they seek to cater for the right to participate in cultural life in terms of section 30, and the right that people may belong to a cultural community and no one may be denied the right to participate in and enjoy their culture as provided for by section 31. These provisions, read with section 9 of the Constitution on the equality clause, serve as protection for customary law adoption of children in the Children's Act.[12] In accordance with section 211(3) of the Constitution, courts must apply customary law when it is applicable, subject to the Constitution and the statutes that deal with it directly. Mokotong argues that since the Constitution recognises customary law, customary law adoption of children is protected by the Constitution and deserves to be treated with the same respect as the common law.[13]

[10] Constitution of the Republic of South Africa, 1996.
[11] Interpretation of section 15(3) of the Constitution.
[12] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 352.
[13] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 352.

Taking into consideration the above, it is important to examine to what degree the Children's Act has properly included and promoted customary law adoption. In putting the Children's Act into effect by official proclamation, the legislature acted in accordance with the South African Law Commission's recommendations, which opted for the inclusion of a general non-discrimination clause, instead of following the preferred route of clarity and certainty.[14] Different submissions, pro-inclusion and against the direct or indirect inclusion of comprehensive customary law provisions affecting children in the Children's Act, were taken into account by the then South African Law Commission (SALC). The justification for objection to the direct inclusion of customary law issues affecting children is that its inclusion could lead to difficulties.[15] No compelling arguments were presented to back up this justification.[16] Additionally, it was argued before the Law Commission that specific instances of customary law affecting children should be respected in case-specific situations.[17]

The Children's Act prescribes a number of requirements to comply with statutory adoption. It is necessary to consider the scope of sections 228, 233, 239, 240 and 242 of the Children's Act and to analyse whether these sections incorporate customary law adoption procedures and requirements. I turn to a separate consideration of sections 228, 233(1), 239 and 242 of the Children's Act.



Section 228 of the Children's Act reads as follows:

> 'Adoption—
> A child is adopted if the child has been placed in the permanent care of a person in terms of a court order that has the effects contemplated in section 242.'

From the reading of this provision, one can reach a conclusion that *prima facie* the Children's Act precludes customary law adoptions. Therefore, statutory adoption is the

[14] South African Law Commission (SALC) Discussion Paper 103 (Project 110) Review of the Child Care Act (2002) 1007.
[15] South African Law Commission Discussion Paper 103 (Project 110) Review of the Child Care Act (2002) 995.
[16] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 353.
[17] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 353.

only legally valid form of adoption. However, with customary adoptions, there is a legal impediment as they are not specifically dealt with in the Children's Act.[18]

In terms of section 233(1), the Act provides as follows:

> 'A child may be adopted only if consent for the adoption has been given by—
> (a) each parent of the child, regardless of whether the parents are married or not:
> Provided that, if the parent is a child, that parent is assisted by his or her guardian;
> (b) any other person who holds guardianship in respect of the child; and
> (c) the child, if the child is—
> (i) 10 years of age or older; or
> (ii) under the age of 10 years, but is of an age, maturity and stage of development to understand the implications of such consent.

This provision lists persons who may consent for a child to be adopted. A parent or guardian may consent and a child who is 10 years and above and who understands the legal consequences of adoption may consent to his/her adoption application. Customary law adoption requires an agreement between the families of the adopted child and the adoptive parent(s).[19]

Section 239 of the Children's Act prescribes a procedure to obtain an adoption order and the necessary documentation to accompany an adoption application. Section 239, read together with section 240 of the Children's Act, prescribes what the court should consider before granting an adoption order. However, the validity of the customary law adoption of a child is dependent on the agreement by the family members, a ritual being performed in public, and the adoption process being reported to the traditional leader.[20] The importance of reporting the adoption process to the traditional leader or the adoption process being done publicly signifies that the child has formally been transferred to another family.[21] Customary law adoption is not dependent on the bureaucratic process of courts and is not validated by judicial order.

[18] Bekker JC 'Commentary on the Impact of the Children's Act on Selected Aspects of the Custody and Care of African Children in South Africa' (2008) 29 *Obiter* 400.
[19] Maithufi 2001 De Jure 396.
[20] Maithufi 2001 De Jure 391-2.
[21] Maithufi 2001 De Jure 392.

Section 242(2)(a)-(b) of the Act reads as follows:

> An adoption order—
> (a) confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent;
> (b) confers the surname of the adoptive parent on the adopted child, except when otherwise provided in the order;

The effect of an adoption order is explained in this provision. The adoptive parents have the authority to change the surname of an adopted minor child. This means that all the parental responsibilities with the former parents are terminated by the court order, meaning that the adoptive parents are now the new parents of the adopted child.[22] Section 242(a)-(b) demonstrates that the adoptive parent has the legal authority to register the birth and include his/her name on the birth certificate of the adopted child.[23] The culturally adopted child would be unable to change his or her surname to the adoptive parent's if the Children's Act does not recognise the customary law adoption of children.[24]

The effect of the non-inclusion of customary law adoption of children in the Children's Act leaves a sour taste in the mouth and much to be questioned. On critical analyses of the non-inclusion of cultural adoption in the Children's Act, one wonders if this is practical, taking into account the socio-economic circumstances of most African people who cannot afford to approach courts for an adoption order, the rising numbers of child-headed homes, and the right to equality for those practising their culture and tradition who must be subjected to long and bureaucratic court processes. Also, is it justifiable to leave this to the discretion of the Children's Court and deal with this on a case-by-case basis, or is parliament avoiding responsibility to deal with this matter by enacting or incorporating cultural adoptions in the Children's Act?[25]

[22] Section 241(1) (a)-(d) of the Children's Act.
[23] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 353.
[24] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 353.
[25] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 353.

I have alluded to the distinction between the provisions regulating statutory adoption, and as illustrated above, the Children's Act is silent on the cultural adoption of children.

