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HAS THE 'BEST INTERESTS OF THE CHILD' PRINCIPLE BEEN
APPLIED TO CHILDREN'S RIGHTS IN BOTSWANA ON MAINTENANCE,
CUSTODY AND ADOPTION MATTERS?

LLM THESIS

By

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MKBLIN003

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Research Thesis presented for approval by the Senate in fulfilment of part of the requirements for LLM in approved courses and a minor Thesis/Dissertation. The other part of the requirements for qualification was completion of a programme of courses.

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DECLARATION

I hereby declare that I have read and understood the regulations governing submission of an LLM thesis/research papers, including those relating to length and plagiarism as contained in the rules of this University and that this thesis/research paper conforms to those regulations.

Linah Mokibe

DEDICATION

This thesis is dedicated to my late father Oteng Mokibe who believed that I have what it takes to be a lawyer despite me and my business ideas, my daughters Katlego Sarona Mokibe and Ame Kealeboga Oahile who had to endure the absence of a mother gone to study.

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LIST OF ABBREVIATIONS

UNCRC	UN Convention on the Rights of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
OAU	Organization of African Unity

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I. INTRODUCTION

The United Nations Convention on the Rights of the Child was adopted by the United Nations on the 20 November 1989 as the foundation of universal standards to protect and for the survival as well as the development of all children.¹ Countries which have ratified the Convention pledge the protection of children from exploitation which is economic or sexual, violence as well as other abuse forms and to improve children's rights to health, education, and a decent living standard.² The treaty further addresses the rights of children to name, nationality, and the right to be listened to and be treated fairly when alleged to have committed crimes, when denied of parental care as well as other rights.³ The United Nations CRC was the fastest as well as widely ratified treaty for human rights in history and has 196 countries who are state party, with only the United States of America having not ratified the Convention.⁴ The advancement of the rights of children perspective all through government, the judiciary and parliament is requisite to give effect to the implementation of the Convention, particularly and through the prism of the articles which follow, recognized by the Committee as the four guiding principles:

Article 2: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, Article 3 (1): the best interests of the child as a primary consideration in all actions concerning children, Article 6: the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child, Article 12: the child's right to express his or her views freely in "all matters affecting the child", those views being given due weight. ⁵

The 'best interests of the child' principle applies to acts carried out by 'public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies.'⁶ The principle calls for active measures at government, parliament as well as the judiciary.⁷ All legislative, judicial as well as administrative bodies or institutions are required to apply the best interests of the child principle through considering how the rights of children including their interests are, or will be affected by their actions or decisions.⁸ It has been held that determining what is considered 'best' or 'least detrimental' to a specific child is generally indeterminate as well as speculative.⁹ Currently, our

¹ Joachim Theis, *The State of International Children's Rights*, (2018) 6 Available at <https://bettercarenetwork.org> accessed on 23 March 2025

² Ibid

³ Ibid

⁴ Ibid

⁵ Committee on the Rights of the Child, General Comment No.5 (2003), General Measures of Implementation of the Convention on the Rights of the Child, CRC/GC/2003/5

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Robert H. Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' 39 *Law and Contemporary Problems* (1975) 229 Available at <https://scholarship.law.duke.edu/lcp/vol39/iss3/8> accessed on 23 March 2025

society lacks a precise unanimity when it comes to the values that can be used to determine what is considered ‘best’ or ‘least detrimental’. In the case of Botswana, the Committee on the Rights of the Child has applauded the explicit recognition of the right of children to have their best interests made a primary consideration in the Children’s Act. The Committee further welcomed the progressive application of the right through high court decisions.¹⁰ However, the Committee is still worried that the right is not entirely applied in decisions which affect children, especially at the lower courts by specialists who work with and for children.¹¹ This paper therefore asks the question, ‘has the “best interests of the child” principle been applied to children’s rights in Botswana on maintenance, custody and adoption matters?’

II. BACKGROUND OF THE STUDY

(a) Introduction

In a typical African nation, a majority of individuals carry out their private actions subject to and in accordance with customary law.¹² Customary law is generally indigenous in its foundation, and typically operates only within the area which has been occupied by an ethnic group, or in settlement of disputes if either party to the dispute stands to be a member to the ethnic group.¹³ It is generally thought of to be original to the people, founded on ‘immutable traditions’.¹⁴ It has been said that customary law is a somewhat imprecise expression used to refer to a body of principles, rules, usages, as well as expectations which have their origins in the culture of the pre-colonial societies of the Tswana people, and substitutes the colonial tag ‘native law and custom’.¹⁵ Customary law is neither a single, nor static legal system founded on rigid tradition. It is a ‘living law’ grounded on an always developing legal system as societal and economic circumstances change.¹⁶ Customary law and African traditions worked for the needs of traditional societies from which they evolved and together, the traditional practices as well as customary rules made sure that every community member had access to shelter, food, as well as clothing.¹⁷ In the pre-colonial era, children’s rights in Botswana were exercised in accordance with customary law only.

¹⁰ Committee on the Rights of the Child, ‘*Combined Second and Third Reports Submitted by Botswana under Article 44 of the Convention, due in 2017*’ CRC/C/BWA/2-3 4 Available at <https://digitallibrary.un.org/record/1654233> accessed on 8 May 2024

¹¹ Ibid

¹² Muna B Ndulo, ‘*Legal Pluralism, Customary Law and Women’s Rights*’ (2017) Southern African Public Law, Vol. 32 No 1 and 2 4 Available at <https://upjournals.co.za/index.php/SAPL/index> accessed on 18 June 2014

¹³ Ibid

¹⁴ Ibid

¹⁵ A Molokomme, ‘*“Children of the Fence”: the Maintenance of Extra-Marital Children under Law and Practice in Botswana*’, Leiden: African Studies Centre 26 Available at <https://hdl.handle.net/1887/4633> Accessed on 19 June 2024

¹⁶ Op cit note 12 at 4

¹⁷ Ibid

(b) The Evolution of Children's Rights in Botswana

In Botswana, customary law in relation to a specific tribe or ethnic community is defined in section 2 of the Customary Law Act¹⁸ to be the customary law of such ethnic group or community for as long as it is compatible with provisions of written laws or is not conflicting with humanity, morality, or natural justice. According to the Customary Law Act therefore, customary law will only be allowed to operate if it is compatible with the provisions of written laws and does not conflict with humanity, morality or natural justice.

The inhabitants of Botswana are predominantly indigenous Africans, with the majority as Tswana who speak Setswana language.¹⁹ The Tswana society, like many other African nations, continue to function in a dual system of law, originally founded on customary legal systems and received law, founded on the law of the past colonial government.²⁰ The roots of customary law found in Botswana is traceable to the establishment of Bechuanaland protectorate as declared in March 1885.²¹ Previous to the Bechuanaland protectorate, a multiplicity of tribal legal systems were in existence and they are now collectively referred to as customary law.²²

The imprecise meaning of customary law according to the Customary Law Act effectually leaves the substance of customary law to the community level where a variety of customary laws are found, of which most are not codified.²³ The term thus covers an assortment of usages, rules, and principles for the distinct *merafe* [communities] who may be different from each other, and may differ from within.²⁴

In 1885 when the British government hesitantly assumed authority in Bechuanaland, such was meant to bring to an end a state of lawlessness on the Cape border as well as guarantee that the Boers did not close the way to the north.²⁵ The British government had no interest in governing the country such that the first Assistant Commissioner was under instruction 'not to interfere with Native Administration; the Chiefs are understood not to be desirous to part with their rights to sovereignty, nor are Her Majesty's Government by any means anxious to assume the responsibilities of it.'²⁶

¹⁸ Section 2 of the Customary Law Act no 51 of 1969 (Chapter 16:01) Laws of Botswana

¹⁹ Rekha A. Kumar, 'Customary Law and Human Rights in Botswana' (2009) 3 Available at <http://www.du.edu/korbel/hrhw/working/2009/52-kumar-2009.pdf> accessed on 20 June 2024

²⁰ Ibid

²¹ Ibid

²² Ibid

²³ Op cit note 15 at 26

²⁴ Ibid

²⁵ JH Pain, 'The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho, and Swaziland' (1978) XI CILSA 163

²⁶ Ibid

Before 1885 there existed already traditional methods of government in Botswana through 'dikgosi' [chiefs] who were responsible for administering customary rules, enforced through a 'kgotla' [traditional court] system.²⁷ Britain declared Botswana, then known as Bechuanaland, a colony in 1885²⁸ with the result that on the 10th June 1891, an Order in Council was issued. The Order in Council authorized the High Commissioner to issue Proclamations for 'administration of justice, the raising of revenue, and generally for the order and good government of all persons'.²⁹ This Order in Council stood to be a momentous forerunner to the receiving of Roman Dutch Common Law and English Common Law in Botswana.³⁰ In accordance with the authorities conferred on him by the Order in Council, the High Commissioner issued a proclamation called 'General Administration'. The Proclamation partly stated that 'the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the first time being in force in the Colony of the Cape of Good Hope....'³¹

For the reason that the 10th June Proclamation did not bear a date on which the specific laws had to apply, in 1909 another Proclamation was issued and its section 4 provided³²:

Subject to the provisions of any order in Council, in force in the Bechuanaland protectorate at the date of the taking effect of this Proclamation, and to the provisions of any proclamation or regulation in force in the said Protectorate at such date (not including the provisions of the section hereby repealed) the laws in force in the Colony of the Cape of Good Hope on the 10th day of June, 1891, shall mutatis mutandis and so far as not inapplicable be the laws in force and to be observed in the said protectorate, but no Statute of the Colony of the Cape of Good Hope, promulgated after the 10th day of June, 1891, shall be deemed to apply, or to have applied, to the said Protectorate unless specially applied thereto by Proclamation.³³

Thus, once the 1909 Proclamation³⁴ came into effect, the laws which were in force at the Colony of the Cape of Good Hope on the 10th June 1891 became part of Botswana laws, save for the statutes promulgated after the 10th June 1891.

²⁷ Otsetswe Keletso Koboyankwe *Legal Pluralism and Discriminatory Application of Progressive Laws to Women Subject to Customary Law in Botswana* (Unpublished LLM thesis, Loyola University Chicago School of Law, 2014) 10

²⁸ Ibid

²⁹ Op cit note 25 at 163

³⁰ Op cit note 27 at 8

³¹ Section 19 of the 1891 Order in Council, Laws of Bechuanaland Protectorate (1948) Vol.1

³² Bankie Forster, *Introduction to the History of the Administration of Justice of the Republic of Botswana* Botswana Notes and Records, Vol. 13 at 91

³³ Proclamation No 36 of 22 December 1909, Laws of Bechuanaland Protectorate (1948) Vol.

³⁴ The General Law Proclamation of 1909 Cap 27 Laws of Bechuanaland Protectorate (1948) Vol.1

Through the 1909 Proclamation, the Roman Dutch law, regarded as the main law of the Cape Colony came to be the Botswana common law, and continues to be regarded as so until today.³⁵

The second feature of the 1909 Proclamation was a comprehensive transference of some statutory laws from the Cape Colony statute books, enacted prior to the 10th June 1891 to the Botswana statute books, all founded on English laws.³⁶

Subsequent to establishing Bechuanaland protectorate, the native scheme of law [customary law] continued unaffected.³⁷ The kgosi [chief] continued to apply judicial power on his tribe.³⁸

Come 1942, the Native Courts Proclamation was issued and it sought 'to make provision for the recognition, constitution, powers and jurisdiction of Native Courts and generally for the administration of justice in cases recognizable by Native Courts.'³⁹

It has been stated that the introduction of the Roman Dutch law to form part of the Botswana common law was an unfortunate remnant of the relationship of the state with the Colony of the Cape because the so-called Roman-Dutch law is currently not Roman or Dutch.⁴⁰ In addition, it is stated that as at 1891, the system was, according to contemporary jurists, not developed, and it is the same law which was considered to be the common law as opposed to the law as later developed in some other states. This was due to the fact of the absence of professional judges to develop it in Botswana, resulting in Botswana courts consulting South African authors, who based their opinions on such law as developed through their courts, or the courts in other states.⁴¹ Thirdly, Roman law stopped to be considered as a course for meaningful pursuit and it has been removed from law modules in most law faculties of distinguished universities in Europe and North America.⁴²

British rule has, on the other hand, kept its word on the attitude that the native/customary law of the occupied citizens in her colonies must be acknowledged.⁴³ In the event the law got altered, such would have been a reaction to the necessities of an evolving society.⁴⁴

³⁵ Justice Akinola Aguda, 'Legal Development in Botswana from 1885 to 1966' Sabinet African Journals 57 Available at <https://journals.co.za/doi/pdf> accessed on 18 June 2024

³⁶ Ibid

³⁷ Op cit note 27 at 10

³⁸ Ibid

³⁹ Ibid at 11

⁴⁰ Op cit note 35 at 57

⁴¹ Ibid

⁴² Ibid

⁴³ Op cit note 32 at 89

⁴⁴ Ibid

Britain gave Botswana independence in 1964.⁴⁵ However, a Constitution was adopted in 1965, leading to the earliest general elections and the changing of Gaborone as the capital city, including independence.⁴⁶ Bechuanaland protectorate became an independent Republic of Botswana on the 30 September 1966.⁴⁷ On independence, the Constitution of the Republic of Botswana became effective despite that there is no clear provision which makes the Constitution the highest law of the land in Botswana and this is merely presumed.⁴⁸

At the end of it all, Botswana was left with a pluralistic legal system, thus customary law operating parallel to the Constitution, common law and statute laws. Children in Botswana are subject to all these laws and systems.

