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**ADOPTION LAWS AND PROCEDURES OF  
BOTSWANA: QUESTIONING THEIR EFFECTIVENESS  
AND COMPLIANCE WITH REGIONAL AND  
INTERNATIONAL HUMAN RIGHTS STANDARDS**

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*Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.*

*I hereby declare that I have read and understood the regulations governing submission of the Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.*

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## CHAPTER ONE

### 1.1 INTRODUCTION

Botswana has undergone a rapid process of demographic growth and socio-political change, which has resulted in noticeable increase in the overall adoption of children both nationally and internationally. During the pre-independence period, the traditional informal adoptions were the order of the day under various customary practices till 1952 when the Adoption of Children Proclamation<sup>1</sup> was introduced by the British to the territory. The introduction of legislation on adoption did not replace adoptions under customary law; rather they have continuously operated alongside each other to date within a dual legal system. The 1952 Proclamation has been and still is the sole piece of legislation regulating the common law adoption of children in Botswana despite its deficient provisions, particularly on inter-country adoption. It will be revealed in this dissertation that the concept of adoption of children then was different and so were the purposes thereof, when considered from contemporary human rights perceptions of the concept.

Botswana has suffered the worst impact of the HIV/AIDS pandemic (given its minute population) leaving a great number of orphaned children. This has also contributed to the increase in the number of adoptions, mostly the informal ones under customary law by relatives. There were 111 828 orphaned children, representing 15 percent of the child population according to the 2001 population census records, 54 percent of whom are found in rural areas.<sup>2</sup> These children either have one parent still alive but unable to care for them or worst still have both their parents dead and living under the care of relatives or their siblings who might also be minors. All these children have a right to a family life that provides them with love, care, understanding, guidance and counselling, and moral and mental security.<sup>3</sup> The goals most pertinent to the rights of the child are the child's survival, development, participation and the protection from harm.<sup>4</sup> Family life for a child is central to achieving these goals and to ensuring the

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<sup>1</sup> Current Adoption of Children Act, 1952, [Cap 28:01] Laws of Botswana.

<sup>2</sup> Annual Report 2005, UNICEF, Botswana, p9.

<sup>3</sup> LG Balanon, A child's Journey Across International Frontiers: The Asian Experience in Doek J, et al, (eds) *Children on the Move :How to Implement Their Right To Family Life*,(1996), p123.

<sup>4</sup> International Convention on the Rights of the Child, UN Doc. A/44/736 (1989)

survival and development of a child.<sup>5</sup> The family is the foundation and is central to the survival and development of a child. For the children to take their responsibilities in the future, parents bear the responsibility to ensure their proper upbringing, guidance, survival and development. To achieve these goals, every child should live with the parents, for them to control and guide the child, to act as the child's legal representative, to protect the child from harm and to nurture them in a manner conducive to their well-being. This dissertation will show that effective adoption of children, an adoption that is in accordance with the guarantees proclaimed in human rights instruments, can achieve the goals pertinent to the child's right to a family life for those children who cannot be cared for by their own parents and those for whom no alternative means of care are available within the country. Further how Botswana can help children in other countries who need family and parental care.

The issue to be examined in this study is; what is effective adoption and how it can be achieved in Botswana? Achieving effective adoption, that is, one that serves the best interests and welfare of the child and accords the protection intended by the CRC and the African Children's Charter, will mean the existence of effective legislation on adoption rules and procedures, institutions to make the right decisions as to the family needs of the child and carry them out in accordance with the provisions of the law. This prompts one to look into the legislative, administrative and judicial institutions of Botswana on adoption with a view to examining the extent to which they protect the welfare of the child, ensure the protection of the child's right to family life and conform to or comply with international and regional human rights standards.

Where a child is separated from its parents for whatever reason, the state through its system of human rights protection must ensure that the child is provided with another family, to ensure the continuance of his right to family life throughout his childhood. This has to be done in a manner that protects and promotes the rights of the child as proclaimed in the regional and international human rights laws for children and ensure that inter-country adoption is turned to as a last resort.<sup>6</sup>

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<sup>5</sup> Article 6, CRC.

<sup>6</sup> Article 21 CRC and Article 24, African Children's Charter.