### 4.3 Best Interests of the Child Principle

This subsequent section evaluates the influence of international conventions, the constitutionalisation of the paramountcy principle, and its interpretation. The phrase paramountcy principle is used interchangeably to refer to what is known as the best interest of the child principle.[26] The principle of the best interest of a child was developed in the South African legal system in the early 19th century through case law regarding custody, the relationship between children and their parents and child adoption.[27] After the United Nations endorsed the Declaration of the Rights of the Child, it was decided that if laws were passed to give children special protection, the child's best interests should be "the paramount consideration."[28] Article 3(1) of the Convention on the Rights of the Child (CRC) affirms the above principle and it broadened its applicability by providing as follows:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'[29]

In addition to the CRC, the principle of the best interest of the child is likewise affirmed in the African Charter on the Rights and Welfare of the Child.[30]

Article 4(1) of the African Charter on the Rights and Welfare of the Child (ACRWC) provides that '[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.'[31] In terms of Article 4(2), '[i]n all judicial or administrative proceedings affecting a child who is

[26] Moyo A 'Reconceptualising the 'paramountcy principle': Beyond the individualistic construction of the best interests of the child' (2012) 12 *African Human Rights Law Journal* 143.
[27] Mills L 'Failing children: The Courts' disregard of the best interests of the child in Le Roux v Dey' (2014) 131 *SALJ* 847. See also Couzens M 'The Best Interests of the Child and the Constitutional Court' (2019) 9 369.
[28] Mills L 'Failing children: The Courts' disregard of the best interests of the child in Le Roux v Dey' (2014) 131 *SALJ* 848.
[29] United Nations Convention on the Rights of the Child, 1989 GA Res 44/25, annex, 44 (1989).
[30] Mills L 'Failing children: The Courts' disregard of the best interests of the child in Le Roux v Dey' (2014) 131 *SALJ* 848-49.
[31] African Charter on the Rights and Welfare of the Child, 1990 OAU Doc. CAB/LEG/24.9/49 (1990).

capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.' Articles 4(1) and 4(2) distinguish between instances when the best interest of the child should be considered.

### 4.3.1 *Observations about international instruments on adoption*

South Africa ratified the ACRWC in 2000 after ratifying the United Nations Convention on the Rights of the Child in 1995. Thus, South Africa is a party that's bound by these treaties. To ensure compliance, these international conventions were then domesticated into national law by the Constitution and the Children's Act.

Article 21 of the CRC deals with adoption. 21(a) provides as follows:

> 'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.'



This provision mandates that an adoption procedure must 'ensure that the child's best interests shall be the paramount consideration.' Additionally, this provision is consistent with the ACRWC. It is, however, noted that Article 30 of the CRC provides that people of 'indigenous origin' or children belonging to this group may not be denied the right to enjoy their culture.

Therefore, these international instruments contribute to the quest of this study because South Africa is a party to these treaties, and because South Africa has ratified these treaties, it creates a legal obligation to locally domesticate the treaties into domestic legislation. The ACRWC and CRC form the basis of our law as they emphasise the importance of the best interest of the child principle and adoption. These treaties have

been incorporated into domestic legislation as the best interest of the child principle has been entrenched in the Constitution and the Children's Act.[32] The South African Constitution, to entrench the best interest of the child principle was influenced by the CRC.[33] Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum 'must consider international law.'

As a result, the Constitution of South Africa is generally considered to be one of the most 'international law-friendly constitutions in the world.'[34] Therefore, it is important to discuss the international law instruments that emphasise the importance of the best interest of the child principle, as they form part of South African law and the Constitution promotes the consideration of international law.

### 4.3.2 *Analyses of judicial interpretation of the best interest of the child principle*

Section 28(2) of the Constitution provides that '[a] child's best interests are of paramount importance in every matter concerning the child.' In *Fletcher v Fletcher,* the court emphasised that the best interests of the child must be the primary consideration in issues concerning the child.[35] However, historically, the paramountcy principle was applied inconsistently by the courts over the years.[36]

Section 9 of the Children's Act affirms the principle of the child's best interest, and section 7 provides that regard must be paid to '[w]henever a provision of the Children's Act requires the best interests of the child standard to be applied'. In a similar vein, Sachs J in his majority judgment in *S v M,* referred to the factors provided in section 7 of the Children's Act and said that '[s]uch factors include, but are not limited to, the nature of the personal relationship between the child and the parents . . . .'[37] Therefore, the holistic reading of this paragraph means that when dealing with matters concerning a child, factors listed in section 7 of the Children's Act form the basis that helps courts in determining what is in the best interest of the child. However, this is not a closed-off

[32] Section 28(2) of the Constitution. See also sections 7 and 9 of the Children's Act.
[33] Skelton A 'Too much of a good thing? Best interests of the child in South African jurisprudence' (2019) 52 *De Jure Law Journal* 559.
[34] Tladi D 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 311.
[35] 1948 1 SA 130 (A) 143.
[36] *Fletcher v Fletcher* 1948 1 SA 130 (A); *McCall v McCall* 1994 (3) SA 201 (C); *F v F* 2006 (3) SA 42 (SCA).
[37] 2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 12.

list, and courts can take other factors into account to determine the best interest of the child. Furthermore, section 6 of the Children's Act provides for 'general principles that must guide all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general'.

In *S v M*,[38] the Constitutional Court interpreted the best interest of the child principle as follows:

> 'The children are innocent of the crime. Yet, as the amicus points out, children's needs and rights tend to receive relatively scant consideration when a primary caregiver is sent to prison. The amicus asserts that in practice the Zinn triad is usually applied in a manner that focuses on the offender and pays little attention to the children. Yet, separation from a primary caregiver is a collateral consequence of imprisonment that affects children profoundly and at every level. Parenting from a distance and a lack of day-to-day physical contact places serious limitations on the parent-child relationship and may have severe negative consequences. The children of the caregiver lose the daily care of a supportive and loving parent, and suffer a deleterious change in their lifestyle. Sentencing officers cannot always protect the children from these consequences. They can, however, pay appropriate attention to them and take reasonable steps to minimise damage. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.'[39] (Footnote omitted)



In this case, the Court emphasised the importance of the right in terms of section 28(1)(b) of the Constitution and that when interpreting the paramountcy principle due consideration should be given to the right to family care. Furthermore, this right must be balanced against the necessary factors and guidelines since 'the 'expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular.'[40]

[38] [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).
[39] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 42.
[40] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para at para 23.