At international level, Botswana acceded to the United Nations Convention on the Rights of the Child [UNCRC] on the 14 March 1995⁴⁹ and has ratified several other international and regional human rights instruments dealing with the rights of children.⁵⁰ The UNCRC is an international treaty which lays down the social, economic, political, civil, health and cultural rights of all children.⁵¹ It is the basic human rights treaty which recognizes that children are also equal as human beings.⁵² Enshrined in the convention are four guiding principles.⁵³ The first principle is the principle of non-discrimination which mandates states who are party to afford equal opportunities amongst all children and guarantee that every child inside their jurisdiction enjoys their human rights free from any discrimination.⁵⁴ For time immemorial, children were deemed as incapable of having human rights and were thus discriminated against when compared to adults.⁵⁵ Children's rights are now considered to be essentially equivalent to those of grownups.⁵⁶

This is followed by the principle of the 'best interests of the child' which places an obligation on bodies, organizations as well as courts of law, administrative authorities and law making bodies including public and private social welfare establishments to give primary prominence to the 'best interests of the child'

⁴⁵ Lubabalo Booi, 'Botswana's Legal System and Legal Research' (2006) Available at <https://www.nyulawglobal.org/Bots> accessed on 20 June 2024

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Committee on the Rights of the Child, Ratification Status for Convention on the Rights of the Child available at <https://tbinternet.ohchr.org/Treaty> accessed 4 June 2024

⁵⁰ Committee on the Rights of the Child, 'Combined Second and Third Reports Submitted by Botswana under Article 44 of the Convention, due in 2017' CRC/C/BWA/2-3 4 Available at <https://digitallibrary.un.org/record/1654233> accessed on 8 May 2024

⁵¹ Styn M Jamu, Jeldau A Rieff, Chirwa Mahloko et al, 'Assessing the State of Child-Friendly Justice in Botswana: Qualitative Situational Analysis for Reform' (2023) 19 available at <https://media.lincdn.com/dms/document/media> accessed on 7 June 2024

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ John Tobin, The UN Convention on the Rights of the Child: A Commentary (2019) 42

⁵⁶ Ibid

in every decision made affecting children.⁵⁷ According to the Committee on the rights of the child, every child's right to have their best interests placed into consideration as a main concern is 'a substantive right, an interpretative legal principle and a rule of procedure.'⁵⁸ It articulates one of the central tenets of the Convention on the Rights of the Child, and is one of the four guiding principles.⁵⁹

Thirdly, the principle of the right to life, survival and development, stated in Article 6(2) which provides for state parties to guarantee to the degree possible, the life, survival as well as development of a child.⁶⁰ States who are party are thus permitted to take their own position on whether childhood starts at the time of conception, in the course of pregnancy, or at the time of delivery of a child.⁶¹ A 'right to life' is specially a 'civil right' and qualifies, in consequence as a right to be protected from capricious killing, that is, to deprive of life translates to killing.⁶² It therefore follows that failure to decrease child mortality does not fall within Article 6 whilst performing or accepting infanticide violates the Article.⁶³ States who are party to the convention agree to create an atmosphere, within their capabilities as well as constitutional developments, which will ensure, to the maximum degree possible, the continued existence as well as healthy growth of a child.⁶⁴

Finally, the inclusion and participation principle is basically the right of every child or young person to have his or her views given due weight as well as being respected in every matter affecting them.⁶⁵ Critically, a responsibility to give respect to the views of a child demands a change in the perception as well as the behavior towards children, from that of inactive things needing of grownup safeguard to lively contributors in decision making practices which affect them at every level of society.⁶⁶ Article 12⁶⁷ has been labelled as a 'lynchpin' of the convention for it 'recognizes the child as a full human being with integrity and personality and with the ability to participate fully in society'.⁶⁸ That is the effect of Article 12 and its application 'alongside the other civil rights, involves a profound and radical reconsideration of the status of children in most societies and the nature of adult-child relationships'.⁶⁹

⁵⁷ Op cit note 51 at 19

⁵⁸ Op cit note 55 at 74

⁵⁹ Ibid

⁶⁰ Op cit note 51 at 19

⁶¹ Op cit note 55 at 191

⁶² Ibid at 195

⁶³ Ibid

⁶⁴ Ibid at 220

⁶⁵ Op cit note 51 at 19

⁶⁶ Op cit note 55 at 398

⁶⁷ Article 12(1) of the UNCRC. It mandates State Parties to guarantee to a child who is capable of making their opinion the right to freely express the views in every issue concerning them and that the views of the child be afforded due weight having regard to their age and level of maturity.

⁶⁸ Op cit note 55 at 398

⁶⁹ Ibid

Such a ground-breaking characteristic of the Article shows that it is correspondingly amongst the most combative rights in the convention.⁷⁰

In a period less than one year post the adoption of the UNCRC, African Presidents by way of the Organization of African Unity [OAU], adopted their own type of the UNCRC, the African Charter on the Rights and Welfare of the Child [ACRWC] in what may be thought of as a sign of umbrage to their lowly level of participation during the drafting of the UNCRC as well as its inadequacy in addressing the unique circumstances of an African child.⁷¹ This was a significant movement which made Africa the single continent to devise a regional tool on children's rights.⁷² Whilst the endorsement of the UNCRC remained far-reaching as well as highly supported in the region, same was not the case for the ratifying of the ACRWC.⁷³

Botswana ratified the ACRWC on the 10 July 2001.⁷⁴ The charter supplements as well as bridges the gap between the UNCRC at international level and the indigenous African customs and practices through recognition of the cultural heritage, traditions, historical background, including the values which are unique to the region.⁷⁵

Apart from only a small number of exclusions, the ACRWC largely guarantees every right acknowledged and safeguarded in the UNCRC and differs only on some vital ways which are exclusively relevant to an African child.⁷⁶ For example, the ACRWC, unlike the UNCRC, expresses the obligation of African children to their families, and contains extra protections from apartheid as well as armed conflict, including discouraging injurious customs as well as traditional ways which curtail children's rights and welfare.⁷⁷ It further varies from the UNCRC when it comes to the privacy right of African children in that whilst the African Charter assures the child of the right to privacy, it [the Charter] subjects the right to parents as well as legal carers to undertake sound supervision on the child's conduct.⁷⁸

Botswana is a dualist state. The rules and principles of international law contained in the treaties referred to do not automatically form part of the

⁷⁰ Ibid

⁷¹ Amana Talala Mbise, 'The Diffusion of the United Nations Convention on the Rights of the Child (UNCRC) more than the African Charter on the Rights and Welfare of the Child (ACRWC) in Africa: The Influence of Coercion and Emulation' International Social Work (2017) Vol.60 (5) 1234

⁷² Ibid

⁷³ Ibid

⁷⁴ African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Charter on the Rights and Welfare of the Child available at <https://www.acerwc.africa/en/member-state/ratifications/30/botswana> accessed 9 May 2024

⁷⁵ Op Cit note 51 at 20

⁷⁶ Op Cit note 71 at 1235

⁷⁷ Ibid

⁷⁸ Ibid

Botswana laws until they are domesticated through an Act of parliament.⁷⁹ Treaties that Botswana has ratified do not generate rights as well as obligations which are enforceable by courts instantly upon ratification.⁸⁰ In *Attorney General V Dow*⁸¹ the court held:

That does not seem to me to be saying that the O.A.U Convention, or by its proper name the African Charter of Human and Peoples Rights, is binding within Botswana as legislation passed by its parliament. The learned judge said that we should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations. Indeed, my brother Aguda J.A referred in his judgment at p.37 to the Charter and other international conventions in a similar light in the *Petrus* case. I am in agreement that Botswana is a member of the community of civilized States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act, adds reinforcement to the view that the intention of the framers of Constitution could not have been to permit discrimination purely on the basis of sex.⁸²

Thus where Botswana has ratified but not domesticated an international instrument, such instrument can only be used as an interpretation tool. Botswana courts will not give an interpretation to domestic legislation which conflicts with her [Botswana] international obligations as was shown in the *Unity Dow* case. Most of the decided cases which followed the *Unity Dow* case have constantly held that to the extent that international law principles are not incorporated in the domestic laws, they only stand to be used as tools of interpretation.⁸³

The Botswana Children's Act of 2009 was enacted to effectively domesticate the UNCRC to give children born in Botswana, regardless of their parents' nationality, a comprehensive and wide-ranging set of human rights.⁸⁴ Section 5 of the Act⁸⁵ provides: 'A person or the court performing a function or exercising a power under this Act shall regard the best interests of the child as the paramount consideration.' This provision is in line with Article 3 of the UN Convention on the Rights of the Child which provides that 'In all actions concerning children, whether undertaken by public or private social welfare

⁷⁹ Bonolo Ramadi Dinokopila, 'The Role of the Judiciary in Enhancing Constitutional Democracy in Botswana' (2018) 13 Available at <https://ubrisa.ub.bw/bitstream/handle/10311/2281/Dinokopila> accessed on 7 June 2024

⁸⁰ Ibid

⁸¹ 1992 BLR 119

⁸² Ibid at 154

⁸³ Op cit note 79 at 14

⁸⁴ Op cit note 50 at 6

⁸⁵ Children's Act No 9 of 2009

institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be paramount.⁸⁶

Despite the inclusion of a children's Bill of Rights in the Children's Act of 2009, same [Bill of Children's Rights] has not been included in the Constitution⁸⁷ of the Republic of Botswana.

(c) Research Question

This research asks the question: Is there an indication that the best interests of the child principle has been applied on children's rights in Botswana under customary law, Roman Dutch common law, and other areas of law when it comes to issues of child maintenance, custody and adoption?

(d) Scope and Objectives of the Study

This paper examines the traditional African customary law, Roman Dutch common law, legislation and judicial measures in Botswana pertaining to maintenance, custody and adoption to see whether the best interests of the child principle has been applied when such matters are being dealt with. By highlighting the weaknesses and gaps in the application of the principle, it is hoped proper legislative as well as judicial and other appropriate interventions will be undertaken geared towards strengthening the systems and laws to make them serve the children better in order to attain international and regional standards.

The study will provide a platform on which the laws relating to maintenance, custody and adoption can be enhanced to better address children's rights and ensure that children benefit fully from the best interests of the child principle which is now part of the Children's Act. In so doing, the study will draw from international laws, regional laws and guidelines which form the foundation of children's rights.

(e) Methodology

The research method used is doctrinal or desk-top and includes a detailed analysis of national laws and customs, jurisprudence as well as international and regional laws to identify gaps when issues relating to child maintenance, custody and child adoption are dealt with.

⁸⁶ Article 3(1) of the UNCRC

⁸⁷ The Constitution of the Republic of Botswana (Chapter 01:01) Laws of Botswana

(f) Chapter Synopsys

Chapter I: INTRODUCTION

This chapter gives a brief introduction about the UN Convention on the Rights of the Child as well as its purpose and intention and highlights the four guiding principles which include the best interests of the child principle. The chapter also highlights the problem statement and the research question.

Chapter II: BACKGROUND OF THE STUDY

This chapter gives a brief history of the development of the laws applicable in Botswana. It also introduces the study and highlights the focus of the study.

Chapter III: THE BEST INTERESTS OF THE CHILD PRINCIPLE

This chapter discusses the best interests of the child principle, highlighting the factors to be taken into account when making an assessment of what is in the best interests of a child as well as the challenges.

Chapter IV: THE STATE OF CHILD MAINTENANCE IN BOTSWANA

The chapter discusses the laws applicable on child maintenance in Botswana and goes on to discuss whether the best interests of the child principle has been applied when maintenance issues are dealt with.

CHAPTER V. CHILD CUSTODY IN BOTSWANA

The chapter discusses applicable laws on child custody in Botswana and goes further to interrogate whether the best interests of the child principle has been applied when custody matters are dealt with.

CHAPTER VI. CHILD ADOPTION IN BOTSWANA

The chapter discusses adoption laws in Botswana and interrogates whether the best interests of the child principle has been applied in custody matters.

CONCLUSION

The conclusion gives an overview of the study and provides an answer to the question whether the best interests of the child principle has been applied in Botswana in relation to the areas identified.

III. THE BEST INTERESTS OF THE CHILD PRINCIPLE

As earlier indicated, the right of a child to have their best interests made as a key concern is a 'substantive right, an interpretative legal principle and a rule of procedure' and articulates one of the essential tenets of the UNCRC.⁸⁸ Allusions to this principle is found in not less than seven articles of the Convention and the range of Article 3, which requires that a child's best interests be taken into account in every action concerning them shows that

⁸⁸ Op Cit note 55 at 74

there is no limitation to the use of the principle wherever a child is concerned.⁸⁹

The UN Convention on the Rights of the Child is not merely a neutral writing which simply enumerates a rights list.⁹⁰ It [UNCRC] is an account of such rights a child is entitled to as well as a creation of a novel democratic dynamic.⁹¹ Previously, a child as defined by the Geneva Declaration of 1924⁹² and the Declaration on the Rights of the Child of 1959⁹³ was understood as a thing needing of attention and protection.⁹⁴ Come the promulgation of the UN Convention on the Rights of the Child in 1989 however, a child was understood as a subject of rights.⁹⁵ By way of different articles and principles, the UNCRC established the concept of a child as a subject of rights.⁹⁶

Article 3 of the UNCRC which is on all fours with section 5 of the Children's Act enjoins all public or private social welfare institutions, courts of law, administrative authorities or legislative bodies taking action concerning children to consider the best interests of the child as paramount.⁹⁷

In breaking down the notion of the interests of the child, an earlier concept of 'the well-being of the child' developed into the principle of 'best interests' which is currently found in Article 3(1) of the UNCRC.⁹⁸ The concept is consequently a comprehensively contemporary legal idea which has as yet not been a subject of extensive study.⁹⁹ Its substance remains rather unclear and its possible functions are numerous.¹⁰⁰ The use of the idea or notion is more appropriately suited to particular issues or logical explanation in jurisprudence.¹⁰¹

This principle was expressly incorporated for the first time in the 1924 Geneva Declaration on the Rights of the Child and the 1959 United Nations Declaration on the Rights of the Child.¹⁰² It also stands to be one of the foundations of the 1989 UNCRC and the 1990 ACRWC.¹⁰³ It is mainly

⁸⁹ Ibid

⁹⁰ Jean Zermatten, *'The Best Interests of the Child: Literal Analysis, Function and Implementation'* Working Report (2010) 2 available at <https://www.childrights.org> accessed 4 June 2024

⁹¹ Ibid

⁹² Geneva Declaration of the Rights of the Child of 1924 Available at <https://www.humanium.org>text-2> accessed on 21 June 2024

⁹³ Declaration on the Rights of the Child of 1959 Available at <https://www.refworld.org>1959> accessed on the 21 June 2024

⁹⁴ Op cit note 90 at 2

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Article 3(1) of the UNCRC, Section 5 of the Children's Act of 2009

⁹⁸ Op cit note 90 at 5

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Aron Degol & Shimelis Dinku, *'Notes on the Principle "Best Interest of the Child": Meaning, History and its Place under Ethiopian Law'* (2011) Mizan Law Review Vol. 5 No. 2 319

¹⁰³ Ibid

applicable to domestic affairs, particularly in disputes which concern custody, maintenance, guardianship, adoption and others of children.¹⁰⁴ The ‘best interests of the child’ principle is a vital legal principle of interpretation established to limit the amount of grown-up authority on children (professionals, parents, teachers, judges, medical doctors, etc.)¹⁰⁵ The principle is founded on recognition that adults are merely in a position to make decisions on children’s behalf due to the child’s want of experience as well as judgment.¹⁰⁶ In actual fact, nobody knows with any measure of certainty what the ‘best interests’ of a particular child or set of children are.¹⁰⁷ Through the framework of the 1924 Geneva Declaration of the Rights of the Child, children’s rights were predominantly viewed as measures to be used against child labour, slavery, child trafficking as well as child prostitution.¹⁰⁸ The Geneva Declaration of the Rights of the Child was premised on the belief that ‘mankind owes to the child the best it has to give’.¹⁰⁹ The 1959 UN Declaration of the Rights of the Child avowed the principle being that ‘mankind owe to the child the best it has to give’.¹¹⁰ It mainly underscored on the necessity for distinct safeguards as well as care for a child and states at Principle 2:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.¹¹¹