## 1.2 BACKGROUND

The CRC,<sup>7</sup> while emphasizing that children should not be separated from parents, recognizes the fact that in certain circumstances the separation is in the best interest of the child.<sup>8</sup> The African Children's Charter<sup>9</sup> also recognizes that for the full and harmonious development of his or her personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding. The CRC<sup>10</sup> and African Children's Charter also gives guidance on national and inter-country adoptions for those countries that recognize adoption.<sup>11</sup>

The recognition of human rights for children worldwide has uncovered the abuses and exploitations of children associated with the informal and often unregulated adoptions, on both national and inter-country levels. Throughout the world children have been separated from or lost their parents as a result of famine, wars, HIV/AIDS pandemic and other diseases.<sup>12</sup> In most cases, it has resulted in children moving from their places of origin alone or with parents to look for a living including crossing the national borders while some would be taken in by relatives or strangers under the guise of adoption and end up being sold or trafficked. In response to the problems of child trafficking and trade resulting from unregulated and/or poorly regulated inter-country adoptions, the Hague Conference adopted the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption, 1993, (The Hague Adoption Convention).<sup>13</sup> The Convention is intended to regulate inter-country adoptions and combat child trafficking problems. The Convention also offers a solution to the plight of orphaned children in countries ravaged by war, diseases and famine. Botswana has not ratified the Hague Adoption Convention.

Botswana was party to a plan of action adopted unanimously by the General Assembly in May 2002, which committed governments to facilitate 'A World fit for

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<sup>7</sup> UN Convention on the Rights of the Child, UN Doc. A/44/736 (1989).

<sup>8</sup> Article 21.

<sup>9</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB./LEG/24.9/49 (1990).

<sup>10</sup> Article 21

<sup>11</sup> Article 24

<sup>12</sup> CMI Moolhuysen-Fase in her opening Speech at the Hague Conference on Private International Law 1993, available in Doek J et al, (eds) *Children on the Move: How To Implement Their Right To family Life*, 1996, p4.

<sup>13</sup> The Hague Convention on the Protection of Children and Cooperation in respect of Inter-country Adoptions, 1993.

children.’ One of the measures agreed by the countries for securing such a world was to put ‘in place, appropriate, effective national legislation, policies and action plans and allocating resources to fulfil and protect the rights of the child and to secure the well-being of children.’<sup>14</sup> Adoption is definitely one way of securing a world fit for children as it ensures that the child is provided with a family will bring him or her up, and ensure his or her development and protection. With such a large number of orphans (111 828 as at 31<sup>st</sup> October 2001 population census (which by now has increased significantly) the state needs to do more than providing aid for the upkeep of these orphans.<sup>15</sup> They are in an extremely vulnerable position. Placement of such children for adoption would be one permanent solution, but this is very difficult; first, there is no adoption agency in Botswana, government or private; secondly, the rules and procedures for the adoption of children are very deficient, vague and not up to date with the social changes taking place within the society; thirdly, most of the adoptions are under customary law which has no written procedures and rules providing for the requirements to be met by the applicants before adopting a child. In other words we can say they are not meant to comply with any written law at all.

Children who are orphaned are at great risk of impoverishment, discrimination, loss of property rights, various forms of abuse, neglect and exploitation of their labour or sexuality. These factors can jeopardize their chances of completing school and may lead to the adoption of practises that increase their vulnerability to HIV infection and other social ills. Comprehensive monitoring of their situation and provision of essential services are crucial to ensure their wellbeing and development. The government is providing financial assistance in the form of food baskets and clothing but nothing close to family love and understanding. Placement of such children for adoption is one significant way of providing them with a family environment, and comprehensive rules and procedures for adoption at all levels, that is, customary law, national legislation and international standards is a good strategy the government could adopt to provide the child’s right to a family and ensure a proper childhood in a world fit for children. Further the incorporation into the national law of the CRC and the African Children’s Charter coupled with the ratification of the Hague Adoption

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<sup>14</sup> United Nations Children’s Fund, *A World Fit For Children*, (New York, UNICEF, (2002) para.31 (a).

<sup>15</sup> As at December 2005, 52 537 orphans were registered with the department of Social Services to receive support from the food basket program. Annual Report 2006, UNICEF, Botswana, p19.

Convention, would make the national law review process easier and ensure the protection of the rights of the child.

### **1.3 SCOPE AND OBJECTIVES OF THE STUDY**

This study is an effort to examine the legislative, judicial and administrative measures in Botswana pertaining to the adoption of children and assess the effectiveness of such measures in protecting the child's right to a family life and promoting child welfare. It is hoped that by unravelling the shortfalls, gaps and weaknesses in the system, legislation, policies and service planning would become more responsive to the child's needs and would thereby cultivate a legal system that is sensitive to child's rights. The significance of the study is to add efforts to raising awareness of the fundamental importance of the protection of the rights of the child in Botswana which protection is a fundamental factor for the child's harmonious and full development.

The study will provide a platform for greater understanding of how the law on adoption in Botswana could effectively protect the child's right to family life and promote child welfare through legislative, conventional and customary law provisions. Further, the study proposes to draw on the principles of the Conventions as regional and international guidelines and foundation stone for a holistic and comprehensive review of the legislation in Botswana dealing with adoption of the children. Focus will be mainly on the Children's Act<sup>16</sup> and the Adoption of Children's Act. It will also identify customary law rules on adoption which are inconsistent with morality, public policy, international human rights principles and humanity for review.