In *Du Toit and Another v Minister of Welfare and Population Development and Others*, the Court dealt with partners in a lesbian relationship who wished to adopt two kids but were unable to do so because the then legislation only allowed married couples to adopt.[41] Skweyiya AJ emphasised that adoption is an excellent approach to give children access to the benefits of family life that they might not otherwise have.[42] In interpreting the best interest of the child principle, the Court relied on *Minister of Welfare and Population Development v Fitzpatrick and Others* where it held that:

> "Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this Court in *Fraser v Naude and Others*."[43] (Footnotes omitted)

In his unanimous judgment in *Fitzpatrick*, Goldstone J said that the best interests of the child principle was never 'given exhaustive content' in our law.[44] As a result, this principle should not be applied in a rigid manner, as particular circumstances of individual children are different, and these personal circumstances will determine which factors 'secure the best interests' of an individual child.[45]

Recently in *Nandutu and Others v Minister of Home Affairs and Others,* Mhlanhla J said while section 28(2) of the Constitution stipulates that a child's best interests come first, legal precedent holds that rights can be limited, and a child's rights do not take precedence over other rights.[46] In general, the paramountcy principle must be interpreted in a manner that serves as a response to South Africa's obligations.

---

[41] [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) at para 1.
[42] *Du Toit and Another v Minister of Welfare and Population Development and Others* [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) at para 18.
[43] *Du Toit and Another v Minister of Welfare and Population Development and Others* [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) at para 20.
[44] *Minister for Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (7) BCLR 713; 2000 (3) SA 422 (CC) at para 18.
[45] *Minister for Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (7) BCLR 713; 2000 (3) SA 422 (CC) at para 18.
[46] *Nandutu and Others v Minister of Home Affairs and Others* [2019] ZACC 24; 2019 (8) BCLR 938 (CC) ; 2019 (5) SA 325 (CC) at para 60.

When applying cases of who should stay with the child (custody), the court in *French v French* stipulated the principles that ought to be considered as follows:

> '(a) [T]he sense of security of a child should be preserved;
> (b) the suitability of the proposed custodian parent;
> (c) material considerations relating to the child's well-being; and
> (d) the wishes of the child.'[47]

These principles are still considered when a child is adopted, taking into account the best interest of the child. The effect of these cases is that courts have dealt with the interpretation of the best interest of the child principle. Additionally, in some judgments, the courts have contended that a contextual interpretation should be applied, and other factors should be taken into account.[48]

### 4.4 The best interests of the child under customary law

According to African customary law, children do not only belong to their biological parents but are also part of extended families; therefore, their welfare and well-being are intertwined with those of their families.[49] An important aspect of African family law is that relationships are formed through the extended family model, and family units are communal. This trait permeates kinship and clans.[50] The system of kinship enables the family circle to include a sizable number of people in the unit, and the individuals that make up the family circle have various rights and obligations.[51] In communal and kinship settings, when members of the family's welfare or interests are threatened by other family members or by outsiders, they collectively defend them.[52]

[47] *French v French* 1971 (4) SA 298 (W) at page 298-99.
[48] *Fletcher v Fletcher* 1948 1 SA 130 (A); *McCall v McCall* 1994 (3) SA 201 (C); *F v F* 2006 (3) SA 42 (SCA).
[49] Songca R 'Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 353.
[50] Songca R 'Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 353. See also Nhlapo 'RT Parenthood in Modern Society Legal and Social Issues for the Twenty-first Century' in Eekelaar J and Šarčević P (eds) *Biological and Social Parenthood in African Perspective: the movement of children in Swazi family law* (1993) 36-7.
[51] Songca R 'Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 353.
[52] Songca R 'Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 353.

Therefore, the "best interests of the child" are not considered immaterial or peripheral to other competing considerations under customary law.[53] Somewhat, there is a belief that due to the communal nature of African people, the best interests of the child are intrinsically linked to the interests of the family and lineage and that these interests are best served by a sense of “belonging”[54]. As a result, Moyo holds that decisions taken in a family setting typically aim to balance the rights and interests of various family members.[55]

Customary law adoption is performed in the child's best interests and needs, with consideration that, in the context of customary law, the idea of interests includes the interests of the ‘family, community, and nation.’[56] Therefore, the paramountcy principle is applied in customary law adoptions.

### 4.5 Towards the reconciliation of the ‘paramountcy’ principle

The paramountcy principle is an essential tenet of the relationship between parents and children in the new constitutional order.[57] The principle of the best interest of the child in terms of statutory provisions typifies ‘individualistic’ endeavours, although in customary law the concept of the best interest of the child is linked to the interest of the family, which is not individualistic in nature.[58] Sachs J. affirmed that our constitutional values require us to be tolerant and respect diversity.[59]

Consequently, it is crucial to note that addressing the differences and exploring the deeper insights of the principle of the best interest of the child calls for the use of the

[53] Nhlapo ‘RT Parenthood in Modern Society Legal and Social Issues for the Twenty-first Century’ in Eekelaar J and Šarčević P (eds) *Biological and Social Parenthood in African Perspective: the movement of children in Swazi family law* (1993) 47.
[54] Nhlapo ‘RT Parenthood in Modern Society Legal and Social Issues for the Twenty-first Century’ in Eekelaar J and Šarčević P (eds) *Biological and Social Parenthood in African Perspective: the movement of children in Swazi family law* (1993) 47.
[55] Moyo A ‘Reconceptualising the ‘paramountcy principle’: Beyond the individualistic construction of the best interests of the child’ (2012) 12 *African Human Rights Law Journal* 142.
[56] Mokotong M ‘Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)’ (2015) 78 *Journal of Contemporary Roman-Dutch Law* 349.
[57] Jokani MC The Customary Law Practice of Ukuthwala – An Antithesis in the South African Constitutional Oder (unpublished LLD, Nelson Mandela Metropolitan University,2017) 73.
[58] Moyo A ‘Reconceptualising the ‘paramountcy principle’: Beyond the individualistic construction of the best interests of the child’ (2012) 12 *African Human Rights Law Journal* 142.
[59] *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051.

theory of re-indigenisation to bring about the reconciliation of the *paramountcy* principle. Ndima defines re-indigenisation as follows:

> '[t]he pursuit of the objective to present African law and culture on the basis of its indigenous value system which has its origins in pre-colonial version but is currently prevalent among its adherents in an adapted form. Indigenisation/re-indigenisation also seeks to exorcise the cancer of coloniality dogging the present day African thought system so as to disentangle it from the hegemonic stranglehold of the dominant Euro-Western cosmology through the substitution of its own epistemology and ontology.'[60]

The theory of re-indigenisation is the procedure that entails reviewing and conceptualising African law in terms of its own values as influenced by the Constitution.[61] This theory's focal point is decolonisation and remedying the exclusion and alienation of African law in this context of the best interest of the child.[62] 'By generating a symbiotic interaction between indigenous values and the Constitution, the courts would fulfil their transformative role and forge the envisioned African law that is free of all traces of cultural distortion.'[63] Therefore, the principle of the best interest of the child in terms of the statutory provisions and constitutional interpretation needs to be decolonised and must go through the process of indigenisation. This process will bring the reconciliation of the 'paramountcy' principle. The best interest of the child principle will not be individualistic, it will be considerate of the interests of others, and it will be constitutionally protected.



It is worth noting that Ndima highlights the objectives and features of the idea of re-indigenisation as follows:

> '(a) reverse the hegemonic coloniality that subverted the operation of African law by fossilising and stone-walling it through the distortive repugnancy clause;
>
> (a) restore African law's most hallowed features of adaptability and mutability;
>
> (b) re-centre the African frame of reference as the mainstream for construing the African law envisioned by the Constitution;

[60] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 48.
[61] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 244 para 7.4.
[62] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 244 para 7.4.
[63] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 246.

(c) promote the quest for African law solutions from within this system thereby advancing the advent of the African renaissance in which there is synergy between the Bill of Rights and indigenous values . . . .'[64] (footnotes omitted)

The application of re-indigenisation will advance the interaction of sections 211(3),9,30 and 31 of the Constitution.[65] Furthermore, it would harmonise the constitutional framework through a developmental clause by employing section 39(2) of the Constitution.[66] This helps underscore the point that customary law adoption of children is constitutionally protected, and the best interest of the child principle is applicable in cultural adoption. Therefore, the use of the theory of re-indigenisation as a vehicle to bring about the reconciliation of the best interest of the child principle in terms of statutory provisions and under customary law shall bring the best outcome for African children who are adopted culturally. Since the best interest of the child in terms of customary law is protected by a sense of "belonging", it will be easy to incorporate this interpretation in statutory interpretations by unifying the principle through the theory of re-indigenisation. At the epicentre of the interpretations given, it is submitted that the best interest of the child is protected and served.

## 4.6 Conclusion

To summarise the main findings in this chapter, South Africa has a dual legal system, which is a manifestation of adaptive legal pluralism. Furthermore, the Constitution of South Africa justifies the significance of customary law, as it includes the right to culture, tradition, and customary law as provided in sections 15(3), 30 and 31 of the Constitution. The Children's Act defines when a child is adopted and its consequences. However, the Children's Act does not recognise customary law adoptions as it makes no provision for them. While adoption is regulated by a statute, the best-interest-of-the-child principle is also constitutionally protected. This principle has its origins in case law and international conventions.

[64] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 248-9.
[65] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 250.
[66] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 250-51.

Various international instruments have been ratified by the South African government, and as a result, the South African Parliament has enacted legislation to domesticate these international conventions regulating the best interest of the child principle. The best interest of the child is important for issues affecting a child and should always be applied to protect the child's interest. The best interest of the child is different in terms of customary law since it is not individualistic in nature and considers other competing rights. Additionally, to protect children adopted in terms of customary law, the best interest of the child in its current form needs to be decolonised to reconcile it with the definition in terms of customary law.

## CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

### 5.1 Introduction

This chapter draws attention to the difference between African and Western jurisprudence and the conflict thereof. This discussion is significant because the legislature and the courts have been tasked with a duty to legislate and implement laws that will redress past injustices and inequalities. The difference and the conflict between the state and customary law legal orders explain why customary law adoptions continue to be excluded from the Children's Act in a legal system dominated by Western legal culture. Furthermore, chapter 5 endeavours to summarise the findings of the study and lay forth recommendations that emerged in the process of resolving the legal issues that were identified.

### 5.2 Differences between African and Western Jurisprudence

With the advent of the democratic dispensation, South Africa found itself having to reconsider the existence of the African and Western jurisprudences, in general, and in relation to child adoption, in particular. The following section is concerned with demonstrating the differences between African and Western Jurisprudence and analysing the conflict thereof. It does so by defining the concepts and evaluating how African jurisprudence is different from Western jurisprudence by assessing their nature and social cosmology in terms of family and adoption. As shown below, the notion of jurisprudence alludes to the philosophy of law.[1]



#### 5.2.1 *African Jurisprudence*

There are four types of contemporary African schools of thought and they are listed as follows:

'(a) ethno- philosophy;
(b) philosophic sagacity;
(c) national-ideological philosophy; and
(d) professional philosophy.

[1] Ndima DD 'The Anatomy of African Jurisprudence: A basis for understanding the African socio-legal and political cosmology' (2017) 50 *Comparative and International Law Journal of Southern Africa* 84.

Pieterse notes that ethno-philosophy is a mixture of customary African ideas and the doctrine of European philosophy, which regards African philosophy as different from Western philosophy because of their distinct 'mental orientations.'[2] This section will therefore reflect on the ethno-philosophy of law. African jurisprudence is described as the epistemological and ontological framework in which the African philosophical legal thought system functions.[3] It incorporates 'all the activities, studies, interactions and discourses' taking place in academia, legislative arm, judiciary and political spheres about the place, meaning, nature and characteristics of African law.[4] To understand African cosmology, the relationship between law, custom and culture must be contextualised.