The best interests of the child principle requires to be considered by decision makers during the decision making process in which rules of procedure are to be applied.¹¹² The only contribution a state party ought to have as regards a decision lies in the process of decision making.¹¹³ Nonetheless, it is clear that the best interest principle ought to respect:

- The importance of each child to be an individual who has opinions;
- The short, medium as well as long term perspectives of the child’s life, not forgetting that a child is a ‘human being’ who is developing;
- The universal spirit of the UNCRC; as well as

¹⁰⁴ Ibid

¹⁰⁵ Op cit note 90 at 6

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Op cit note 91 at 322

¹⁰⁹ Preamble to the Geneva Declaration of the Rights of the Child of 1924 Available at www.humanium.org/geneva-declaration accessed on 18 June 2024

¹¹⁰ Op cit note 102 at 323

¹¹¹ Principle 2 of the UN Declaration on the Rights of the Child of 1959 Available at www.refworld.org/legal/unga/1959 accessed on 18 June 2024

¹¹² Op cit note 90 at 7

¹¹³ Ibid

- An interpretation which is not ‘culturally relativist’ or refutes other rights of the UNCRC like the right to protection from dangerous traditional practices or corporal punishment.¹¹⁴

The best interests of the child principle is acknowledged not just in various national laws of states but similarly in numerous universal human rights laws.¹¹⁵ In spite of such worldwide recognition of this principle, a definition of the notion is still problematic.¹¹⁶ Just as principles as well as social standards are different in all places, so is the appreciation of this concept.¹¹⁷

Assessing a child’s best interests stands to be a unique action which ought to be assumed in every specific case, in light of the peculiar circumstances of the child or a collection of children, or children generally.¹¹⁸ The circumstances are in relation to the specific characteristics of such child or concerned children like, amongst others, sex, age, maturity level, knowledge, being a member of a minority group, bodily, sensual or intelligence disability, including social and cultural contexts in which children find themselves. These contexts may be presence or lack of parentages, whether a child resides with them, the level of connections between a child and their family or guardians, the safety of their environment, or the presence of worthy alternate means obtainable by their nuclear or extended family, or carers.¹¹⁹ As earlier noted, determining what is ‘best’ or ‘least detrimental’ in relation to a specific child is ordinarily indeterminate as well as speculative and for most cases of custody, prevailing psychological philosophies do not produce confident predictions on the outcomes of alternative custody outlooks.¹²⁰ Furthermore, even where accurate predictions could be possible, in most cases, today’s society lacks a precise consensus on the values that can be used to determine what is ‘least detrimental’ or ‘best’.¹²¹ Recognizing the indeterminacy of today’s standards puts into sharp focus another deep-cutting dilemma. Considering that whatever is in a particular child’s best interests is indeterminate, there remains good reason to be upset by the range of power used by a judicial officers in the determination of custody matters. In addition, the core reasons for the indeterminacy being our inability to predict as well as the lack of agreement in relation to values, makes formulation of rules problematic.¹²²

The Committee has therefore found it beneficial to make up a non-exhaustive list which is non-hierarchical, of factors which can be included in the best-

¹¹⁴ Ibid

¹¹⁵ Op cit note 102 at 323

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ Committee on the Rights of the Child, General comment No. 14 (2013) on the Right of the Child to have his or her Best Interests Taken as a Primary Consideration (art. 3, para. 1) Convention on the Rights of the Child, CRC/C/GC/14 12

¹¹⁹ Ibid

¹²⁰ Op cit note 9 at 229

¹²¹ Ibid

¹²² Ibid

interests evaluation by decision makers having to assess children's best interests.¹²³ All elements of this list ought to be considered and well-adjusted having regard to each circumstance.¹²⁴ The Committee has considered that the factors to be considered during assessment and determination of a child's best interests, depending on the circumstances, are the following:

- A child's views. Article 12¹²⁵ of the Convention affords children the right to state their opinions in all decision affecting them. Whichever decision does not take cognizance of a child's view nor give the view due weight in accordance with their age and level of maturity, disrespects the likelihood of the child or children influencing the assessment of their best interest.¹²⁶
- A child's identity. For the reason that children are not the same even when in a group, diversity ought to be made a consideration when determining their best interests. A child's identity comprises characteristics like sex, religion, sexual orientation, beliefs, national origin, cultural identity and personality. Though children as well as young persons share elementary universal needs, their expression of such needs depend on a varied range of individualist, physical and social as well as cultural features, together with their developing capabilities. The right of a child to preserve their identity is guaranteed under Article 8¹²⁷, and ought to be given respect and considered in the determination of such child's best interests.¹²⁸
- The preservation of a family setting as well as preserving relations. The Committee remembers how indispensable it is to carry out an assessment as well as determine a child's best interests within the framework of possible separation of the child from its parents under Articles 9, 10 and 20¹²⁹. It further highlights that the factors stated above are tangible rights and not just features in a determination of the child's best interests. That a family is a vital component of a society as well as a natural setting for the development and well-being of the members, most importantly children [opening of the Convention]. A child's right to their family life is guaranteed under Article 16 of the Convention. In addition the word 'family' ought to be understood in a general sense and includes adoptive, biological, as well as foster parentages and, where relevant, members of an extended family as provided by indigenous custom under Article 5.¹³⁰
- The care, protection as well as safety of a child. In an assessment to determine the best interests of the child or children generally, the

¹²³ Op cit note 118

¹²⁴ Ibid

¹²⁵ Article 12(1) of the UNCRC

¹²⁶ Op cit note 118, Committee on the Rights of the Child, General Comment No 12 on the Right to be Heard (2009) CRC/C/GC/12

¹²⁷ Article 8(1) and (2) of the UNCRC

¹²⁸ Op cit note 118

¹²⁹ Articles 9, 10 and 20 of the UNCRC

¹³⁰ Op cit note 118

state's obligation to guarantee such child protection as well as care which is essential for their well-being in terms of Article 3 paragraph 2 ought to be considered. The expression 'protection and care' ought to be understood in a wide sense as the objective is not indicated in a narrow or adverse terms, but rather to relate to an all-inclusive ideal of guaranteeing a child's 'well-being' and growth. A child's well-being in the wide sense comprises its basic physical, material, educational, as well as emotional requirements, including the need for love and security.¹³¹

- State of vulnerability. A significant component to deliberate on is a child's state of being vulnerable, for example, disability, refugee or asylum status, belonging to a minority group, victim of mistreatment or being homeless. The purpose for assessing the best interests of children or a child in vulnerable circumstances ought not just be in relation to full enjoyment of every right stated in the Convention, it is likewise in regard to additional human rights standards connected to these particular circumstances, like those covered under the Convention on the Rights of People with Disabilities, the Convention Relating to the Status of Refugees, amongst others.¹³²
- A child's right to health under Article 24, as well as their health situation are crucial in determining the child's best interests. Nonetheless, should there be more than a single possible cure for the ailment, or the result of the treatment be unclear, the advantages of every possible treatment ought to be considered against every possible risk or side effect, and the opinions of the concerned child need also be granted due weight on the basis of their age and maturity level. In this way, children ought to be given sufficient and proper information so as to appreciate the position including all pertinent aspects to their interests and be permitted where possible, to approve in a knowledgeable manner.¹³³
- A child's right to education. Access to quality education is in the best interests of a child, as well as non-formal, early childhood, or informal learning or related undertakings, for free. Every decision on methods and activities regarding the education of a particular child or a collection of children ought to respect the best interests of the child or children. As a way of promoting education, or bettering the quality of education for most children, the state parties must have properly qualified educators as well as other specialists employed in diverse education oriented set ups, including child welcoming surroundings. In addition there must be proper educating and methods of learning,

¹³¹ Ibid

¹³² General Comment 14, Committee on the Rights of the Child, General Comment No.9 on the Rights of Children with Disabilities (2006) CRC/C/GC/9 Available at <https://www.refworld.org/crc> accessed on 21 June 2024

¹³³ General Comment 14, General comment 15 (2013) on the right of the child to the enjoyment of the highest attainable level of health (art. 24) para 31 CRC/C/GC/15 Available at <https://www.refworld.org/crc> accessed on 21 June 2024

considering that learning is not just a future investment but a chance for joyful acts, admiration, participation and accomplishment of goals.¹³⁴

The following Articles of the UNCRC are worthy of consideration when the best interests of the child are determined, especially on maintenance, custody and adoption matters being Article 9 relating to family separation, Article 18 concerning parental responsibilities and Article 21 for Adoption.

Article 9 of the UNCRC requires state parties to guarantee the non-separation of a child from his or her parents contrary to what they will. The only exception is where competent authorities determine, subject to a judicial review, and in accordance with relevant laws and procedure, that the separation is crucial for the child's best interests.¹³⁵ The determination might be necessary in a case such as where a child is abused or neglected by its parents, or where the parents live separate lives and a decision ought to be made regarding the child's residence.¹³⁶ Where there are proceedings pursuant to the article, every interested party must be granted an opportunity for participation in such proceedings in order to make known their views.¹³⁷ State parties must respect the child's right to preserve personal relations as well as direct contact with both parents regularly where the child is separated from one or both parents. The only exception is where it would be contrary to the best interests of the child to maintain the contact.¹³⁸ The article language expresses the critical importance of a connection between parents and children as the test is of necessity whilst the deciding criterion is the best interests of the child.¹³⁹ Where governments invoke good reasons for detention of a parent, forcing separation between the parent and child, the Convention mandates state parties to take into consideration the best interests of the child in deciding whether the separation is necessary.¹⁴⁰ The paragraph 2 requirement that every interested party be given a chance to participate and air their views is another feature of the due process.¹⁴¹ Participation includes that of the child whose right not to be forcefully separated from the parents is conditional, that is, the separation must not be against the child's will. Where the child seeks emancipation or seeks to be separated from either or both parents, the whole proceedings might take another course, underscoring the importance of the principle of child

¹³⁴ General Comment 14, Office of the High Commissioner for Human Rights, CESCR General Comment NO.13: The Right to Education (Art.13)(1999) E/C.12/1999/10 Available at <https://www.refworld.org/cescr> accessed on 21 June 2024

¹³⁵ Article 9(1) of the UNCRC

¹³⁶ Ibid

¹³⁷ Article 9(2) of the UNCRC

¹³⁸ Article 9(3) of the UNCRC

¹³⁹ Ziba Vaghri, Jean Zermatten, Gerison Lansdown et al, *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes*, Springer (2022) 129 Available at <https://link.springer.com> accessed on the 28 March 2025

¹⁴⁰ Ibid

¹⁴¹ Ibid

participation.¹⁴² The article further calls on state parties to make clear laws as well as procedures for regulation of such determinations through the guidance of the Beijing Rules including Guidelines for the Alternative Care of Children Rules.¹⁴³

The fourth characteristic of Article 9 as stated in paragraph 4 articulates family members' right, including children as well as parents and members of the extended family to information relating to the whereabouts of a parent or child who is missing or under detention due to state action.¹⁴⁴ The article recommends minimum rules for guarding against impunity of the state in the face of forceful separations between parents and children.¹⁴⁵

Article 18 enjoins state parties to guarantee recognition of the principle that parents jointly have similar duties for the raising as well as the development of their children.¹⁴⁶ Parents and legal guardians hold the primary duty for the upbringing as well as development of their children and the best interests of the child ought to be their main concern.¹⁴⁷ For purposes of ensuring and advancing the rights set out in the Convention, state parties must render proper support to parents as well as legal guardians whilst performing their child-raising duties. State parties must further ensure the creation of institutions as well as facilities and services to care for the children.¹⁴⁸ State parties ought to use every appropriate method to make certain that a child of working parents gets the right to enjoy child-care facilities and services to which they are entitled.¹⁴⁹ The article endeavors to attain a balance of responsibilities between a child's parents and other main caregivers, and the state parties.¹⁵⁰ The article also underscores that parents' decisions must at all times be made with reference to the best interests of the child.¹⁵¹ In addition, Article 18 complements Article 27(2) which gives parents the duty to provide a living environment which is necessary for a child's development.¹⁵²

When it comes to adoption matters, Article 21 of the UNCRC calls upon state parties to identify as well as permit a method of adoption that will guarantee that the 'best interests of the child' are a primary consideration. Such a system ought to ensure that an adoption is sanctioned by competent authorities only. The said authorities ought to make determinations according to applicable laws and procedures, basing on all relevant and credible information, to ensure that the adoption is permitted considering the child's

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ Article 9(4) of the UNCRC

¹⁴⁵ Op cit note 139 at 131

¹⁴⁶ Article 18(1) of the UNCRC

¹⁴⁷ Ibid

¹⁴⁸ Article 18(2) of the UNCRC

¹⁴⁹ Article 18(3) of the UNCRC

¹⁵⁰ Op Cit note 139 at 154

¹⁵¹ Ibid

¹⁵² Ibid

status.¹⁵³ The child's status relates to parents and relatives as well as legal guardians. Where it is required, concerned persons have to grant their well informed consent to the said adoption after all the necessary counselling.¹⁵⁴ In addition, the system of adoption should recognize that adoptions outside the country can be considered as an alternative type of child care in the event a child cannot be placed with an adoptive family or in a foster home or a suitable home cannot be found in the child's country of origin.¹⁵⁵ Where an inter-country adoption guarantees the same safeguards and standards equal those pertaining in national adoptions, such adoption will be in the best interests of the child.¹⁵⁶ A state party ought to take all appropriate measures which will guarantee that a placement in inter-country adoption does not result in inappropriate monetary gains for those who are involved in it.¹⁵⁷ State parties are further called upon to promote where proper, the objectives of Article 21 through the concluding of bilateral or multilateral agreements. In addition, the state parties must strive to ensure, within this Convention, and guarantee that placement of a child in a different country is undertaken by authorities or organs who are competent.¹⁵⁸

There is need for emphasis that the elementary best-interest determination is an overall assessment of every pertinent element of the child's best interests, with the weight of each one component reliant on others.¹⁵⁹ Not all elements may be applicable to each case, but different components may be applied in diverse ways to varying cases.¹⁶⁰ The substance of each component will essentially differ from one child to another and from one case to the other, subject to the nature of decision as well as the material situations as will the significance of each section in the whole assessment.¹⁶¹

At regional level, Article 4(1) of the ACRWC states that in every action concerning a child embarked on by every individual or authority, the best interests of the child must be the major consideration.¹⁶² In every administrative or judicial proceedings concerning a child who is able to communicate his/her views, an opportunity must be afforded for the child's view to be received directly or by way of an independent representative when party to proceedings and such views must be considered by relevant authorities according to the provisions of applicable law.¹⁶³

¹⁵³ Article 21(a) of the UNCRC

¹⁵⁴ Ibid

¹⁵⁵ Article 21(b) of the UNCRC

¹⁵⁶ Article 21(c) of the UNCRC

¹⁵⁷ Article 21(d) of the UNCRC

¹⁵⁸ Article 21(e) of the UNCRC

¹⁵⁹ Op Cit note 118

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² Article 4(1) of the ACRWC

¹⁶³ Article 4(2) of the ACRWC

Under the traditional African customary law in Botswana, the best interests of the child principle was previously afforded no use.¹⁶⁴ What mattered most was always what parents desired and saw as the proper decision regarding a child.¹⁶⁵ This meant that a child's views were never considered, regardless of the child's age or level of maturity. In addition, the welfare principle was generally applied when deciding issues pertaining to child custody.¹⁶⁶ Thus, whatever may have been in the best interests of the child when decisions regarding children were made was never a consideration.