### **1.4 METHODOLOGY**

The study is largely desk bound, which will include a detailed analysis of national and international law on Adoption. The national legislation, jurisprudence and the policies on adoption and international treaties shall be analysed. The Literature review covers and intensely examines the Children's Act and the Adoption Act, together with all international Conventions on the rights of the child and on inter-country adoptions

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<sup>16</sup> Children's Act, 1981, [Cap:28:02], Laws of Botswana.

identifying the inefficiencies and shortfalls in the Adoption Act which need to be improved.

## **1.5 CHAPTER SYNOPSIS**

### **Chapter One: Introduction**

This is an introductory chapter that will highlight the focus of the study.

### **Chapter Two: History of Adoption Laws**

The chapter will give a working definition of adoption and outline the historical development of the adoption laws in Botswana. The chapter will also discuss the purposes of adoption from a traditional Tswana through to a human rights perspective.

### **Chapter Three: Customary Law Adoptions**

This chapter focuses on the adoption laws and procedures under customary law.

### **Chapter Four: Laws and Procedures Under the Adoption Act**

The chapter analysis the provisions of the Adoption Act which are key to national adoption of children and highlight the areas where it is lacking in the protection of the child's right to a family life.

### **Chapter Five: Inter-country Adoption**

The chapter focuses on the provisions of the Act on inter-country adoption and discusses the effectiveness of the Act in providing for inter-country adoption. The chapter will also analyse the CRC, the African Children's Charter and the Hague Adoption Convention and show how they can be used to improve the Provisions of the Act on inter-country adoptions.

### **Chapter Six: Conclusion and Recommendations**

This chapter will provide a general overview of the dissertation and conclude the study with recommendations for the effective review of legislation on the adoption of children and other legislative instruments on child rights.

## CHAPTER TWO

### HISTORY OF ADOPTION LAWS IN BOTSWANA

#### 2.1 INTRODUCTION

This chapter gives meaning to the preceding introductory chapter by defining adoption and explaining its objectives. The chapter will also take us through the historical development of the adoption laws in Botswana and state the objectives of adoption.

#### 2.2 DEFINITION OF ADOPTION

Adoption has been defined as involving a radical divestiture of the responsibilities, rights, duties, powers, interests and obligations of the biological parent brought about by the operation of law in favour of the adoptive parents.<sup>17</sup> Instinctively adoption is seen as a process of amputating a baby from the mother and grafting it into another family, all contact with the natural mother being cut off so that the child is a child of the new family.<sup>18</sup> Therefore adoption is a process by which an adoption order will be made by an authoritative body of the state transferring a child from one family to another, which order vests in the adoptive family all rights, responsibilities, duties, obligations and interests the natural parent had in the child, at the same time changing the status of the child, to that of the legitimate child of the adoptive parents irrespective of whether he or she was born out of wedlock. CRC<sup>19</sup> and the African Children's Charter<sup>20</sup> make it a legal requirement that adoption should be determined and authorised by competent state authorities in conformity with the applicable laws and procedures. Therefore the legal relationship established by means of adoption does not necessarily depend on a natural relationship. Adoption is thus a matter of law not contract. The Adoption Act recalls CRC's and the African Children's Charter's

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<sup>17</sup> K Norrie, *Parent and Child*, 2ed, (1999), 118.

<sup>18</sup> M Richardson, *Adoption*, (1989), 19

<sup>19</sup> Article 21.

<sup>20</sup> Article 24.

requirement that adoption be effected by a magistrate court of the district where the child resides<sup>21</sup> in terms of the rules and procedures laid provided in the Adoption Act.

The definition of adoption is different under customary law. Adoption under customary law is not a matter of law but contract. The transfer of a child from his or her natural family to the adoptive family is effected by an agreement between the two families<sup>22</sup> which agreement is not necessarily the decision of the headman or chief at the kgotla.<sup>23</sup> It is a simple and loose form of placing children with relatives or friends to be cared for as a traditional practice without totally severing the parent-child relationship between the child and his or her natural parents.

### **2.3 HISTORICAL DEVELOPMENT OF THE LAW ON ADOPTION IN BOTSWANA**

Child care, protection and parental responsibility forms part of an old African customs and tradition by which various members of the extended family may assert responsibility over a child and feel obligated to care for the children of other members of the family who were not able to care for their own children<sup>24</sup> Indigenous Batswana had a similar cultural practice of sharing responsibility and caring for their children. This practice did not only apply to temporary care such as foster care and guardianship. The adoption of children was one major way in which members of the extended family with children could assist relatives and even friends who had no children of their own by giving them their child for the relatives or friends to bring up as their own.<sup>25</sup>

The concept of adoption was therefore not totally new when the Adoption of Children Proclamation<sup>26</sup> introduced common law adoptions in Botswana.<sup>27</sup> Adoption in Botswana originated under Tswana customary law, which was essentially fragmented,

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<sup>21</sup> Section 4 (1) of the Adoption of Children Act, [Cap 28:01] Law of Botswana.