In African law, the relationship between law, custom and culture is intertwined.[5] The law refers to the regulations and principles that regulate the implementation, administration, and execution of the rights, obligations, and responsibilities included in customs; whereas customs are a framework of the clan's morals, which are preserved as a yardstick of conduct in society.[6] Therefore, customs are a manifestation of the law.[7] Additionally, culture interrelates with customs and the law because the law embodies 'the traditions and contexts of applying the laws and customs as they impact on the various aspects of social interactions.'[8]

An important characteristic of African jurisprudence is the principle of *ubuntu/botho*.[9] The concept of Ubuntu embodies universal human interdependence, unity and close kinship which can be found in close-knit communities in pre-colonial Africa and is at

[2] Pieterse M 'Traditional' African Jurisprudence' in Roederer C & Moellendorf D *Jurisprudence* (2004) 440.
[3] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 47.
[4] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 47.
[5] Ndima DD 'The Anatomy of African Jurisprudence: a basis for understanding the African socio-legal and political cosmology' (2017) 50 *Comparative and International Law Journal of Southern Africa* 86.
[6] Ndima DD 'The Anatomy of African Jurisprudence: a basis for understanding the African socio-legal and political cosmology' (2017) 50 *Comparative and International Law Journal of Southern Africa* 86.
[7] Ndima DD 'The Anatomy of African Jurisprudence: a basis for understanding the African socio-legal and political cosmology' (2017) 50 *Comparative and International Law Journal of Southern Africa* 87.
[8] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 52.
[9] Ndima DD 'Reconceiving African Jurisprudence in a Post-Imperial Society: The Role of Ubuntu in Constitutional Adjudication' (2015) 48 *Comparative and International Law Journal of Southern Africa* 360.

the heart of every indigenous culture.[10] The prominent issue with Ubuntu is defining this notion.[11] However, the Constitutional Court and various scholars have tried to define it, by explaining the various components of the concept.[12]

'[U]buntu places the interests of humanity at the centre of all social activities.'[13] Therefore, it is an important principle that forms the basis of customary law adoption because it promotes a culture of inclusiveness, communal living and kinship, shared belonging, and collective responsibility.[14]

In African jurisprudence, a family unit consists of close ties with extended family members.[15] Moreover, every member of the extended family unit has rights and responsibilities such as the duty to preserve family ties.[16] Furthermore, members of the extended family have the duty to care for children and the elderly in the family.[17] As a whole, members of the family, including extended family members, have a responsibility to promote the survival and protection of the family, as they are all socially interdependent on each other.[18] Therefore, how members of the family care for each other, promote and protect the culture of inclusiveness, communal living and kinship, shared belonging, and collective responsibility, symbolises the spirit of *Ubuntu.*[19]

### 5.2.2 *Western Jurisprudence*



[10] Pieterse M 'Traditional' African Jurisprudence' in Roederer C & Moellendorf D *Jurisprudence* (2004) 441.
[11] Himonga C, Taylor M and Pope A 'Reflections on judicial views of *ubuntu*' (2013) 16 *PELJ* 376.
[12] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 at paras 224-25, 263 and 308; *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at para 163; *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 37. See also Pieterse M 'Traditional' African Jurisprudence' in Roederer C & Moellendorf D *Jurisprudence* (2004) 445.
[13] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013) 223.
[14] Maluleke MJ 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 *PELJ* 5 where he states 'All African cultural, traditional and customary practices, including those pertaining to women and children, were based on Ubuntu.'
[15] Pieterse M 'Traditional' African Jurisprudence' in Roederer C & Moellendorf D *Jurisprudence* (2004) 452.
[16] Pieterse M 'Traditional' African Jurisprudence' in Roederer C & Moellendorf D *Jurisprudence* (2004) 453.
[17] Pieterse M 'Traditional' African Jurisprudence' in Roederer C & Moellendorf D *Jurisprudence* (2004) 453.
[18] Pieterse M 'Traditional' African Jurisprudence' in Roederer C & Moellendorf D *Jurisprudence* (2004) 453.
[19] Pieterse M 'Traditional' African Jurisprudence' in Roederer C & Moellendorf D *Jurisprudence* (2004) 453.

Western jurisprudence refers to the common law and civil law systems.[20] These two branches of law have their origins in Western countries, specifically the English common law and Roman Law.[21] They represent legal traditions with a Eurocentric culture, whose distinguishing element is the principle of stare decisis.[22] Western laws are codified. The common law principles are found in case law (judicial decisions), which form a precedent for other similar cases, while the civil law rules are found in legislation and textbooks.[23]

In Western jurisprudence, a nucleus family made up of the parents and their biological children is regarded as a family and extended family members are not included.[24]

### 5.3 The Conflict between African and Western Jurisprudence

The sources of law for African jurisprudence and Western jurisprudence originate from different branches of law, and the philosophies belong to different mental orientations. African jurisprudence is communal in nature and Western jurisprudence is individualist in nature. The definition of a family in terms of customary law is different from that of a family in terms of common law. A family in terms of customary law includes extended family members, whereas in common law it refers to the nuclear family as the biological parents and their children.[25] In terms of African jurisprudence, customary law adoptions are regulated by customs and traditions, and family members must agree.[26] The adoption must take place in public, and rituals must be performed to signify the child has been transferred to another family.[27] Conversely, in Western jurisprudence, as prescribed by the relevant statute, adoption is only valid once a court has pronounced it.[28] Therefore, the conflict hereof is that the Constitution prescribes that courts should apply customary law, and this provision protects customary law

[20] Hamid SS 'Influence of Western Jurisprudence over Islamic Jurisprudence: A Comparative Study' (2013) 4 *Northern University Journal of Law* 13.
[21] Hamid SS (2013) 13.
[22] Hamid SS (2013) 14-5.
[23] Hamid SS (20213) 15.
[24] Pieterse M 'Traditional' African Jurisprudence' in Roederer C & Moellendorf D *Jurisprudence* (2004) 452. -po
[25] Bekker JC 'Commentary on the impact of the Children's Act on Selected Aspects of the Custody and Care of the African Children in South Africa' (2008) 29 *Obiter* 396.
[26] Maithufi 2001 De Jure 391-2.
[27] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 349.
[28] Section 228 of the Children's Act 38 of 2005.

adoptions.[29] However, section 228 of the Children's Act precludes customary law adoptions. Significantly, customary law adoption does not require a judicial order to validate it.