When it comes to legislation, Botswana has from the mid-nineties undertaken a systematic review as well as a reform of its laws and policies to include human rights.¹⁶⁷ Throughout the years, the best interests of the child principle has been extended to areas such as maintenance, custody, and adoption.¹⁶⁸ The high court being the upper guardian of all minors at common law has also gradually shown that it is obliged to consider the best interests of the child when making decisions affecting children.¹⁶⁹ Despite this gradual application of the principle, it has been shown that there is still a lack in some areas such as child maintenance, custody and adoption.

(a) The Best Interests of the Child Principle in Child Maintenance in Botswana

As a starting point I will address the law relating to child maintenance. Child maintenance in Botswana is provided for under the Affiliation Proceedings Act of 1999.¹⁷⁰ Despite that the law provides for child maintenance and applicants approach courts for child maintenance orders, the Botswana report¹⁷¹ submitted to the Committee on the Rights of the Child shows that the state party has acknowledged the need to see to it that more is done to make sure that child maintenance orders emanating from courts are complied with.¹⁷² This is due to the fact that by failing to pay a child's support, resources are limited which could have been accessible to the child in question, undermining the best interests of the child principle.¹⁷³

When it comes to customary law, as stated earlier, the customary law of any specific tribe or ethnic community is defined under section 2 of the Customary Law Act. Section 2 of the Customary Law Act defines the customary law of an ethnic group or community as the customary law of such ethnic group or community in so far as it is compatible with provisions of every written law

¹⁶⁴ Tebogo Jobeta and Bonolo Ramadi Dinokopila, 'The Best Interests of the Child Principle in Botswana' (2018) Vol.26 No.2 University of Botswana Law Journal 20

¹⁶⁵ Ibid

¹⁶⁶ Ibid

¹⁶⁷ Op cit note 50 at 7

¹⁶⁸ Op Cit note 164 at 21

¹⁶⁹ Ibid

¹⁷⁰ Affiliation Proceedings Act

¹⁷¹ Op Cit note 50 at 9

¹⁷² Ibid

¹⁷³ Ibid

and not conflicting with morality, natural justice, or humanity.¹⁷⁴ Customary law is still largely applicable in Botswana.

Under customary law, fathers of children whose mothers they have not married often make once-off payments for child-support. Thereafter, they are not obliged to pay support for their children.¹⁷⁵ Such children are thereafter adopted to their mother's family and may in future get adopted to their mother's matrimonial family.¹⁷⁶ Whilst the once-off maintenance pay might have been adequate for the child's needs under a cattle based economy, the cash economy demands can never be met through such an arrangement.¹⁷⁷ This traditional mind-set, brought about by culture, has however proved hard to change notwithstanding amendments to the Affiliation Proceedings Act.¹⁷⁸ The result therefore has been that children who are maintained under this kind of arrangement are not adequately provided for in terms of their support and the arrangement does not take into account the best interests of the child.

When it comes to the Roman Dutch common law, a father, regarded as the *pater familias* [head of the family], was taken to be the natural legal guardian of his children born under marriage.¹⁷⁹ He was liable for their affairs until they were of age.¹⁸⁰ Thus, he could never be refused custody including access unless there was good cause.¹⁸¹ On the other hand, a father to children born outside marriage bore no relationship to the children, despite being liable for their maintenance payments.¹⁸² Their mother was the sole legal guardian.¹⁸³ The father bore no natural right of access to such children.¹⁸⁴

It has nonetheless become obvious that the maternal dominance in situations where children are born outside of marriage violates the concerned child's right to preserve his or her identity as well as family relations under Article 8.¹⁸⁵ The fact that a child born out of wedlock is regarded as belonging to its mother and the mother's family means that the father has only a limited access or no access to the said child. The father cannot form any meaningful bond with the child and reduced access means the father cannot fully maintain the child as he may have wanted. The child's right to identity is affected as the identity of the mother becomes dominant without necessarily having heard the child's view on the identity he or she might have preferred. The child's right to be a member of the father's family is also violated.

¹⁷⁴ Section 2 of the Customary Law Act No 51 of 1969 (Chapter 16:01) Laws of Botswana

¹⁷⁵ Op cit note 50 at 9

¹⁷⁶ Ibid

¹⁷⁷ Ibid

¹⁷⁸ Ibid

¹⁷⁹ Op cit note 164 at 33

¹⁸⁰ Ibid

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Ibid

¹⁸⁵ Article 8 (1) and(2) of the UNCRC

(b) The Best Interests of the Child Principle in Custody in Botswana

When it comes to custody issues and the best interests of the child, under the traditional African customary law in Botswana, if parents married and later separated, the children's custody is traditionally given to the father's family, and the mother will only retain the visitation right of the children.¹⁸⁶ There is no respect for the views the children may have regarding the said custody regardless of the children's age or level of maturity. Whether the said arrangement would be in the children's best interests or not is not an issue. The concerned children stand to be in a somewhat powerless situation due to their dependence on their parents or caregivers in a traditional Tswana society.¹⁸⁷ This is due to the fact of a culture wherein children are habitually treated as the property or possessions of their parents as opposed to bearers of particular rights whereas the Convention underscores respect for the children's dignity and identifies a child as human and not as property.¹⁸⁸

(c) The Best Interests of the child Principle in Botswana Adoptions

In relation to adoptions, the Children's Act gives the main duty to care for children as well as the responsibility to maintain them to their biological parents.¹⁸⁹ Section 13 of the Children's Act¹⁹⁰ further gives every child a right to know as well as to be taken care of by both parents.¹⁹¹ Adoption of a child by individuals not connected to the child through relation is uncommon in Botswana culture and is thus regarded with disapproval.¹⁹² It can be said that fostering is more accepted when compared to adoption.¹⁹³ The more common type of adoption stands to be where a husband adopts the wife's non marital child.¹⁹⁴ The Combined Second and Third reports¹⁹⁵ by Botswana to the Committee on the Rights of the Child have recommended that Botswana should comply with the Committee's recommendation to expedite a review of its Adoption of Children's Act.¹⁹⁶ Such review should enable, amongst others, safeguarding of children who have been adopted informally, as well as encourage local adoptions.¹⁹⁷ Botswana has been reviewing the Adoption of Children's Act in pursuance of the recommendation.¹⁹⁸

¹⁸⁶ Op cit note 19

¹⁸⁷ Ibid

¹⁸⁸ Ibid

¹⁸⁹ Section 27(1) of the Children's Act of 2009

¹⁹⁰ Children's Act of 2009 (Chapter 28:04) Laws of Botswana

¹⁹¹ Ibid

¹⁹² Op cit note 50 at 20

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ Ibid

¹⁹⁷ Ibid

¹⁹⁸ Ibid

Thus, informal adoptions which have not been registered are not in the best interests of the child because upon the death of the alleged adoptive parent, the concerned child might be denied inheritance. Where the parents of the informally adopted child divorce, the child might be deprived of maintenance if there is no proof that it was adopted. In light of the above, it is evident that there is still a lack in the application of the best interests of the child principle in relation to child maintenance, custody and child adoptions in Botswana.

III. THE STATE OF CHILD MAINTENANCE IN BOTSWANA

(a) Introduction

The Children's Act of 1981 was repealed and replaced by the Children's Act of 2009 to domesticate the provisions of the United Nations Convention on the Rights of the Child [UNCRC] as well as the African Charter on the Rights and Welfare of the Child [ACRWC]. The best interests of the child principle was, for the first time, incorporated into children's law in Botswana.¹⁹⁹ Article 7 of the UNCRC guarantees to all children, a right to the knowledge of and care by their parents.²⁰⁰ In addition, Article 18(1) of the UNCRC obliges all states who are party to the Convention to apply their best efforts to safeguard respect for the rule that mothers and fathers have mutual responsibilities to bring up and develop their children.²⁰¹ Thus, parents as well as legal guardians, bear the key responsibility of upbringing, including the development of their children.²⁰² In addition, the best interests of the child should be their main concern.²⁰³ Article 27(1) mandates state parties to recognize that every child has a right to a living standard which is adequate for such child's bodily, psychological, spiritual, ethical as well as societal growth.²⁰⁴ Parent(s) and other people answerable for a child bear the main responsibility of securing, within their capabilities as well as financial abilities, conditions of life which are necessary for the development of the child.²⁰⁵ State parties are therefore obliged to take all appropriate measures towards securing the payment of child maintenance from parents and other people who have financial obligations for the child.²⁰⁶ Payment of the maintenance should be made both within as well as outside the state party.²⁰⁷ Where the individual who has financial duty towards the child resides in a different country from where the child resides, the state party shall support acceding to international treaties or concluding of such treaties, including making of some other suitable arrangements.²⁰⁸

¹⁹⁹ Op cit note 164 at 28

²⁰⁰ Article 7 of the UNCRC

²⁰¹ Article 18(1) of the UNCRC

²⁰² Ibid

²⁰³ Ibid

²⁰⁴ Article 27(1) of the UNCRC

²⁰⁵ Article 27(2) of the UNCRC

²⁰⁶ Article 27(4) of the UNCRC

²⁰⁷ Ibid

²⁰⁸ Article 27(4) of the UNCRC

At regional level Article 4(1) of the African Charter on the Rights and Welfare of the Child provides that in every action concerning a child carried out by a person or authority, the best interests of the child must be the main consideration.²⁰⁹ All children are thus entitled to enjoyment of their parents' maintenance and protection as well as the right to stay with their parents whenever possible.²¹⁰ Parents as well as other people responsible for a child bear the main responsibility of raising and development of the child.²¹¹ The best interests of the child shall at all times be their basic concern.²¹² They shall further secure living conditions within their capabilities and financial abilities which are necessary for the child's growth and development.²¹³

As stated earlier, Botswana acceded to the UNCRC in 1995²¹⁴ and at regional level, Botswana has ratified the African Charter on the Rights and Welfare of the Child.²¹⁵ In domesticating the international and regional law provisions relating to child maintenance, the Children's Act of 2009 provides:

Subject to the child's best interests, every child has a right to know and be cared for by both of his or her biological parents, and to appropriate alternative care where the child is removed from the family environment²¹⁶ A child who is born out of wedlock and does not live with both of his or her biological parents has a right to access the absent parent, and to be nurtured, supported and maintained by such absent parent in accordance with the provisions of the Act or any other Act which deals with the care and maintenance of children.²¹⁷

(b) Child Maintenance under the Affiliation Proceedings Act

The Act which specifically deals with child maintenance in Botswana is the Affiliation proceedings Act.²¹⁸ Section 3 of the Act permits an expectant woman, a child's parent or any person who is maintaining or has child custody, to make application to court on complaint, for an alleged father of such child to be summoned to court.²¹⁹ The complaint could likewise be served to the child's other parent.²²⁰ In the event the complainant is the person who is maintaining or has custody of the child, such complaint can be delivered to either, or both parents.²²¹ The complaint is filed with the court which has jurisdiction within an administrative district where the

²⁰⁹ Article 4(1) of the ACRWC

²¹⁰ Article 19(1) of the ACRWC

²¹¹ Article 19(1)(a) of the African Charter on the Rights and Welfare of the Child

²¹² Ibid

²¹³ Article 19(1)(b) of the African Charter on the Rights and Welfare of the Child

²¹⁴ Op cit note 49

²¹⁵ Op cit note 74

²¹⁶ Section 13(1) of the Children's Act of 2009

²¹⁷ Section 13(2) of the Children's Act of 2009

²¹⁸ Affiliation Proceedings Act of 1999 (Chapter 28:02) Laws of Botswana

²¹⁹ Section 3(1)(a) of the Affiliation Proceedings Act

²²⁰ Section 3(1)(b) of the Affiliation Proceedings Act

²²¹ Section 3(1)(c) of the Affiliation Proceedings Act

complainant is resident.²²² Alternatively it can be filed in the administrative district which is more convenient for such complainant.²²³ In the event the evidence is sufficient for the court, it [court] may either make a paternity order against the defendant alleged to be a father or the court may make a maintenance order.²²⁴ If the defendant is a mother, the court can grant a maintenance order against her.²²⁵ In the event the child's parent has no earnings from which to make deductions for the child's maintenance and/or education, the Act provides for a social worker to be appointed for assessment of the defendant's estate or socioeconomic standing.²²⁶ Same shall then be used to determine how the defendant can contribute to the child's maintenance and/or education.²²⁷ The social worker has to prepare a report.²²⁸ Thereafter, such complaint shall, together with the report, be referred, to a customary court for the application of customary law.²²⁹

The Affiliation Proceedings Act thus recognizes maintenance under both the Act and customary law. As earlier indicated, despite that the law provides for child maintenance and applicants often approach courts to file complaints resulting in child maintenance orders, the Botswana report²³⁰ shows that Botswana has acknowledged the need to see to it that more is done to make sure that child maintenance orders emanating from courts are complied with.²³¹ This is due to the fact that by failing to pay a child's support, resources are limited which could have been accessible to the child in question, undermining the best interests of the child principle.²³²

In addition, the Affiliation Proceedings Act does not enjoin courts making orders under the Act to ensure that the best interests of the child shall be the paramount consideration when such orders are made. All that the Act requires is that the court be satisfied on the evidence adduced that there is need for the child to be maintained. It may well be that during the hearings, other considerations come into play especially the means of the parents and not necessarily what is in the best interests of the child. This is so because Section 6(3) of the Act states:

Where a complaint has been made to a magistrate's court and the parent of the child has no income from which deductions for maintenance and education of the child can be made, the court shall (a) order that a social worker assess his estate or socio-economic standing forthwith to determine

²²² Section 5 of the Affiliation Proceedings Act

²²³ Ibid

²²⁴ Section 6(1)(a) of the Affiliation Proceedings Act

²²⁵ Section 6(1)(b) of the Affiliation Proceedings Act

²²⁶ Section 6(3)(a) of the Affiliation Proceedings Act

²²⁷ Ibid

²²⁸ Ibid

²²⁹ Section 6(3)(b) of the Affiliation Proceedings Act

²³⁰ Op cit note 50 at 9

²³¹ Ibid

²³² Ibid

how he can contribute to the maintenance and education of the child, and prepare a report thereon; and, (b) refer the complaint, together with the report, to a customary court, which shall apply customary law thereto.²³³

It is thus clear, that the Act enjoins magistrate's courts to use a financial means test when making decisions relating to child maintenance and not necessarily to consider what is in the best interests of the child as paramount. This is so because where the defendant is found not to have financial means, from which deductions can be made, the Act requires the court to stop the proceedings, request for a social inquiry report by a social worker and then refer the complaint to a customary court to ascertain how the child can be maintained. It is apparent that where there are no financial means, the court's hands are tied by the Act and there is nothing a magistrate can do. It may well be that after receiving the social inquiry report, the presiding officer [magistrate], through the application of the best interests of the child principle, could determine other ways in which the defendant can be ordered to contribute to the child's support. The Affiliation proceedings Act does not however allow the presiding magistrate to apply the best interest of the child principle due to the absence of the principle from the Act. Instead, the Act requires for the matter to be referred to the customary court. There is therefore a need for the Affiliation proceedings Act to be amended to incorporate the best interest of the child principle and empower magistrates who preside over child maintenance cases.