<sup>22</sup> I Schapera, *A Handbook of Tswana Law and Custom*, (1970), 173.

<sup>23</sup> Meaning *Customary Court*.

<sup>24</sup> P Onyango and S Bali, *Regional Practice : The African Situation in Doek J el al (eds) Children on the Move: How to Implement Their Right to Family Life*, (1996), 142.

<sup>25</sup> Schapera, op cit N22, at 174.

<sup>26</sup> Proclamation No 63 of 1952, Bechuanaland Protectorate.

<sup>27</sup> The then Bechuanaland Protectorate.

unwritten, and developing through the practices and customs of the Tswana communities. The adoption of children under customary law was a loose, informal arrangement whereby children were taken in by relatives or friends, to care for and bring up as their own. The African practice by which a child was considered as not belonging only to his or her parents but to the extended family and to the community as a whole played a major role as a child care resource.<sup>28</sup> Customary law adoptions were not a permanent placement of a child. The child could return any time to its biological parents. The ties between child and natural parents were never wholly severed by the adoption nor were it replaced by an artificial relationship established by the adoption between the adoptive parent and the child.<sup>29</sup> These customary law adoptions were not abrogated by the Colonial ruler's common law.<sup>30</sup>

Common law adoptions did not become part of Botswana law until the introduction of the Adoption of Children Proclamation<sup>31</sup> to the colony in 1952. The Proclamation was discriminatory in nature, in that it expressly excluded Africans from participating in common law adoptions.<sup>32</sup> The Proclamation also made it clear that it was not to be construed as preventing the adoption of African children by Africans in accordance with Tswana law and custom. The Proclamation did not supplant or override the pre-existing customary law adoptions.

Upon colonising Botswana, Britain recognised and respected the indigenous laws and judicial institutions of the Tswana people in the colony and allowed them to co-exist with the colonial common laws and institutions to the extent that they did not detract from British sovereignty over the Tswana territory.<sup>33</sup> The provision excluding Africans from participating in common law adoptions was repealed in 1964 and a new provision allowing Africans to adopt children under the Proclamation was enacted.<sup>34</sup>

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<sup>28</sup> Onyango and Bali, N24.

<sup>29</sup> S Roberts, *Tswana Family Law*, (1972), 13.

<sup>30</sup> *Marman v Marman and Others* [2003] 1 BLR 97, in which case the procedure to assume parental control by a father of his children born out of wedlock by adoption was explained and also proving that old customary law practices on adoption are still adhered to.

<sup>31</sup> Proclamation No. 63 of 1952, Bechuanaland Protectorate.

<sup>32</sup> Adoption of Children Proclamation No.63 of 1952, Section 15.

<sup>33</sup> DDN Nsereko, *Constitutional Law in Botswana*, (2002) 202

<sup>34</sup> General Law (Removal of Discrimination) Revision Law No. 28 of 1964 Bechuanaland Protectorate.

The indigenous laws were tolerated but only to the extent that they were not repugnant to morality, humanity or natural justice according to British standards.<sup>35</sup>

The post-independence administration allowed this dualism to continue, the customary courts administering and effecting customary law adoptions in accordance with customary law while common law courts operated on the basis of the 1952 Adoption of Children Proclamation which is the present day Adoption of Children Act (Adoption Act).<sup>36</sup> The Adoption Act applies to all common law adoptions and section 16 of this Act precludes its application to customary law adoptions. Tswana law has continued to be subject to the repugnancy clause, that is, it is valid and acceptable to the extent that it is not repugnant to morality, humanity and natural justice.<sup>37</sup> The jurisdiction of indigenous judicial institutions was also limited to cases in which the parties were tribesmen not involving homicide and serious crimes.<sup>38</sup>

The recognition of the value and positive role of customary courts has seen the preservation of customary law and customary judicial institutions through to this day. Customary law adoptions continue to be made under customary law of the parties, with most of the adoptions occurring privately between the parties, while common law adoptions are effected by the magistrates' courts in accordance with the provisions of the Adoption Act.<sup>39</sup> The High Court,<sup>40</sup> as the upper guardian of all children, also hear adoption matters in accordance with the rules and procedures contained in the Adoption Act. The customary law procedures on adoption were affected by the recognition for human rights for children.

The CRC<sup>41</sup> and the African Children's Charter<sup>42</sup> recognised children as independent individuals with rights, including the right to a family life.<sup>43</sup> They provide the

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<sup>35</sup> Nsereko N33, at 199.

<sup>36</sup> [Cap 28:01], Laws of Botswana.

<sup>37</sup> Customary Law (Application and Ascertainment) Act, 1969, [Cap 14:03], Law of Botswana.