African jurisprudence is different from Western jurisprudence. The conflict between these two philosophies is that they treat child adoption differently. They belong to different areas of law, and their mental orientations are also different. The fact that only statutory adoptions are recognised and regulated leads to an anomalous circumstance where two normative orders relating to child adoption in South Africa apply simultaneously: one is applied by black Africans without necessarily involving courts and the other is statutorily prescribed. In conclusion, the main difference between the two is the content in terms of the requirements and what is prescribed for a valid adoption. Therefore, one is left to wonder: is the law proactive and responsive to the needs of the community as required? Additionally, which one of the two normative orders would take precedence as the law? In this context, the dichotomy between African and Western jurisprudence continues and will continue to engage judicial and statutory attention.

In conclusion, the study tries to provide answers to the fundamental issues raised in Chapter 1 of the thesis:

(a) What is the position of customary law adoptions under South African law?

(b) What is the difference between African and Western requirements for adoption?

(c) What are the variations in the adoptions of children?

(d) In what ways can the Children's Act incorporate customary law adoptions?

This research evaluated how the South African legal framework provides for customary law adoption of children. It investigated how the legal framework reflects customary law adoptions and the best interest of the child principle. In so doing, it probed the difference between African and Western requirements for adoption.

[29] Section 212(3) of the Constitution.

To answer the research questions, the study utilised a desktop exploratory study that utilised content analysis of legislation, case law, and secondary sources of law. The study assessed the history of the South African legal system and how we find ourselves in the debacle of having to consider the existence of two legal systems in relation to child adoption. Additionally, it evaluated how customary law adoption is recognised and the principles that underlie statutory adoption and customary law adoption. Primary sources such as the Constitution and the Adoption of Children Act 25 of 1923, the Children's Act 31 of 1937, the Children's Act 33 of 1960, the Child Care Act 74 of 1983, and the Children's Act 38 of 2005 were also examined. Furthermore, case laws were assessed for judicial patterns, interpretations, and attitudes. I used the physical library to access textbooks and electronic information resources to access articles on the history of South Africa's legal order, customary law, and customary law adoption.

I proceed to summarise the study's findings, as well as answers to the questions by essentially calling for the amendment of the Children's Act, and the adoption of the theory of re-indigenisation.

## 5.4 Summary of significant observations of the study

### 5.4.1 *Chapter one*

The first chapter provided background to the study and highlighted the research problem and the objectives of the study. Furthermore, the chapter described the research methodology that was used. Finally, it provided the motivation for the research and outlined the structure of the following chapters of the thesis.

### 5.4.2 *Chapter two*

In chapter two, the author defined adoption. It examined the history of child adoption in South Africa and the legislative framework that governs it. Colonisation brought the imposition of Roman law and Roman-Dutch law on South Africa's legal system; as a result, they form the basis of our law. It was explained that historically, adoption was part of Roman law. There were two ways that adoption could take place in Roman law: through *adrogatio* and *adoptio,* but there was a variation between the two both in form

and function. However, foundationally, adoption was not part of the Roman-Dutch law, even though it was practiced informally. The first legislation to regulate child adoption in South Africa was the Adoption of Children's Act No 25 of 1923. Thereafter, there were four subsequent enactments. It is observable that the legislative framework does not formally provide for or accommodate customary law adoptions. The chapter found that customary law adoption is an old traditional system that is established and has been practised by most black African people since time immemorial.[30] Furthermore, there has been an ongoing debate amongst scholars on whether or not customary law adoption of children is an established system in South Africa.

5.4.3 *Chapter three*

Chapter three captures the status of customary law before colonisation, through the colonial lenses during the apartheid era, and also in the constitutional dispensation. Additionally, the difference between indigenous law and customary law was elucidated. This chapter explored whether customary law adoption exists in South Africa and how its validity is determined. It highlighted the requirements to validate customary adoption as an agreement between the families of the adopted child and the adoptive parent(s),[31] communication of the agreement to the traditional leader,[32] and a public traditional ceremony to cement the adoption.[33] Indeed, the legitimacy of customary law adoption lies in the agreement between these families.[34] Furthermore, the chapter noted that South African courts recognise customary law adoption on an ad hoc basis. However, the issue of customary law adoption of children came up as a supplementary issue to the main issue for the determination of enforcing maintenance of children by their adoptive parents.

*5.4.4 Chapter four*

This chapter sought to answer the study's sub-question: what is the difference between African and Western requirements for adoption? It analysed the legal framework affecting customary law adoptions and examined the interpretation and

[30] Keewatin D an Indigenous Perspective on Custom Adoption (unpublished Master of Social Work thesis, University of Manitoba, 2004) 20-1. See also Maithufi 2001 De Jure 391-92.
[31] Maithufi 2001 De Jure 391.
[32] Maithufi 2001 De Jure 391.
[33] Maithufi 2001 De Jure 392.
[34] Maithufi 2001 De Jure 392.

application of the best interest of the child principle, using the Constitution and the Children's Act as benchmarks. Subsequently, it examined whether the interpretation of the best interest of the child as articulated in the Constitution can be merged with the interpretation in terms of customary law. The chapter concluded by proposing that the theory of re-indigenisation should be applied by the courts to reconcile the best interest of the child principle as a more transformative interpretation that is beneficial to all parties involved in customary law adoption.

## 5.5 Recommendations for Parliament

Legislation and policies should be reviewed and amended to incorporate customary law adoption of children. The Children's Act should be amended to incorporate provisions that clearly identify types and processes of customary law adoption.[35]

The constitutional recognition of customary law plays a significant role because the Constitution indirectly recognises adoption by demanding the judicial recognition of customary law and promoting cultural rights. As a result, the provisions of the Children's Act should expressly recognise and legalise child adoption under customary law.[36] The formal regulation of customary law adoption would protect children living under customary law against child marriage, identify the types and processes of customary law adoption, and mitigate the risks to children in South Africa.[37]



## 5.6 Recommendations for the South African Law Commission

To cater for the differences in the requirements for customary law adoptions in the different ethnic groups, the SALC must conduct more research. Thereafter, it should make recommendations for the legislature to define the basic requirements of customary law adoption and express that cultural adoption shall be valid if concluded in terms of the customs and norms of the concerned ethnic group. Registration of the cultural adoption can be a requirement, instead of obtaining a judicial order. Due to the stringent and expensive process of bringing an application before the court,

[35] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 354.
[36] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 352.
[37] Mokotong M 'Oe Gapa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 353-54.

statutory adoption is really a foreign concept for Black people as it is not their way of life. The Western concept of regulating adoptions should not be imposed on South Africa's indigenous people's practices and way of living.