In addition, the Act [Affiliation Proceedings] provides for cases relating to defendants who do not have financial income to be referred to the customary court. It has however been shown that traditional African customary law and courts have their own flaws when it comes to child maintenance issues. The said flaws are discussed under customary law maintenance.

Section 2 of the Affiliation Proceedings Act provides for the order to require a parent to maintain a child with no less than P100 a month. This is to cover both upkeep and the child's education if the child is of school going age. The Affiliation Proceedings Act was enacted in year 1999 and one wonders whether an amount of P100 a month was enough to cater for a child's maintenance and education at the time, or whether such a meagre amount can adequately support a child in this day. With the passage of time, 25 years to be exact, the amount of P100 as the minimum amount a parent can be liable for to cater for the education and other needs of a child needs to be reviewed.

(c) Child Maintenance under the Tswana Customary Law

Under the traditional African customary law, a fathers to a child whose mother he has not married is only required to make a once off payment in child support and subsequently has no responsibilities towards his children.²³⁴ Such child is thereafter, accepted into the mother's family with the possibility

²³³ Section 6(3)(b) of the Affiliation Proceedings Act

²³⁴ Op cit note 50 at 9

of later being adopted into its mother's marriage family.²³⁵ Whilst the once off payment might have been adequate for the child's needs in a 'cattle economy', the cash economy demands can surely not be met through such an arrangement.²³⁶ This cultural mind-set has nonetheless proved hard to change, despite amendments in the Affiliation proceedings Act.²³⁷

In addition, the automatic adoption of the child into its maternal family as well as the exclusion of its father from the child's affairs after the once off payment results in the possibility of the child being adopted by the mother's husband, if at all she gets married subsequently. Thus, had the biological father not been excluded by custom, chances of the child's adoption would have been reduced by the bond the child would have had with the father. In addition, the obligation to maintain the child would remain with the biological father as international law requires, as opposed to being transferred to the mother's husband. The traditional African customary arrangement is thus not in the best interests of the child as it promotes severance of ties from a biological father. In addition, it encourages biological fathers to abandon their children to the child's mother's family which is not in the best interests of the child.

In the case of *Ivy Masusu v Michael Masusu*,²³⁸ an appeal against the decision of a Customary Court of Appeal [CCA], the appellant Ivy Masusu was seeking that a decision of a customary court of appeal be overturned. The decision had on divorce granted Ivy Masusu and Michael Masusu's house to the defendant, Michael Masusu. Ivy Masusu was granted the divorce by a headman in a village called Malolwane who had presided in the customary court and had further divided the parties' assets. Ivy Masusu had sought the divorce on the reason, amongst others, that there was no peace in her marriage because her husband insulted her together with her family, assaulted her and failed to financially take care of her and their two children. The evidence had not been disputed by the defendant, Michael Masusu throughout the divorce hearing. The headman granted custody of the Masusus' two children to Ivy Masusu and gave the family house to Michael Masusu. Movable property was shared between the parties.²³⁹

Ivy Masusu made an appeal of the home award. Her grounds were that the house was necessary for bringing up the children who were under her custody. On review of the customary court decision of Malolwane, another customary court at Mmathubudukwane granted the home to Ivy Masusu. The case ultimately reached the Customary Court of Appeal whose decision is

²³⁵ Ibid

²³⁶ Ibid

²³⁷ Ibid

²³⁸ (High Court) Unreported Case No CAHLB 000001-07

²³⁹ Ibid at 3

relevant for present purposes. The Customary Court of Appeal gave Michael Masusu the house.²⁴⁰

A unanimous verdict of three presiding chiefs is produced hereunder for better appreciation of the reasoning that informed it:

ASSESSMENT. According to the entire Tswana culture, when a woman gets married, she is married into the man's clan; likewise, if a man divorces a woman, that woman is effectively divorced by the man's clan. Similarly, if a woman divorces a man, she is in essence divorcing the man's clan. Even if a couple has built its homestead outside the ward of the man's clan, to all intents and purposes, that homestead is an integral part of the man's ward. Upon delivering judgment, headman E. N Bogatsu gave the house to Michael. By so doing, headman Bogatsu gave appropriate effect to the Tswana culture. That is so for the simple reason that if Ivy did not love Michael, there was no way she could enjoy the comfort of his property. It is astonishing that while Ivy did not want Michael, she should want Michael's homestead, which was going to be inherited by his children...In terms of Tswana culture, if a woman divorces, she quits the ward of her husband. How come that while Ivy divorces Michael, she should be given a house which belongs to the Masusu family? Who among the Masususes would visit her since she has divorced them...This court also considers that it would be inappropriate for the house to be sold for that would be tantamount to selling the children's estate and disrupting the ward of Michael's clan. I concur entirely with the judgment passed by headman E.N Bogatsu; it is strong as it conforms to Tswana culture and tradition....²⁴¹

To the Customary Court of Appeal, it did not matter that Ivy had contributed towards building of the house. As far as the court was concerned, the house belonged to the Masusu clan. In addition, it did not matter that Ivy had been granted custody of the children who Michael Masusu had not maintained. One of the things that the Customary Court of Appeal had stated was that even if a husband runs around with other women, the wife should resolutely remain in the home with the children. Whether the children were maintained or not did not seem to be an issue to the court as long as they remained in the home.

On appeal to the High Court, it was held that the Customary Court of Appeal had failed to amongst others state what should happen in the event the wife resolutely stayed in a matrimonial home where the spouse did not run around with other women, but instead neglected to maintain the family amongst others.²⁴² It was held that the Customary Court of Appeal found it fully acceptable to give the home to the defendant [Michael Masusu] and had failed to consider what happened to the children. The defendant had not disputed during trial that he had failed to participate in the children's maintenance. The High Court held further that the Customary Court of Appeal could have considered how the home might be used to contribute to the children's

²⁴⁰ Ibid at 3-4

²⁴¹ Ibid at 4

²⁴² Ibid at 7

maintenance.²⁴³ In addition, the High Court found that the Customary Court of Appeal did not appear to have weighed the benefits against the detriments of removing a mother with her children from a home that the children have known as their only home and give the home to the father who had failed to maintain the children. That such a state of affairs would in addition to unfairly increasing the prevailing financial burden on the mother being the only supporter of the children could also not have possibly been in the best interests of the children. It required noting that the trial court had given the appellant the children's custody and given the house to the respondent and failed to consider or make a decision on how the children were to be maintained. The court seemed to have assumed that the mother ought to continue supporting the children as she had been doing. The High Court found that ideas and principles which do not form part of Botswana law as it is today had influenced the approach taken by the Customary Court of Appeal in determining the case. That such notions could well be a part of customary law as the Customary Court of Appeal had found.²⁴⁴

On the issue of children, it was held that a principle was long established to the effect that in every decision concerning children, the paramount consideration is their best interests.²⁴⁵

The High Court found that after division of the parties' movable assets, having granted custody of the children to Ivy Masusu, the Customary Court of Appeal had choices in the midst of which was the best interests of the children whose family was torn apart Vis:

- Granting of the home to either party, with an order that the party awarded the home compensates the party who moves out half of the value of the home. In such instance, an order for payment of monthly maintenance for the children had to be granted against Michael Masusu.
- The second option would be to give the home to Ivy Masusu and, considering the respondent's past conduct of failing to maintain the children, order his half share of the house to form a pre-payment for the children's support for a definite period.
- Thirdly, an order for the home to be sold with the proceeds being shared amongst the parties. In such instance, the respondent's part can be applied as a down payment for the children's maintenance. If the court found that the respondent will change his past conduct and actually maintain the children in future, a monthly award of maintenance payment could be ordered.²⁴⁶

It is evident that the High Court was able to make the best interests of the children being their care and maintenance the paramount consideration in

²⁴³ Ibid at 10

²⁴⁴ Ibid at 11

²⁴⁵ Ibid at 14

²⁴⁶ Ibid at 15

dividing the parties' assets on divorce, whilst the Customary Court of Appeal had failed to do so. The Customary Court of Appeal, through the application of Tswana customary law, had focused on the interests of the divorced husband and his clan, disregarding the children who were affected by the divorce in the process.

Customary law thus differentiates between a duty to maintain children who are born outside wedlock and the obligation to maintain children who have been legitimized through marriage.²⁴⁷ A child born outside wedlock in terms of customary law belongs to the mother as well as her family group.²⁴⁸ The legal carer for such child is its maternal grandfather and the maternal uncle in the absence of a maternal grandfather.²⁴⁹ The responsibility to care for the child and its protection is associated with the maternal parentages of the child.²⁵⁰

In *Mashabane V Molosankwe*²⁵¹ it was held that an unmarried mother could claim maintenance of a child under Tswana customary law separate from any payment that would have been made as damages for the pregnancy.²⁵² Customary law was assailed due to the differential, discriminatory treatment it gave to children born out of wedlock and for failure to have regard to the best interests of the child.²⁵³

In *Moremi V Mesotlho*²⁵⁴ the High Court stated in certain terms that children have a common law right of support from their parents. That this right, arises from a sense of natural justice and filial, parental duty and affection of blood and this extends to children born out of wedlock.²⁵⁵ The decision in *Moremi V Mesotlho* thus departed from Tswana customary law as it is known when it comes to the maintenance of children born out of wedlock.

The Court of Appeal has held in *Magibisela V Mogobe*²⁵⁶ that in terms of Roman Dutch common law both the mother of the child and the father are obliged to support the child according to their respective means.²⁵⁷ That the obligation to support the child lapses when the child reaches the age of 21, marries or becomes self-supportive²⁵⁸ and that to hold otherwise would obviously not be in the best interests of the child.

It requires noting that the three cases being *Mashabane*, *Moremi* and *Magibisela* were decided at either the High Court or the Court of Appeal which

²⁴⁷ Op cit note 164 at 34

²⁴⁸ Ibid

²⁴⁹ Ibid

²⁵⁰ Ibid

²⁵¹ 2000 (1) BLR 185

²⁵² Ibid

²⁵³ Op cit note 164 at 34

²⁵⁴ 1997 (2) BLR 7

²⁵⁵ Ibid

²⁵⁶ 2002 (2) BLR 53 (CA)

²⁵⁷ Ibid

²⁵⁸ Ibid

courts considered what was in the best interests of the child whilst the Customary Courts of Appeal failed to do so in the *Masusu* case.

(d) Child Maintenance under the Roman Dutch Law

Roman-Dutch law does not acknowledge an affiliation between a child born outside of marriage and the child's father.²⁵⁹ This state of affairs bars the obligation placed on such father to support the child. The law only recognizes the affiliation between a child born outside of wedlock and the child's mother and maternal relatives to the omission of the child's father and paternal relations.²⁶⁰

A father, regarded as the *pater familias* [head of the family], was taken to be the natural legal guardian of his children born under marriage.²⁶¹ He was liable for their affairs until they were of age.²⁶² Thus, he could never be refused custody as well as access, unless there was good cause.²⁶³ On the other hand, a father to children born outside marriage bore no relationship to the children, despite being liable for their maintenance payments as their mother was the sole legal guardian.²⁶⁴

The notion of 'potestas' represents the virtually unconstrained and absolute legal authority of the head of a Roman family, the 'paterfamilias', characterized by total rights over persons as well as possessions which belong to his household.²⁶⁵ The authority over children of his house was named 'patria potestas'.²⁶⁶ This influence was exercised on children born inside marriage.

It has nonetheless become obvious that the paternal dominance of a father in situations where children are born in marriage and the maternal dominance of a mother in situations where children are born outside of marriage ought to be subordinated to the best interests of the child principle contained in the Children's Act of 2009.²⁶⁷

Thus, whether a child is born in or out of wedlock should not be the determining factor when issues relating to the child, including its maintenance or custody are concerned. Denying a father of a child born out

²⁵⁹ Elizabeth Macharia Mokobi, 'Lingering Inequality in Inheritance Law: The Child Born Out of Wedlock in Botswana' Paper Presented at the Judicial Colloquium on the Rights of Vulnerable Groups, Lansmore Hotel, Gaborone, Botswana on 28 and 29 March 2014 141 Available at <https://www.southernafricalitigationcentre.org> accessed on 26 June 2024

²⁶⁰ Ibid

²⁶¹ Op cit note 164 at 33

²⁶² Ibid

²⁶³ Ibid

²⁶⁴ Ibid

²⁶⁵ Hanneretha Kruger, 'The Legal Nature and Development of Parental Authority in Roman, Germanic and Roman-Dutch Law- A Historic Overview' (2004) 10 *Fundamina* 84 Available at <https://journals.co.za.>doi>pdf> accessed on 26 June 2024

²⁶⁶ Ibid

²⁶⁷ Op cit note 164 at 33

of wedlock custody outright denies the concerned child the right to be properly cared for by the father as it blocks the child's relations with the father. This is not in the best interests of the child.