<sup>38</sup> Schapera, N22.

<sup>39</sup> Section 2.

<sup>40</sup> According to Section 95 (2) of the Constitution of Botswana the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred by the Constitution or any other law. It therefore has the power to hear adoption cases even though the Adoption of Children Act restricts the jurisdiction in adoptions to the Magistrates' Courts.

<sup>41</sup> Preamble para 5.

<sup>42</sup> Preamble para 6.

international and regional recognition of the importance of rules regulating and controlling the adoption of children nationally and internationally. They also lay down aspirational goals on achieving effective adoption at both national and inter-country levels.<sup>44</sup> The rights the CRC and the African Children's Charter proclaims require implementation by the member states which implementation will influence and shape the adoption laws of the member states.

Responding to global socio-political changes brought about by these human rights instruments, Botswana ratified the CRC in 1995 and the African Children's Charter in 2001. The commitment to implement the rights of the child contained in these instruments redirected the approach Botswana took in the protection of the rights of the child. In addition to the measures taken by Botswana towards child care,<sup>45</sup> in line with the international and regional requirements for the adoption of children Botswana needs to review all its legislative enactments on child rights to comply with the human rights standards. This gives a new dimension to the adoption laws.

The sale or trafficking and abduction of children worldwide, resulting from unregulated inter-country adoptions was an impetus for the Hague Conference on Private International Law to adopt the Hague Conventions, among which is the 1993 Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoptions.(the Hague Adoption convention)<sup>46</sup> This Convention has not been ratified by Botswana. The non ratification of the Hague Adoption Convention by Botswana does not hinder the use of the convention by the courts in the interpretation of national adoption laws to ensure their compliance with international and regional human rights laws.<sup>47</sup>

The purposes of adoption under customary law and the common law differ from those contained in regional and international human rights treaties.

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<sup>44</sup> Article 21, CRC; Article 24, African Children's Charter.

<sup>45</sup> The measures taken are the registering of orphans and destitutes and financially assisting them through the social welfare department and subsidising children's homes such as SOS Children's Villages in Tlokweng and Francistown.

<sup>46</sup> L Silberman, *The Hague Children's Convention: Internationalization of Child Law* in Katz SN et al, (eds), *Cross currents : Family Law and Policy in the United States and England*, at 163.

<sup>47</sup> *AG v Dow* 1992 BLR, 119 at 169.

## 2.4 OBJECTIVES OF ADOPTION

Traditionally, the adoption of children was not particularly intended to serve the interests of the child. Adoption was seen principally as a means of providing heirs.<sup>48</sup> Among the Tswana an heir is an important and significant figure in the family. Every family needed to have an heir (who must be a male child) whose major role was to carry on the lineage and preserve the family's property and heritage from extinction. Since female children got married and took up their husbands names they were not good enough to be heirs. The inability to bear a male child was an impetus for adoption of male children to secure heirs under customary law. This was one societal value that a family would guard jealously.<sup>49</sup>

Adoption was further perceived as a way in which the extended family and the community as a whole could help some of their members who were not able to take care of their children. The child was regarded not only as a child of his or her parents but also as belonging to the community as a whole. Being seen as a perpetuation of the human species, the child's survival and development was in the interest of the society and not his immediate family alone.<sup>50</sup> In the African extended family context adoption of children was intended to serve the interests of the society and not the child or his or her family. It was a way of strengthening the family and community ties. In some cases adoption was intended to specifically serve the interests and wishes of the adoptive parents. Adoption was used as a primary method for providing childless parents with children.<sup>51</sup>

Under human rights law adoptions serve the best interests of the child. It is what the child needs, not what parents' need, which is the paramount consideration. International and regional human rights laws require that a child remain in the custody of his or her parents and prohibit their separation except in circumstances where doing so is in the best interests of the child. The Adoption Act<sup>52</sup> and the Customary Law

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<sup>48</sup> K Norrie, *Parent and Child*, (19), 117.

<sup>49</sup> Roberts, N29, at 13.

<sup>50</sup> Onyango and Bali, N24.

<sup>51</sup> Schapera, N22, 174.

<sup>52</sup> Section 4 (2) (c) Adoption of Children Act 1952, [Cap 28:01] Law of Botswana.

(Application and Ascertainment) Act<sup>53</sup> recognised this principle and acknowledged the fact that any action taken concerning a child should be in the best interest of the child and conduce to his or her welfare. At international and regional level the CRC<sup>54</sup> and the African Children's Charter<sup>55</sup> require the best interest of the child to be the paramount consideration in all decisions and actions taken concerning a child. A major human rights goal of adoption is therefore to promote the welfare of the child by providing the child with a family in which to grow.<sup>56</sup> Adoption should only be allowed where it is in the best interests of the child taking into consideration all the circumstances surrounding the child's needs in a particular case.