### 5.7 Recommendations for the Judiciary

Magistrate courts and judges in the High Court should be equipped and empowered for legal interpretation of cultural adoption practices. This will enable them to adjudicate disputes that arise from the application of legislation and regulations on customary law adoptions. Courts should resist following the Eurocentric approach and interpretation of customary law adoption issues. African jurisprudence should be promoted as the source of law, and courts have started to consider African lived experience from the indigenous law perspective.[38] For example, in *Alexkor Ltd and Another v Richtersveld Community*, the Constitutional Court recognised the compulsory practices of the indigenous people by interpreting their rights and interests in their land.[39]

The judiciary should employ the re-indigenisation theory when interpreting the best interest of the child principle to harmonise the principle under the Constitution. 'By allowing African values to influence South African law, the Constitution has engendered an enlightened coexistence between the country's legal traditions.'[40] Specifically, the Constitutional Court must take decisive steps to make bolder judgments that promote the importance of customary law and the right to practice cultural adoption.

The South African Judicial Education Institute (SAJEI) is an institution established to continue judicial education for judges as provided for in the South African Judicial Education Institute Act.[41] Therefore, it should ensure that judges and magistrates are

[38] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 51.
[39] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 51.
[40] Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (doctoral thesis, University of South Africa, 2013) 225.
[41] 14 of 2008.

trained to interpret legislation and regulations on customary law adoptions so as to write clear and concise Judgments.

## 5.8 Recommendation for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

The Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities must reflect on its understanding and mandate about culture. It should investigate violations, prejudices, and difficulties experienced by parents who have adopted children in terms of customary law and the prejudices suffered by children adopted in terms of customary law as opposed to those adopted in terms of the statute. Furthermore, it should make recommendations and bring an application to the High Court to challenge the constitutionality of the provisions in the Children's Act dealing with adoption to determine whether they are discriminatory.

Furthermore, the Commission should host public engagements with communities and people practising customary law adoption of children. In addition, it should conduct further research and raise awareness about the issue. Finally, it should work with civil society organisations dealing with the protection and promotion of culture to address the silence of the Children's Act on customary law adoption.



## 5.9 Conclusion

At the centre of this thesis is the legal position of customary law adoptions under South African law. Customary law adoption is an old traditional system which black African people employ to "accept others as our own."[42] It serves as the foundation of support in child-headed homes, for adults who are unable to have children or do not have an heir, and for children whose parents are unable to take care of them.

This study has shown the legal position of customary adoptions in South Africa. In addition, it has highlighted the variations in child adoption in South Africa and the difference between African and Western jurisprudence. The Children's Act excludes

[42] Keewatin D *An Indigenous Perspective on Custom Adoption* (unpublished Master of Social Work thesis, University of Manitoba, 2004) 8.

customary law adoptions of children, despite cultural adoption being an old practice. It is argued that the law must meet the needs of society and be reflective of society's needs. Specific provisions dealing with customary adoptions should be incorporated into the Children's Act to address customary law adoption. This is important because it has the same legal effect as statutory child adoption.

Ultimately, this thesis promotes the recognition of customary law adoptions in the hope that one day those who adopt children in terms of customary law will not need to institute an expensive and lengthy process of litigation to validate their adoptions.

## BIBLIOGRAPHY

### Books

Barnard, Cronjé & Olivier *The South African Law of Persons and Family Law* 3 ed (1994) Durban: Butterworths.

Bekker JC Seymour's customary law in Southern Africa 5 ed (1989) Cape Town: Juta

Bennett TW Customary Law in South Africa (2004) 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 Human Rights and African Customary Law under the South African Constitution (1995) Cape Town: Juta.

Botha C *Statutory Interpretation: An introduction to Students* 5 ed (2012) Cape Town: Juta.

Himonga C Family Law in Zambia (2011) Netherlands: Kluwer Law International.

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.

Van Zyl DH History and Principles of Roman Private Law (1983) Durban: Butterworths.

### Chapters in Books

Nhlapo 'RT Parenthood in Modern Society Legal and Social Issues for the Twenty-first Century' in Eekelaar J and Šarčević P (eds) *Biological and Social Parenthood in African Perspective: the movement of children in Swazi family law* (1993) Dordrecht: Martius Nijhoff Publishers.

Pieterse M 'Traditional' African Jurisprudence' in RoedererC & Moellendorf D *Jurisprudence* (2004) Cape Town: Juta.

### Journal Articles

Bekker JC 'Commentary on the Impact of the Children's Act on Selected Aspects of the Custody and Care of African Children in South Africa' (2008) 29 *Obiter* 395-405.

Couzens M 'The Best Interests of the Child and the Constitutional Court' (2019) 9 363-86.

Diala AC & Kangwa B 'Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa' (2019) 52 *De Jure Law Journal* 189-206.

Diala AC 'Peacebuilding and the Interface of State Law and Indigenous Market Laws in Southern Nigeria' 2020 (64) *Journal of African Law* 1-26.

Diala AC 'Legal Pluralism and the Future of Personal Family Laws in Africa' (2021) 35 *International Journal of Law, Policy and the Family* 1-17.

Diala AC 'The Concept of Living Customary Law: A Critique' 2017 (49) *Journal of Legal Pluralism and Unofficial Law* 1-23.

Diala AC 'Curriculum Decolonisation and Revisionist Pedagogy of African Customary Law' 2019 (22) *PER / PELJ* 1-37.

Diala AC 'Our Laws Are Better Than Yours: The Future of Legal Pluralism in South Africa' 2019 (26) *Revista General de Derecho Público Comparado* 1-23.

Diala AC 'Neoliberal Influences on Legal Pluralist Marriage Reforms in Africa' 2022 (9) *Journal of International and Comparative Law* 81-108.