Whilst the Botswana report to the Committee on the Rights of the Child appreciates the courts in the state party upholding the principle of the best interests of the child, same cannot be said about the traditional African customary courts in their application of customary law when issues affecting child maintenance come into play. These courts are still lagging behind when it comes to the application of the best interests of the child principle despite that they handle cases concerning children, especially in areas where there are no magistrates' courts or High Courts. On the Roman-Dutch law aspect, the higher courts have intervened in such matters as can be seen from the *Magibisela V Mogobe* case as well as the *Masusu* case.

V. CHILD CUSTODY IN BOTSWANA

(a) Introduction

Custody is defined by Bekker as 'the capacity of a person to have actual physical "possession" of a minor, to live with him or her, to take care of him or her and to assist him or her in his or her daily life.'²⁶⁸

The topic on the custody of children has been regarded from ancient time through a patriarchy lens.²⁶⁹ Under the civil law practice of Western Roman Empire, it was usual for fathers to be granted their children's custody on divorce.²⁷⁰ For the reason that women were uneducated, there was no way they could make out a living for themselves or even provide materially for their children. To add more insult to the injury, mothers were regarded as not fit to maintain their children.²⁷¹ On the other hand, fathers had comprehensive control on their children. Such a legal as well as social ideal capacitated fathers with far-reaching and unqualified control including the custody of their children.²⁷²

Women's hopeless status emanated from Roman Empire to Medieval Europe and due to their disadvantageous position, they were considered to be minors when it came to societal as well as legal issues.²⁷³ A husband might effortlessly get a divorce through joint agreement with the wife or through repudiation of the wife but still get custody ruled in his favour as his fault

²⁶⁸ Nqobizwe Mvelo Ngema, 'The Impact of Customary Law on Children's Rights in Botswana' (2016) OIDA International Journal of Sustainable Development 11 Available at

<http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html> accessed 13 June 2024

²⁶⁹ Nico P Swartz, 'A Judicial Appraisal on the Best Interest of the Child Standard with Regard to Custody and Access Decisions on Divorce: A Constitutional Developmental Imprint' (2016) Journal of Social Science Research, Vol. 11 No 2 2401 Available at

<https://www.researchgate.net/publications/31874552> accessed 13 June 2024

²⁷⁰ Ibid

²⁷¹ Ibid

²⁷² Ibid

²⁷³ Ibid

could not dismiss him from a custody entitlement. It stood to be his automatic right as the Latin maxim denotes the husband as the household head [Paterfamilias] with absolute authority on the wife and children.²⁷⁴

This legal standard governed for centuries in civil Roman law and European countries, including under the common law jurisdictions till the 19th century when social as well as political movements encouraged civil rights, women and children's rights.²⁷⁵ The marriage establishment, family structure, parent as well as gender underwent social change and women were permitted to participate in employment out of the home environment, triggering divorce issues.²⁷⁶ Parents currently resort to the courts to help determine child custody arrangement issues and this has pushed the courts to change the legal attention from parental rights towards the best interests of the child.²⁷⁷

(b) Child Custody under Tswana Customary Law

In Botswana under the traditional African customary law custody of a child born outside wedlock rests with its mother as well as her family group.²⁷⁸ In the event the parents got married under customary law and separate, the father was given custody of the children with the mother having mere visitation rights.²⁷⁹ Where the husband had fulfilled his responsibility and paid lobolo [bride price], he as well as his family have full custody of the children.²⁸⁰ This is appositely summed up in *Madyibi V Nguva*²⁸¹ as follows:

By nature the progeny of woman accrue to her father's group and are members of his group and tribe for religious and practical purposes...these rights and duties are transferred by Native law to another group only on contraction of a valid customary union whereby the woman's group receives lobolo from the other group and transfers the natural right to the woman's productive powers and her progeny to the group providing lobolo.²⁸²

In accordance with the above assertion, custody including parental rights are ultimately exercised by numerous people within the woman's family if she is unmarried, or the husband's family if she is married. Each member of the woman's family is allowed to contribute to discussions pertaining to her child's interests.²⁸³ This kind of decision making practice will not often promote the child's best interests as a large number of people are allowed to decide, leading to conflicting resolutions to problems making quick decisions

²⁷⁴ Ibid

²⁷⁵ Ibid

²⁷⁶ Ibid

²⁷⁷ Ibid

²⁷⁸ Op cit note 268 at 11

²⁷⁹ Ibid

²⁸⁰ Ibid

²⁸¹ 4 NAC 40

²⁸² Ibid

²⁸³ Op cit note 268 at 12

difficult owing to numerous opinions even if the child's best interests need a quick solution.²⁸⁴

Customary law is certainly not documented and familiarity of the law as well as its use is handed over from one kgosi [chief] to another including to members of the specific community.²⁸⁵ Customary courts largely echo the traditions as well as the attitudes of the concerned community and often they make quicker judgments for the reason that the cases get heard by a local chief or presiding officer.²⁸⁶

The use of the best interests of the child principle in customary law in Botswana is insignificant since under customary law, the rights of a child are not treated separate from those of the family group.²⁸⁷ This is revealed where the head of the family assesses what is in the best interests of the child in accordance with family ideals as well as the cultural and religious context.²⁸⁸

The *Masusu* case which was discussed above [under maintenance] however seems to demonstrate a major shift from the hard customary law stance that where the parties were married under customary law and then separated, the father is granted custody of the children and the mother has visitation rights only. That where the husband has paid lobolo, he and his family group has full custody over the children. In the *Masusu* case, despite that the couple was married under customary law, upon divorce the customary court granted the mother full custody of the children. Having regard to the circumstances that prevailed under *Masusu*, it was in the best interests of the children that their mother was granted custody as their father had admitted that he failed to maintain them.

Custody, maintenance and guardianship of a child are founded on the blood affiliation between the child and their parents.²⁸⁹ It cannot be held that the father of a child born outside marriage is not the parent to the child.²⁹⁰ Although it may be acknowledged that a child's parent does not necessarily have to be its blood relations, there remains a stronger tie amid blood relations than people not connected by blood.²⁹¹ There is consequently an affiliation established by blood between an extra marital child and its biological father.²⁹² The biological father of the child is as a result the parent of such child.²⁹³

²⁸⁴ Ibid

²⁸⁵ Op cit note 19 at 5

²⁸⁶ Ibid

²⁸⁷ Op cit note 268 at 1

²⁸⁸ Ibid

²⁸⁹ Douglas Mailula, 'Taking Children's Rights Seriously: Access to, and Custody and Guardianship of a Child Born out of Wedlock' *Codicillus*, Vol. 46, No 1 (2005) 25 Available at <https://journals.co.za/EJC27464> accessed on 14 June 2024

²⁹⁰ Ibid

²⁹¹ Ibid

²⁹² Ibid

²⁹³ Ibid

Failure by customary law to recognize the relationship between an illegitimate child and its biological father thus violates the best interests of the child in that it denies the child the right to its identity and family. In addition, when issues of custody relating to the child are decided, the child's views are not taken into account. The child's view is however one the factors that should be taken into account when child custody is decided.²⁹⁴

A child born outside marriage ought to be granted an in-built right to access as well as custody of their biological father with the right only being curtailed in the event it is conflicting with the child's best interests.²⁹⁵ Denying a child born outside marriage an intrinsic right of custody to the biological father is thus a violation of the child's constitutional right to parental care and is not in the child's best interests.²⁹⁶

The entrenchment of the best interest of the child as paramount stands to be the most advanced moves for the recognition of, as well as respect for children's rights and the principle has a profound influence on the association between a child born out of wedlock and its biological father.²⁹⁷ It is in the child's best interests that it be given intrinsic right to access, custody as well as guardianship of both parents.²⁹⁸

Determining the best interests of a child may not be an easy exercise to undertake and the issue is worsened by the fact of it not being given an in-depth treatment under foreign or global jurisprudence.²⁹⁹ The imprecision surrounding the principle led one commentator to declare that due to its indeterminacy, working through it is akin to exercising 'Solomonic judgment'.³⁰⁰

As earlier indicated, under the traditional African customary law in Botswana, the best interests of the child principle was afforded no use.³⁰¹ What mattered most was always what parents desired and saw as the proper decision regarding a child.³⁰² This meant that a child's views were never considered in custody issues regardless of the child's age or level of maturity. In addition, the welfare principle was generally applied when deciding issues pertaining to child custody.³⁰³

It remains a grave deficiency that the best interests of the child principle is not considered on custody differences under customary law. In addition, the fact that the views and opinion of the child is never considered is not in the child's best interest as it denies the child the right to participate in the making

²⁹⁴ General Comment 14

²⁹⁵ Op cit note 289 at 25

²⁹⁶ Ibid

²⁹⁷ Ibid

²⁹⁸ Ibid

²⁹⁹ Op cit note 268 at 13

³⁰⁰ Op cit note 9, Ibid

³⁰¹ Op cit note 164 at 20

³⁰² Ibid

³⁰³ Ibid

of decisions that affect the child.³⁰⁴ Such failure to take into account the best interests of the child and its wishes is in violation of Article 12 of the UNCRC which guarantees to every child the right to express his or her views freely in all matters affecting the child for the said views to be given due weight.³⁰⁵ The provisions of Article 12 underscore the importance of consideration of a child's views when determining its best interests.³⁰⁶ The Convention provides that:

- State parties ought to guarantee to a child capable of making his or her personal views a right to state such views liberally in every matter which affects the child, with the child's views given due weight according to the age as well as maturity of such child.³⁰⁷
- For such purpose, a child ought, specifically, to be accorded the chance to be heard during judicial or administrative proceedings which affect the child directly, or by way of a representative, or a suitable body, in a way consistent with rules of procedure or national law.³⁰⁸

In similar tone, the African Charter on the Rights and Welfare of the Child provides for the views of a child to be considered in every matter affecting such child. The Charter states that all children who are capable of stating their views will be guaranteed the right to state such opinions liberally in every matter as well as disseminate their opinions subject to restrictions prescribed by law.³⁰⁹

In view of the above international and regional instruments, failure to hear a child's views and opinions during custody hearings under the Tswana customary law violates these instruments.³¹⁰ The deliberation on the child's view in every matter affecting them is important as it allows the court to acquaint with the child's desires, difficulties and ambitions, the sort of connection they have with either parent, including the child's personality.³¹¹

The Committee on the Rights of the Child has also emphasized this point that in assessing what is in the best interests of the child, the views of the child concerned ought to be taken into account.³¹² The child should be able to say who they prefer to be given custody between the mother and father if they are of the age and level of maturity to be able to express such view. Failure to allow them under such circumstances will not be in their best interest. In addition, denial of the right to custody to a father who is not married to the mother denies the child the right to preserve his or her identity, guaranteed under Article 8 of the Convention which enjoins state parties to respect every

³⁰⁴ Op cit note 268 at 13

³⁰⁵ Article 12(1) and (2) of the UNCRC

³⁰⁶ Op cit note 268

³⁰⁷ Article 12(1) of the UNCRC

³⁰⁸ Article 12(2) of the UNCRC

³⁰⁹ Article 7 of the ACRWC

³¹⁰ Op cit note 268 at 13

³¹¹ Ibid

³¹² Op cit note 118

child's right to preserve their identity which includes nationality, family relations and name as recognized by law.³¹³ By denying the child custody means such child cannot have family relations with their biological father or identify with the father's nationality or the father's name which is not in the child's best interest. This also extends to the preservation of the family environment and maintaining of relations as required under General comment 14. A child cannot maintain relations with the father when such father is denied custody and the denial further violates Article 9 of the Convention which is against separation of a child from parents against their will unless it is in their best interests.³¹⁴ Where the law separates a child from the parents outright it means the child's best interests were never a consideration from the onset. Still under the right to maintain relations, outright denial of custody affects the responsibilities that the father has towards the child as the child could be staying with the father and getting the necessary care needed daily. It can thus not be in the child's best interests and violates Article 18.³¹⁵ A father who is denied custody can never have common responsibility as a mother staying with the child. The denial of custody further arbitrarily interferes with the child's right to family contrary to Article 16³¹⁶ of the UNCRC. The interference is arbitrary as it is indiscriminate and is made without any considerations.

(c) Child Custody under the Roman Dutch Law

Asides from customary law, in Botswana, authority of parents or a parent-child association remained regulated under Roman Dutch common law.³¹⁷ Children born outside wedlock had, under the common law, a legitimate affiliation with the mother only.³¹⁸ Botswana case law acknowledged the hereunder broad principles previous to enactment of the Children's Act of 2009:

- Custody of a child of tender age ought to be granted to the mother.
- A son's custody should be granted to the father whilst custody of a daughter is given to its mother.
- A child's custody should not be granted to a parent who is immoral.
- The desires of the concerned child may, not ought to be considered.
- The child's prevailing association as well as its environment must not be disturbed lightly.
- The material gain of either parent over the other parent would not largely be a concern.³¹⁹

³¹³ Article 8(1) of the UNCRC

³¹⁴ Article 9

³¹⁵ Article 18(1) of the UNCRC

³¹⁶ Article 16(1) of the UNCRC

³¹⁷ Julia Sloth-Nielsen, 'A New Children's Law in Botswana: Reshaping Family Relations for the Twenty-First Century' (2012) *The International Survey of Family Law* 29

³¹⁸ Ibid

³¹⁹ Ibid

In *Mazile V Mazile*³²⁰ the applicant and the respondent had been married and bore two children of ages two years and eleven months and almost over one year. There was a matrimonial issue amongst the parents, and though not divorced, the applicant being the wife applied for a provisional order for custody of the two minor children. The court had to determine which of the two parents to grant custody of the children. It was held that in assessing the grant of custody to one of the children's parents, the main consideration by the court was the children's welfare. In deciding which parent the court should award custody, the court considered the ensuing factors:

- Suitability of such parent;
- That it was desirable to keep the siblings together;
- The readiness of a parent to be responsible for daily care;
- The need to ensure stability as well as safety in the children's lives
- The readiness of a parent to provide the children with emotive, mental, social as well as environmental growth; and,
- The appropriateness of the children's prevailing surroundings, regard being had to maintaining the status quo.³²¹

It requires noting that though the *Mazile* case was decided before the Children's Act of 2009, the court stated that the determining factor in deciding will be the best interests of the child. On suitability, the court noted that it could not be said any of the parents loved the children any less than the other.³²² Both desired what was best for the children. The respondent had, at first pursued custody for both children and had re-considered the position and required custody of only the elder boy.³²³ It was held that it will not be in the children's best interests to share them, that separation will have emotional impact on them at a period when their lives were unsettled by the collapse of the parents' matrimony.³²⁴ From the evidence, the applicant had been the most hands-on parent.³²⁵ The kind of the respondent's employ was such that he was not hands on domestically.³²⁶ In addition, he shuttled between two main homes and even travelled further on business.³²⁷ This made him less accessible to give intimate daily care for young children.³²⁸ It was abundantly clear that if the respondent was given custody, he would have to get the help of other people to provide daily care. The applicant was as a result granted custody.³²⁹

³²⁰ 2001 BLR 175 (HC)

³²¹ Ibid

³²² Op cit note 320 at 177

³²³ Ibid at 176

³²⁴ Ibid at 177

³²⁵ Ibid at 177

³²⁶ Ibid at 177

³²⁷ Ibid at 177

³²⁸ Ibid

³²⁹ Ibid

In another case *Ntshhekisang V Ntshhekisang*,³³⁰ decided after the coming into effect of the Children's Act of 2009, the parties' marriage was dissolved through a divorce decree in August 2011. There was two children born from the marriage and during the proceedings, the plaintiff claimed custody to go to Australia with the children for 18 months in pursuit of her studies.³³¹ The children were aged seven and three years respectively. The defendant challenged the custody. The court applied the best interests of the child principle and allowed the children to go to with the mother to Australia.³³²

A majority of children in Botswana are born outside wedlock.³³³ The situation of fathers to children born outside wedlock is a matter which has disturbed lawmakers.³³⁴ The background is the position of the Roman Dutch common law that an unmarried father enjoys no intrinsic parental right to a child born outside wedlock.³³⁵

In Botswana, historically children born outside wedlock bore no legal relationship to their fathers and they neither took his name nor inherited from him.³³⁶

The Roman Dutch law position in relation to children born out of wedlock can be likened to the customary law position discussed above. Under both laws the children are held not to have a legal relationship with their fathers.