The provision of a loving environment is one of a number of variables that need to be met if the child's developmental needs are to be accommodated. Without a secure and loving environment, children would find it extremely difficult to develop a healthy self-esteem, lasting and meaningful relationships and cope positively with realities in their lives. This is the principle underlying decisions that children should not be uprooted from their origins, save for sound reasons which are particularly in their best interests. Thus the purpose of adoption of children under modern law as influenced and shaped by human rights law, is to provide a child with a family environment in which to grow in an atmosphere of happiness, love and understanding<sup>57</sup>. That is what would achieve the harmonious development and survival of a child. It has nothing to do with interests of the natural and adoptive parents of the child. To achieve this human rights goal, the adoption laws and procedures of Botswana should be set out in terms that would meet the international and regional standards.

## 2.5 CONCLUSION

In the pre-colonial period Botswana enjoyed their traditional practices of caring for each other's children without perceiving this responsibility as a legal obligation. There was no distinction between the needs of a child and those of the family, all were group as needs of the family unit and the community's interests.

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<sup>53</sup> Section 6, 1969, [Cap 14:03] Law of Botswana.

<sup>54</sup> Article 3.

<sup>55</sup> Article 4.

<sup>56</sup> Preambles of the African Charter on the Rights and welfare of the Child, 1990 and the UN Convention on the Rights of the Child, 1989.

<sup>57</sup> Preambles, CRC, the African Children's Charter, and the Hague Adoption Convention.

The historical development has shown that common law adoptions did not abrogate the customary practices of providing a family and care for the children of other members of the family and community. Even though the powers of the traditional leaders have been taken away their power to administer customary law was preserved. Customary law adoptions continue to be a simple affordable way of caring and providing a family environment for children in Botswana. Human rights law only gave customary law adoptions a new focal point-the best interests of the child and a new dimension.

The different types of adoption outlined and briefly discussed in this chapter will be analysed and discussed in details in the next three chapters. The next chapter will carry the discussion on customary law adoptions further and give a detailed analysis of the adoption process, customary laws, customary courts, persons eligible to adopt children, and the impact of human rights on customary law adoptions.

## CHAPTER THREE

### CUSTOMARY LAW ADOPTIONS

#### 3.1 INTRODUCTION

The preceding chapter has taken us through the historical development of adoption laws in Botswana, showing the roots of such laws in customary law. It also gave an overview of the introduction of the common law adoptions and how human rights laws have changed the meaning and purpose of adoption in Botswana.

This chapter will focus on the adoption of children under customary law. The advantages of, and the potential dangers presented by customary law adoptions will be outlined, critiqued and suggestions made on how harmful cultural practices can be done away with and customary law improved to better serve the interests of the children in their quest for a family environment in which to grow. The CRC and the African Children's Charter will be used to measure customary law's compliance with human rights laws.

#### 3.2 ADOPTION PROCESS

Customary law adoptions were the original adoptions in Botswana and they were in accordance with the customary practices and usages of the tribes. These customary laws of the tribes are not written and are in a continuous process of change as they develop through the practices and customs of a particular community. There are no fixed rules of procedure for the adoption of children.<sup>58</sup> The adoptions are informal and in most cases not permanent. Customary law adoptions are founded on an agreement between the natural parent of the child and the prospective adoptive parents. Most of the adoptions are private family matters which do not involve customary court. These in some instances end up in the High Court, for example, where disputes concerning the inheritance rights of the adopted child or maintenance have arisen.<sup>59</sup>

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<sup>58</sup> A Molokomme, *Children of the fence: The Maintenance of Extra-Marital Children Under Law and Practice in Botswana*, (1991), 27.

<sup>59</sup> *Montshiwa v Montshiwa* [1999] 2 BLR 216 (HC).

As a matter of contract between the parties, customary law adoptions do not amount to a permanent placement of the child with the adoptive parents. The ties between the child and his or her natural parent are never wholly severed, the child could return to his or her natural parents during the course of the adoption arrangements.<sup>60</sup> There are no fixed procedures for adopting a child. The tradition of giving a child to relatives or friends who are not able to bear children of their own or who are willing to help the natural parents who are not able to care for their children has not been done away with. It has been carried on privately from the pre-colonial period to this day.

Interviews with the head of the Tribal Administration Authorities in Gaborone<sup>61</sup> revealed that customary courts in villages and towns or next to which there is a magistrate no longer hear cases of adoption. They refer such cases to the magistrate court to be dealt with under the Adoption Act. The reason given for this was that adoption involved a change of the birth register, to change the surname of the adopted child, and this required an order from magistrates' courts made under the Adoption Act.<sup>62</sup> Some adoptions are decisions of the head of the extended family placing their relatives' orphaned children with the surviving relatives to bring up. It will be explained under adoption by relatives that such adoptions present potential dangers of abuse and exploitation of adopted children by such parents.