Hamid SS 'Influence of Western Jurisprudence over Islamic Jurisprudence: A Comparative Study' (2013) 4 *Northern University Journal of Law* 13-26.

Himonga C, Taylor M and Pope A 'Reflections on judicial views of *ubuntu*' (2013) 16 *Potchefstroom Electronic Law Journal* 369–430.

Maithufi I 'Metiso v Road Accident Fund case no 44588/2000 (T): Adoption according to customary law' 2001 De Jure 390-397

Maluleke MJ 'Culture, Tradition, Custom, Law and Gender Equality' (2012) 15 *Potchefstroom Electronic Journal* 1-22.

Marius P 'Its a 'Black Thing': Upholding Culture and Customary Law in a Society Founded on Non-Racialism' (2001) 17 *SAJHR* 364-403.

Mills L 'Failing children: The Courts' disregard of the best interests of the child in Le Roux v Dey ' (2014) 131 *SALJ* 847-64.

Mokotong M 'OE GaPa Le Namane Customary Law Parenting (Step-Parent Adoption from an African Perspective)' (2015) 78 *Journal of Contemporary Roman-Dutch Law* 344-355.

Moore E & Himonga C 'Living customary law and families in South Africa' (2018) *Children, Families and the State* 61 – 69.

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.

Moyo A ‘Reconceptualising the ‘paramountcy principle’: Beyond the individualistic construction of the best interests of the child’ (2012) 12 *African Human Rights Law Journal* 142-177.

Mujuz JD ‘Reconciling customary law and cultural practices with human rights in Uganda’ (2021) 42 *Obiter* 239-56.

Ndima DD ‘The Anatomy of African Jurisprudence: a basis for understanding the African socio-legal and political cosmology’ (2017) 50 *Comparative and International Law Journal of Southern Africa* 84-108.

Ndima DD ‘Reconceiving African Jurisprudence in a Post-Imperial Society: The Role of Ubuntu in Constitutional Adjudication’ (2015) 48 *Comparative and International Law Journal of Southern Africa* 359-80.

Ndima DD ‘The African Law of the 21st Century in South Africa’ 2003 (36) *The Comparative and International Law Journal of Southern Africa* 325-345.

Osman F ‘The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage’ (2019) 22 *PER / PELJ* 1-24.

Rautenbach C and Matthee J ‘Common Law Crimes and Indigenous Customs: Dealing with the Issues in South African Law’ (2010) 61 *Journal of Legal Pluralism and Unofficial Law* 109-144.

Rautenbach C ‘Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law ‘(2010) 60 *Journal of Legal Pluralism and Unofficial Law* 143-177.

Skelton A ‘Too much of a good thing? Best interests of the child in South African Jurisprudence’ (2019) 52 *De Jure Law Journal* 557-579.

Songca R ‘Evaluation of children's rights in South African law: the dawn of an emerging approach to children's rights?’ (2011) 44 *The Comparative and International Law Journal of Southern Africa* 340-359.

Tladi D ‘Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga’ (2016) 16 *African Human Rights Law Journal* 310-338.

Van der Walt G ‘The History of the Law of Adoption in South Africa’ (2014) 35 *Obiter* 421-452.

**Case Law**

*Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC).

*Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

*Certification of the Constitution of the Republic of South Africa*, [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

*Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051.

*Daniels v Campbell NO* 2004 (7) BCLR 735 (CC), 2004 (5) SA 331 (CC).

*Du Toit and Another v Minister of Welfare and Population Development and Others* [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC).

*Edwards v Fleming* 1909 TH 232.

*F v F* 2006 (3) SA 42 (SCA).

*Fletcher v Fletcher* 1948 1 SA 130 (A).

*Fibinger v Botha* (1905-1910) 11 HCG.

*French v French* 1971 (4) SA 298 (W).

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

*Maneli v Maneli* [2010] ZAGPJHC 22; 2010 (7) BCLR 703 (GSJ).

*Maswanganye v Baloyi N.O and Another* [2015] ZAGPPHC 917.

*McCall v McCall* 1994 (3) SA 201 (C).

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

*Minister for Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (7) BCLR 713; 2000 (3) SA 422 (CC).

*ML v KG* [2013] ZAGPJHC 87.

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

*Nandutu and Others v Minister of Home Affairs and Others* [2019] ZACC 24; 2019 (8) BCLR 938 (CC); 2019 (5) SA 325 (CC).

*Robb v Mealey Executor* (1899) 16 SC 133.

*S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).

*S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

*Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).
*Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).
*Thibela v Minister Van Wet en Orde* 1995 3 SA 147 (SCA)
*Van Breda and Others Appellants v Jacobs and Others Respondents* 1921 AD 330.

**Legislation**

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

**Law Commission papers**

South African Law Commission Discussion Paper 103 (Project 110) Review of the Child Care Act (2002).



**Dissertations**

Ferreira S Interracial and Intercultural Adoption: A South African Legal Perspective (unpublished doctoral thesis, University of South Africa, 2009).
Jokani MC The Customary Law Practice of Ukuthwala – An Antithesis in the South African Constitutional Oder (unpublished LLD, Nelson Mandela Metropolitan University 2017).
Keewatin D An Indigenous Perspective on Custom Adoption (unpublished Master of Social Work thesis, University of Manitoba, 2004).
Ndima DD Re-Imagining and Re-Interpreting African Jurisprudence under the South African Constitution (unpublished doctoral thesis, University of South Africa, 2013).

**Treaties**

African Charter on the Rights and Welfare of the Child, 1990 OAU Doc. CAB/LEG/24.9/49 (1990).
United Nations Convention on the Rights of the Child, 1989 GA Res 44/25, annex, 44 (1989).

**Online Material**

Blackie D 'Fact Sheet on child abandonment research in South Africa' *National Adoption Coalition* 20 May 2014 available at *http://www.adoptioncoalitionsa.org/report.* (accessed 2 April 2022).
Karl Marx 'The German Ideology Part I: Feuerbach. Opposition of the Materialist and Idealist Outlook B. The Illusion of the Epoch' available at *https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01b.htm* (accessed 11 July 2023.

**Internet Sites**

https://www.sahistory.org.za/article/race-and-ethnicity-south-africa.