The Botswana Children's Act seems to attain equality in the roles of wedded as well as unmarried parents.³³⁷ Section 28 of the Children's Act which deals with parental rights provides:

Subject to the best interests of the child, and to section 78, every parent shall have the right, in relation to that child, to- (a) have the child live with him or her;³³⁸ (b) control and guide the child's upbringing;³³⁹ (c) maintain personal relations with, and have access to, the child if the child does not live with him or her;....³⁴⁰

The provisions relate similarly to married parents who live together with the child, as well as to unmarried parents, who might well stay with the child but frequently do not.³⁴¹ The granting of residence rights to an absent father seems to set up potential for conflict, based on assertions of rights over the

³³⁰ 2011 (2) BLR 894 (HC)

³³¹ Ibid at 894

³³² Ibid at 895

³³³ Op cit note 317 at 36

³³⁴ Ibid

³³⁵ Ibid

³³⁶ Ibid

³³⁷ Ibid

³³⁸ Section 28 (1)(a) of the Children's Act of 2009

³³⁹ Section 28(1)(b) of the Children's Act of 2009

³⁴⁰ Section 28(1)(c) of the Children's Act of 2009

³⁴¹ Op cit note 317 at 37

child's residence.³⁴² As earlier indicated, parents now look up to the courts for help in determining child custody arrangements.

Custody laws do not provide a measures for determining the best interests of the child.³⁴³ Judges are left with an imprecise as well as indeterminate standard with little direction on how they have to proceed.³⁴⁴ The best interests of the child principle thus remained vague, indeterminate and unspecified.³⁴⁵ Boggled down by the inertia, courts reached out towards social scientists as well as mental health specialists to assist in determining issues surrounding the best interests of the child criteria.³⁴⁶ This advancement in custody resolves were hallmarked by involvement of professional witnesses like social workers, psychologists, and psychiatrists in courts for determinations of the best interests of the child.³⁴⁷ The courts noted these professionals' reports in custody decision-making processes.³⁴⁸

General comment 14³⁴⁹ however provides guidelines or factors that ought to be taken into account when the best interests of the child are to be considered. The list of such factors is not exhaustive. From observation it seems the courts in Botswana apply the principle of the best interests of the child when deciding custody matters. It is however not clear whether the children concerned are allowed to air their views in relation to proposed custody applications which affect them. The authorities referred to above are not clear on that.

There is an observation that children are not at ease to express themselves adequately and liberally in courts due to cultural as well as language variations amongst children and court staff and this has negative effects on the realization of the best interests of the child.³⁵⁰ There is consequently a necessity to establish courts which are child friendly where court judges will be able to listen to, comprehend and give weight to what children are saying in court. In multi-cultural societies like in Botswana, children get expected to engage with staff from court whilst their cultural connections and/or language awareness differ from their own.³⁵¹ This signifies a language as well as cultural block which hinders children from speaking out in court, thus trampling on their right to express their best interests and desires.³⁵² Language and cultural variances not only affect the way children feel as well as react in courts, it might also make it difficult for judges to reach correct decisions at the end of the hearing.³⁵³

³⁴² Ibid

³⁴³ Op cit note 269 at 2402

³⁴⁴ Ibid

³⁴⁵ Ibid

³⁴⁶ Ibid

³⁴⁷ Ibid

³⁴⁸ Ibid

³⁴⁹ Op cit note 118

³⁵⁰ Op cit note 269 at 2406

³⁵¹ Ibid

³⁵² Ibid

³⁵³ Ibid

VI. CHILD ADOPTION IN BOTSWANA

(a) Introduction

As indicated, child adoption in Botswana is another area where the application of the best interests of the child principle is lacking.

Child adoption includes a biological mother/parents, the child to be adopted as well as the adoptive parents, and involves a permanent transference of parental rights and responsibilities from a biological parent to an adoptive parent/s.³⁵⁴ When the adoption process is complete, the child is, for all intents and purposes, a legal as well as social child of its adoptive parents and gets entitled to every right and benefit due to a biological child which includes the right to inherit.³⁵⁵ A legal or formal adoption of a child can hence be defined as an agreement which involves an intentional and permanent abdication of a person's parental rights as well as duties relating to a biological child to some other person who then becomes the child's parent legally and socially.³⁵⁶ It is equally a legal deed which brings a child who is born to some other parent to another family to take the place of a biological child inside the adoptive family.³⁵⁷ Through an adoption, people who previously did not have a biological connection create an affiliation similar to a biological connection for the well-being of the agreeing parties, hence it is presumed to be a legal right equal to biological parenthood.³⁵⁸

(b) Adoption under the Adoption of Children Act

In Botswana, the consequence of an adoption in terms of the Adoption of Children Act³⁵⁹ lies in the fact that it gives the surname of the parent who adopts to an adopted child.³⁶⁰ The adopted child is for all intents and purposes deemed, according to law, to be a lawful child of its adoptive parent.³⁶¹ An adoption order ends all the rights as well as legal duties prevailing between the adopted child and the natural parents including their relations, save for the child's right of inheritance from them intestate.³⁶²

The UNCRC contains a set of rights which protects a child to stay with his or her family.³⁶³ Article 7 guarantees a child 'as far as possible, the right to know

³⁵⁴ John Kachikwulu Ekwunife, *Childless Marriages and Child Adoption Among the Igbo* (2020) 197

³⁵⁵ *Ibid*

³⁵⁶ *Ibid*

³⁵⁷ *Ibid*

³⁵⁸ *Ibid*

³⁵⁹ (Chapter28:01) Laws of Botswana

³⁶⁰ Section 6(1) of the Adoption of Children Act

³⁶¹ Section 6(2) of the Adoption of Children Act

³⁶² Section 6(3) of the Adoption of Children Act

³⁶³ Frances Nicholson, 'The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied' (2018) 2nd ed United Nations High Commissioner for Refugees 5 Available at <http://www.refworld.org> accessed on 15 June 2024

and be cared for by his or her parents'.³⁶⁴ Under Articles 8 and 9, State parties agree to respect a child's right to 'family relations as recognized by law without unlawful interference'³⁶⁵ including to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities, subject to judicial review, determine this is in the best interests of the child.'³⁶⁶ Article 18 also acknowledges that 'parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child' and that 'the best interests of the child will be their basic concern.'³⁶⁷

The best interests of the child principle is an all-encompassing human rights standard which ought to be respected in every matter, including matters concerning the right of the child to a family life.³⁶⁸

In the African region, Article 18 of the African Charter on Human and Peoples' Rights [ACHPR] similarly confirms that a family is 'the natural unit and basis of society.'³⁶⁹ Article 18 of the African Charter on the Rights and Welfare of the Child likewise acknowledges a family as a 'natural unit and basis of society' and calls on state parties to safeguard and aid its creation.³⁷⁰

At local level, section 13(4) of the Children's Act prohibits the separation of a child from its parents, relatives or guardians except if it is in the best interests of the child to do so. The significance of children growing up in a family environment which is stable and in which they can be able to form permanent emotional connections with members of the family can barely be over-emphasized.³⁷¹ It stands to be a fact though that not all children have the chance to develop in a family, viewed as the ideal method of child upkeep.³⁷² Adoption consequently affords such child with a chance to grow in a family setup.³⁷³

Article 21 of the UNCRC enjoins state parties to recognize as well as permit the system of adoption and guarantees that the best interests of the child are the utmost consideration.³⁷⁴ State parties are further enjoined to guarantee that adoption of children is sanctioned by only competent authorities to assess if the adoption is permissible according to relevant laws and processes. In addition, and basing on all germane and credible evidence, state parties ought to ensure that such adoption is acceptable having regard to the child's

³⁶⁴ Article 7(1) of the UNCRC

³⁶⁵ Article 8(1) of the UNCRC

³⁶⁶ Article 9(1) of the UNCRC

³⁶⁷ Article 18(1) of the UNCRC

³⁶⁸ Op cit note 363 at 5

³⁶⁹ Article 18 of the African Charter on Human and Peoples' Rights

³⁷⁰ Article 18(1) of the ACRWC

³⁷¹ Sandra Ferreira, 'Adoption in Botswana: does it serve the best interests of the child?', (2012) Vol. 45 No.3 *The Comparative and International Law Journal of Southern Africa* 412

³⁷² Ibid

³⁷³ Ibid

³⁷⁴ Article 21 of the UNCRC

parental status, relations and legal carers. Where it is required, relevant persons must grant their knowledgeable consent to such adoption on the basis of necessary counselling.³⁷⁵ Also, state parties ought to know that inter-country adoption may be viewed as other means of caring for a child if such child could not be placed with a foster or adoptive family and could not be cared for in some proper way in its original country.³⁷⁶ State parties ought to guarantee that the concerned child in inter-country adoption enjoys protections as well as standards comparable to those prevailing in domestic adoptions.³⁷⁷ They must take every suitable measure to confirm that the consequences of the inter-country adoption is not improper monetary benefit for those concerned with it.³⁷⁸ State parties ought to also encourage, where proper, the objects of the article by entering into mutual or multidimensional agreements, and make effort, within the structure, to confirm that the placing of the child in a different country is approved by competent establishments.³⁷⁹

The enhanced protection, granted specially in an adoption, indicates the weighty impact an adoption places on the child's life.³⁸⁰

Even though the Children's Act gives the main duty to care for children as well as the responsibility to maintain them to their biological parents,³⁸¹ where a child is adopted, the said responsibility passes on to the adoptive parent.

The requirement in the Adoption of Children Act on participation by the child to be adopted is however limiting which is not in the best interests of the child.³⁸² Children who are less than ten years are not allowed to participate in the adoption proceedings, regardless of their level of maturity or understanding.³⁸³

On the other hand, mandatory participation of children who are ten years and over is also disturbing as these children are legally required to consent for them to be adopted.³⁸⁴ This is so despite that there may be children who are above ten years who might be unable to give consent like the severely physically disabled or mentally incapacitated.³⁸⁵ Such a provision in the law excludes these children from the opportunity to be adopted and being part of a family without justification and merely because they are unable to consent.³⁸⁶ The mandatory requirement for consent by children who are ten

³⁷⁵ Article 21(a) of the UNCRC

³⁷⁶ Article 21(b) of the UNCRC

³⁷⁷ Article 21(c) of the UNCRC

³⁷⁸ Article 21(d) of the UNCRC

³⁷⁹ Article 21(e) of the UNCRC

³⁸⁰ Op cit note 371 at 416

³⁸¹ Section 27(1) of the Children's Act

³⁸² Op cit note 371 at 421

³⁸³ Ibid

³⁸⁴ Ibid

³⁸⁵ Ibid

³⁸⁶ Ibid

years and older may therefore at times not be in the best interests of the child who needs to be adopted.

The Adoption of Children Act further requires that the children's consent be written.³⁸⁷ The requirement for consent to be in writing overlooks the fact that a child who has to consent to the adoption might be illiterate.³⁸⁸

The requirement for consent contained in section 4(2) (e) of the Adoption of Children Act can essentially work against the best interests of the child if a child who is required to consent is unable to do so due to a disability. On the other hand a child younger than ten years old whose level of maturity allows them to express their view on a proposed adoption will be prevented by the Act from expressing such view, contrary to the best interest principle. The Adoption of Children Act therefore has some shortcomings when the best interests of the child principle is being considered.

The failure of an adoption application on the basis of non-compliance with the statutory provisions will result in the child being denied the right to a family which would not be in the child's best interests. Denial of the adoption may also violate the child's other rights like the right to be cared for by the adoptive parent or family as well as the right to a proper home and family setting.

(c) Adoption under Tswana Customary Law

Traditionally, adoption of a child by individuals not connected to the child through relation is uncommon in Botswana culture and is thus regarded with disapproval.³⁸⁹ It can thus be said that fostering is more accepted when compared to adoption.³⁹⁰

The more common type of adoption stands to be where a husband adopts the wife's non marital child.³⁹¹ Such adoptions are however generally not formalized when carried out under customary law. The combined second and third reports³⁹² by Botswana to the Committee on the Rights of the Child has recommended that Botswana should comply with the committee's recommendations to expedite a review of its Adoption of Children's Act to enable, amongst others, safeguarding of children who have been adopted informally, as well as encourage local adoptions.³⁹³ Botswana has been reviewing the Adoption of Children's Act in pursuance of the recommendations to register adoptions under customary law in order to

³⁸⁷ Section 4(2)(e) of the Adoption of Children Act

³⁸⁸ Op cit note 371

³⁸⁹ Combined 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th Report Submitted by the Republic of Botswana to the African Committee of Experts on the Rights and Welfare of the Child on the Implementation of the African Charter on the Rights and Welfare of the Child, (2021) 35 Available at <https://www.acerwc.africa/botswana> accessed on 27 June 2024

³⁹⁰ Op cit note 50 at 20

³⁹¹ Ibid

³⁹² Ibid

³⁹³ Ibid

safeguard children in circumstances where an adoptive parent dies or the child's parents divorce.³⁹⁴

Currently, it is not unusual upon divorce, for a man to refute that he adopted a divorced wife's non marital child where the adoption has not been registered and such situation has negative consequences on the concerned child, especially on its upkeep after the divorce.³⁹⁵ The effect of unregistered adoptions is also noted in Botswana's report to the African Committee of Experts on the Rights and Welfare of the Child.³⁹⁶

The reality of it is that the concerned child's mother may have lost connection to the biological father who, upon the mother's marriage and by conduct, would have recognized the adoption of the child by its mother's husband.³⁹⁷

Unregistered adoptions are thus not in the best interests of children in instances where the adoption has to be proved after the divorce of the child's parents or after an alleged adoptive parent's death when it comes to issues of inheritance.