Traditional procedures, most of which are still followed today presents a general African practice whereby relatives and members of the community were responsible for the care and upbringing of children of fellow community members and relatives. Natural parents give their child to a relative or friend to bring up as their own. This is done at anytime after the birth of the child. Where the child is given to a relative or friend soon after weaning the child grows in the family of the adoptive parents and such an adoption is regarded as a permanent adoption.<sup>63</sup> The permanency in such adoptions stems from the fact that the child is taken in by the relatives or friends for a long term and immediately after weaning, and remain in the care of the adoptive parents till they marry or get married. A male child still had a choice to return to his natural parent's home after marrying. Even though regarded as permanent, the natural

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<sup>60</sup> Roberts, N29.

<sup>61</sup> Interviews held on 19 December 2007.

<sup>62</sup> Section 13 of the Adoption of Children Act, 1952, [Cap 28:01] Law of Botswana.

<sup>63</sup> Schapera , N22.

parent-child relationship is never totally severed and the adoption does not automatically give the child the right to inherit from his or her adoptive parents' estate.<sup>64</sup> Where the adoptive parents have sons of their own, the adopted child did not become the heir but would rely on the will of the heir in the adoptive family to inherit from his adoptive parents' estate. It is only when the adopted child is the only son the adoptive parents had that child would be the heir.<sup>65</sup>

The adoptive parents acquire the same responsibilities over the child but not the same rights. Where the child is adopted by a friend, the friend is expected to consult the child's natural parents in all issues of control and decision making over the child's affairs, which is not required of the adoptive parent who is a relative.<sup>66</sup> In the case of a girl child adopted by relatives, they could negotiate her bride price when she got married and keep it, but if the adoptive parent is a friend, the natural parents of the girl would negotiate and receive the bride price. They would, however, give the adoptive parents part of the bride price.<sup>67</sup>

The requirement for payment of bogadi<sup>68</sup> is common in cases where a child born out of wedlock is adopted by his or her natural father.<sup>69</sup> However, non payment of bogadi does not vitiate the adoption already completed. Otherwise there is no consideration to be made in adoption cases under customary law unlike in the pre-colonial period when bogadi was part of all adoption agreements.<sup>70</sup>

Even with the socio-economic and political changes which Botswana went through, the traditional family adoption arrangements are still practiced and recognised by the Tswana society. Besides being a preservation of family values customary law adoptions still continue to play the vital role of providing a home and family for the lucky orphaned children whose extended family members still preserves these values.

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<sup>64</sup> Roberts, N29.

<sup>65</sup> Ibid.

<sup>66</sup> Schapera, N22.

<sup>67</sup> Roberts, N29.

<sup>68</sup> Meaning *bride price*. In the context of adoption it means payment in cattle as consideration for the child's upbringing.

<sup>69</sup> *Marman v Marman* [2003] 1 BLR 96 (HC) at 99.

<sup>70</sup> Schapera, Supra, N22, at 174.

### 3.3 CUSTOMARY LAW

Customary law which is one of the laws the state recognized as an independent source of law is accorded the following definition:

“...in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provision of any written law or contrary to morality, humanity and natural justice”.<sup>71</sup>

This definition indicates that the content of customary law is dependant on the practices, usages and expectations of tribal communities that have their roots in the cultures of the indigenous Tswana societies headed by tribal heads.<sup>72</sup> Among these tribal communities there is a plurality of customary laws all of which are not codified. This justifies the conclusion that customary law varies in different parts of the country depending on different groups’ culture, principles and usages and on the attitude of the chief of a particular community.<sup>73</sup>

Customary law is the law that is applied by customary courts in matters before them to the exclusion of criminal matters.<sup>74</sup> The High court is also required, in the exercise of its review powers over matters from the customary courts or on appeal, to apply customary law.<sup>75</sup> Customary law applied by customary courts is the non-rule-oriented Tswana customary law related to the social reality according to which most tribal communities conduct their lives today.<sup>76</sup> As a result it may contain practices which are harmful to the rights of the child which cannot be easily revealed except through review by the High Court.

Having a variety of laws and customs for each particular tribe applicable in adoption matters affecting the tribesmen makes the whole attempt of safeguarding the rights of the child against harmful customary law practices futile. Customary law is

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<sup>71</sup> Section 2 of the Customary Law Act, 1969 [Cap 16:01] Law of Botswana.

<sup>72</sup> R Kuppe and R Potz, *Law and Anthropology*. Available at <http://books.google.com/books?> Assessed on 22 February 2008.

<sup>73</sup> Molokomme, N58, at 26.

<sup>74</sup> Section 11 of the Customary Law Act, N70, and Section 15 (a) of the Customary Court Act, 1968, [Cap04:05] Laws of Botswana..