In addition, under customary law adoptions, the different laws and customs of each individual tribe to be applied in the adoption process makes any effort to protect the child from harmful cultural practices ineffective.³⁹⁸ Customary law is constantly evolving.³⁹⁹ The fact that it is unwritten often makes finding it not always easy due to its non-static nature.⁴⁰⁰ It is thus not always easy to state with any measure of certainty what an applicable rule of custom is at any given time,⁴⁰¹ including in adoptions. The responsibility of establishing the usages, rules or practice of customary law for a particular tribe at any given time is usually left for the court dealing with a customary issue.⁴⁰²

The High Court as an appellate court on customary matters as well as the 'upper guardian of all minors' has the responsibility to apply customary law in all customary adoption cases which come before it on review. It [High Court] accordingly has to determine the appropriate customary law by referring to decided cases, textbooks and other sources as well as receive opinions from experts, in most cases tribesmen or chiefs.⁴⁰³

³⁹⁴ Ibid

³⁹⁵ Ibid

³⁹⁶ Op cit note 389

³⁹⁷ Op cit note 50 at 20

³⁹⁸ Sitheni Felicity Sigweni *Adoption Laws and Procedures of Botswana: Questioning their Effectiveness and Compliance with Regional and International Human Rights* (unpublished LLM thesis, University of Cape Town, 2008) 21

³⁹⁹ Op cit note 15 at 27

⁴⁰⁰ Op cit note 398

⁴⁰¹ Ibid

⁴⁰² Ibid

⁴⁰³ Section 11 of the Customary Law Act (Chapter 16:01) Laws of Botswana

The use of text books as a source of customary law instead of them being a guide makes the source more rule oriented and presents the Tswana customary law outside its societal context.⁴⁰⁴ The argument is conceivable for the reason that a customary law which was applicable to an adoption case some years back might not be applicable today due to the non-static nature of customary law.⁴⁰⁵

Consideration is being given to registering of adoptions under customary law in order to safeguard children in circumstances where an adoptive parent dies or the child's parents divorce.⁴⁰⁶ Currently, it is not unusual upon divorce, for a man to refute that he adopted a divorced wife's non marital child where the adoption has not been registered.⁴⁰⁷ Such a situation has negative consequences on the concerned child, especially on its upkeep after the divorce. The reality of it is that the concerned child's mother may have lost connection to the biological father who, upon the mother's marriage and by conduct, would have recognized the adoption of the child by its mother's husband.⁴⁰⁸ Unregistered adoptions are thus not in the best interests of children in instances where the adoption has to be proved after the divorce of the child's parents or after an alleged adoptive parent's death when it comes to issues of maintenance or of inheritance.

(d) Adoption under the Roman Dutch Law

In the case of *Mokoti V Okatswa*⁴⁰⁹ the applicant and the respondent were involved in a romantic relationship which bore them two children. The applicant resided with some other woman and at first merely visited the respondent at the respondent's home and would return back to his live-in companion. He increasingly spent more time at the respondent's place and spent less time at his residence. He ultimately separated with his erstwhile partner and went to live with the respondent and the two lived as husband and wife.⁴¹⁰

Later on the applicant secured a plot and built a house for himself and the respondent and they relocated to the new house where they continued living as husband and wife. The applicant at some stage stated that he had intention to get married to the respondent but never fulfilled the intention. He nevertheless introduced the respondent as a potential daughter in law to his parents as well as relations who welcomed her.⁴¹¹

Unknown to the applicant, the respondent gradually lost interest in the love relationship and searched for a chance to leave the applicant. The opportunity

⁴⁰⁴ Op cit note 15 at 27-28

⁴⁰⁵ Op cit note 398

⁴⁰⁶ Op cit note 50 at 20

⁴⁰⁷ Ibid

⁴⁰⁸ Ibid

⁴⁰⁹ 2011 (2) BLR 1021

⁴¹⁰ Ibid at 1023

⁴¹¹ Ibid at 1023

came when she was transferred from Moshupa, a place where she was employed as an educator to another place called Magoriapitse. On her departure, she never returned to the applicant's home and she left with the two minor children.⁴¹²

She later met another man and fell in love with him and they subsequently got married. Her husband considered the respondent's children to be his own and proposed to legally adopt them.⁴¹³

The applicant contested the adoption of his children by the mother's spouse and sought to continually interact with them. The respondent on the other hand wanted the children to totally cut connection with the applicant so that they could be adopted by her spouse. She further wanted to deny the applicant access to the children or any relationship with them stating that the children will be confused as to who the father figure was in their lives. She further stated that the children had found a new father and did not require the biological father⁴¹⁴

Highlighting the Roman Dutch law position in Botswana enunciated in *Ndlovu V Macheme*,⁴¹⁵ the court stated that the traditional Roman Dutch position of the law on the rights of a father to a child born outside of marriage is that such father bore no relationship with the child though he was responsible for maintenance. It was held that the mother stood to be the sole carer of the child.⁴¹⁶

The court in *Mokoti* nonetheless mentioned the development of international human rights instruments, in this case the UNCRC and advancements in domestic law including case law on children's rights and the best interests of the child principle, made domestic by section 5 of the Children's Act. The court went on to state that the paternal dominance of a father in situations where children are born inside marriage and the maternal dominance of a mother in a situation where children are born outside wedlock are, following the legal developments, subject to the best interests of the child.⁴¹⁷ The court stated that the contemporary legal standard is found in the UNCRC which views children as autonomous beings who have human rights. Further that children have ceased to be appendages of the parents as they are human beings with rights separate from their parents' rights. Consequently that the Roman Dutch law notions have now taken a back seat to give way to the now leading overarching norm of the best interest of the child.⁴¹⁸

Having said that, the court went onto state that the main consideration in the case is, 'which parent serves the best interests of the children?' What captures

⁴¹² Ibid at 1024

⁴¹³ Ibid 1024

⁴¹⁴ Ibid at 1024

⁴¹⁵ 2008 (3) BLR 230

⁴¹⁶ Op cit note 409 at 1026

⁴¹⁷ Ibid at 1027

⁴¹⁸ Ibid at 1027

attention about the *Mokoti Case* is the judge's indication that he had the pleasure of interviewing the two children concerned in the dispute and they were both clear as to their biological father. In addition the children recognized the change in their mother's marital status and the entry into their lives of their mother's spouse. They nevertheless expressed the view that they would want to reside with their mother together with her husband and be allowed to visit their father when chance permits.⁴¹⁹ The fact that the court was able to take into account the views of the children whose rights stood to be affected was a great step in the realization of the best interests of the child principle.

The court found that to all of a sudden sever connection between the applicant and his children with whom they had a deep emotional connection and with whom they wanted to interrelate would not be in the best interests of the children.⁴²⁰ The court thus preserved the children's family relations with their biological father which was in the best interests of the children.

In another case of *Khwarae V Keaikitse and Others*⁴²¹ the applicant, who was a biological father to a female minor challenged the constitutionality of section 4(2)(d)(i) of the Adoption of Children Act. The said section did not require his consent for his child to be adopted as the child was born outside wedlock. The section provides for a court to which an application for an adoption order is made not to grant the order unless consent to the adoption is granted by both parents to the child or, by the child's mother if the child be illegitimate.⁴²²

The applicant had been involved in the life of his daughter, providing care as well as maintenance when the first respondent was pregnant and he had also followed his child's birth. He maintained the child by giving financial support including following up on the well-being of the child and seeing the child whenever the first respondent allowed him.⁴²³

When the first and the third respondent's relationship went through challenges, the first respondent asked for the child to reside with the applicant. Both agreed that the child will reside with the applicant who would then take the child to school. The applicant was afraid that the third respondent was pursuing adoption of the child without his consent. The applicant argued, amongst others, that excluding a requirement of a biological father's consent to the adoption of his child discriminated against him on the reason of his sex as well as marital status, violating section 15 of the Constitution.⁴²⁴

He further argued that the different treatment given to unmarried fathers in section 4(2)(d)(i) of the Adoption of Children Act is unreasonable and discriminating as it allowed for the one-sided termination of the biological

⁴¹⁹ Ibid at 1028

⁴²⁰ Ibid at 1028

⁴²¹ 2014 (3) BLR 523

⁴²² Section 4(2)(d)(i) of the Adoption of Children Act

⁴²³ Op cit note 421 at 524

⁴²⁴ Ibid

father's rights and responsibilities. Further that the provision engrains a view which contravened the best interests of the child principle that fathers should have a curtailed connection with their children, especially when they are not married.⁴²⁵

The court stated that the Children's Act has recognized that an unmarried father could no longer be disqualified from the lawful meaning of 'parent' and had to participate in legal processes pertaining to his child's future.⁴²⁶ The court went on to state that the applicant was treated unfavorably by the Adoption of Children Act when compared to a woman due to a prejudicial and stereotypical cultural view that a child born outside marriage belongs to the mother, effectively excluding the father from parenting duties. That the said view regarded a father less fitting to carry out a parent's role merely because he is an unmarried father.⁴²⁷

The court further stated that the authority of the best interests of the child principle has been recognized in legislation as well as judicial decisions relating to children which includes children born outside marriage.⁴²⁸ That the Children's Act specifies guiding principles to be applied when determining the best interests of the child. Further that the said guides include considering the ability of the parents to maintain and protect the concerned child, the significance of stability as well as the likely result on the child of changes or disruptions in the child's situations. In addition the court stated that decisions or actions resulting in discrimination of a child's status which includes family will not be taken, and further that a child's parents have the main duty of preserving as well as promoting the child's well-being.⁴²⁹

The court decided that section 4(2)(d)(i) of the Adoption of Children Act is unconstitutional in that it did not necessitate the father's consent in the adoption of his child born outside wedlock and that an adoption of the applicant's child could only be done with the applicant's consent.⁴³⁰

Although the *Khwarae* case was decided on the basis of violation of the applicant's constitutional right, the court was alive to the best interests of the child principle. The decision was in the best interests of the child in that though the applicant was an unmarried father, the court was able to preserve the child's relations with its biological father. Although an adoption can operate in the best interests of a child by giving a child who has no family the right to a family, it can have a downside if its effect is to sever the child from an already existing family member, especially if that family has been a caring one. The negative effect would be greater if the child is severed from a

⁴²⁵ Ibid

⁴²⁶ Ibid at 525

⁴²⁷ Ibid at 526

⁴²⁸ Ibid at 548

⁴²⁹ Ibid at 548

⁴³⁰ Ibid at 558

biological parent who has throughout shown love, care and support for the child as such adoption would not promote the child's well-being.

CONCLUSION

In conclusion, the application of the best interests of the child principle is still lacking when it comes issues of child maintenance, custody and adoption of children in Botswana. When it comes to maintenance under the Affiliation proceedings Act, it has become evident that although the courts do make orders for children to be maintained by parents, there are instances where the court orders are not complied with, resulting in children's rights to be cared for and maintained by parents being violated. The Affiliation Proceedings Act further still uses the financial means test when assessments are made relating to child maintenance instead of applying the best interests of the child test. This results in courts referring parents without financial means to customary courts for maintenance, which is not in the best interests of the child as customary courts have also been found wanting. The minimum amount that can be paid under the Act is also a paltry sum of P100.00 to cover a child's upkeep and educational expenses in the event the child is attending school.

Under customary law, fathers to children whose mothers they have not married have been found to make once off payments on child maintenance and thereafter, abandon the children to the mother's family which also violates the best interest principle. The encouragement of severance of ties from the biological father by customary law violates the best interests of the child principle as well as the child's right to family relations between a child and its biological father and denies the concerned child of the right to be maintained. Customary law has been found wanting as it tends to focus on the interests of parents as opposed to those of children. In addition it discriminates between children born in wedlock and those born outside wedlock, which is not in the children's best interests.

Roman Dutch law like customary law fails to acknowledge an affiliation between an unmarried father and his biological child, resulting in the father's failure to properly maintain the child. This is not in the best interests of the child as the concerned child is also deprived of proper care from the father.

When it comes to custody determinations, the issue of wedlock or otherwise of a father continues to dominate when making such decisions under customary law and Roman Dutch law as opposed to the best interests of the child principle. In addition, children's views are never regarded, regardless of the child's age or level of maturity as the parents views are the ones which take center stage. This is not in the best interests of a child who has the ability to form their own views regarding his or her custody. In addition, the fact that the custody of an illegitimate child remains with the mother without question, tends to sever ties between the child and its biological father, which is not in the child's best interests. This is so especially in relation to a child who would have preferred custody of their father as opposed to that of the mother.

Finally on the issue of child adoption, children who are less than ten years are not permitted by the Adoption of Children Act to participate in the adoption, despite that such children may, by virtue of their level of maturity be able to state their views regarding a proposed adoption. This is not in the best interests of such a child. Conversely, it is mandatory for children ten years and over to consent to the adoption, despite that the concerned child may be unable to consent by reason, maybe of a disability whilst desiring to be adopted. The mandatory requirement for the child's consent under such circumstances would therefore not be in the best interests of the child and ought to be done away with as the result would be a denial of the child's right to a family environment as well as to form family relations. In addition, the requirement that the consent be in writing has the potential to deny illiterate children the right to be adopted, resulting in denial of their right to family. The written consent requirement would under such circumstances not be in the best interests of the child.

On customary law adoptions, the fact of them not being registered is also not in the best interests of the adopted child because upon divorce or death of the adoptive parent, there is possibility of them being disputed, denying the affected child either the right to inherit or maintenance. There is therefore a need for customary adoptions to be registered.

When it comes to Roman Dutch law, the courts have demonstrated a move towards compliance with International as well as regional instruments and local legislation on the application of the best interests of the child principle. The same standard should therefore be seen to be applied in the lower courts.

In conclusion, the application of the best interests of the child principle is still lacking in maintenance and adoption cases in Botswana. When it comes to custody matters, the cases cited have demonstrated a move towards the application of the principle in the higher courts which is a great step towards attainment of what is in the best interests of the child when such decisions are made.

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