<sup>75</sup> Section 3 of the Customary Law (Ascertainment and Application) Act, 1969, [Cap 14:01] Laws of Botswana. (Currently titled Customary Law Act [Cap 16:01]).

<sup>76</sup> Molokomme, N58, at 26.

continuously changing. It is not written and finding it is not always easy, in view of its non-static nature. It therefore is often difficult to say with certainty what the applicable rules are at a given time. The task of ascertaining<sup>77</sup> the practices, usages or rules of customary law of a particular tribe at a given time is left to the courts. While the nature of customary law poses no special problem for customary courts, this is not the case with non-customary courts which have had the power since the colonial period to review or hear appeals from customary courts and develop customary law.

The High Court, as the appeal court and the upper guardian of all minors, must apply customary law to all customary law adoption cases coming before it for review or on appeal. It consequently has to ascertain the applicable customary law by consulting text books, cases, other sources and by receiving opinions from experts (who are in most cases the chiefs) either orally or in writing.<sup>78</sup>

It has been argued that the treatment of text books as a codification of customary law rather than as a guide to general principles makes these sources too rule-oriented and present Tswana customary law outside its social context.<sup>79</sup> This argument is plausible in that the customary law applied to an adoption case two years ago may not be the same customary law applied to an adoption case heard today. Owing to the non-static nature of customary law, codified customary law would distort the customary law applicable at the time the case is heard. However the argument has somewhat been outmoded by human rights requirements of taking measures in implementing the rights of the child. Rules and procedures affecting children's rights should be set out expressly in legislative enactments and written policies for ease of reference and for testing their compliance with international and regional human rights standards.

The treatment by the High Court of text books as codification of customary law supports the requirement for the codification of all laws on child issues including customary law to facilitate access to information on these laws and for their development to fit in with human rights laws. Botswana's human rights based approach to law reform adopted in revising the Children's Act includes customary law

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<sup>77</sup> Section 11 Customary Law Act, 1969, [Cap 16:01] Law of Botswana.

<sup>78</sup> Section 11 of Customary Law Act, *supra*, N67.

<sup>79</sup> Molokomme, N58, p28.

issues and paves a way to collaborate with traditional leaders and their institutions.<sup>80</sup> This approach will help eliminate all customary laws and practices that are harmful to children's rights.

Most customary law systems allow for a degree of flexibility and the application of rules is not always of overriding importance. This practice contributes towards the non observance of the permanent nature of adoption orders and their legal consequences. It defeats the object of an adoption which under statute and international human law is to provide the child with a permanent family environment in which to grow. In this form customary law adoptions lack the legal force afforded adoptions carried out and determined by competent authorities as required by the African Children's Charter<sup>81</sup> and the CRC<sup>82</sup>

Customary law does not recognise the rights of the child as separate from the human rights of the family unit. This attitude is reflected in the way the customary courts treat the right of the child to participate in decision making in issues that affect his or her welfare and in having their views heard. The child has no direct say under customary law. An elder mostly the head of the family or parent should speak on the child's behalf. This customary practice indirectly satisfies human rights requirement and guarantee in the CRC<sup>83</sup> and the African Children's Charter<sup>84</sup> of taking the views of children into account in matters affecting them. It implies that an adoption order may be granted without the views of the child being directly heard even where he or she is mature enough to state his or her wishes since an intermediary would speak on his or her behalf. This also has an advantage, which is that even the views of very young children who may be regarded as incapable of making their wishes known can be heard indirectly.

Customary practices and tradition of the extended family sharing the responsibility of caring for children gives the child a better home in a familiar environment and keeps the child within his own cultural background. There are no consequences of the child

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<sup>80</sup> Report on the Revision of the Children's Act, 2003.

<sup>81</sup> Article 24.

<sup>82</sup> Articles 21.

<sup>83</sup> Article 12.

<sup>84</sup> Article 7.

loosing his or her identity through adoption. The informal, flexible and cost free customary law procedures make it easier for relatives and friends to take in and provide family environments to children of their friends and relatives. These hassle free customary law adoptions have a potential of providing a solution to the problem the state is battling with of a large number of orphaned children. Customary law adoptions also satisfy the CRC's<sup>85</sup> and African Children's Charter's<sup>86</sup> requirements of the child maintaining personal relations and contact with his or her family.

Customary law is applicable to other causes of action the parties are tribesmen or if they are not the defendant must consent to the jurisdiction of the court.<sup>87</sup> It applies across the country in civil matters but practices differ from one tribe to another, with major similarities.<sup>88</sup> These similarities should form the basis for the codification of customary law in areas of child law. With customary practices common to most tribes codified, uniformity and certainty can be easily achieved in rules and procedures on adoption and this would protect children from the cloak in trafficking domestically.

### **3.3.1 REPUGNANCY CLAUSE**

Customary law is subordinated to written law and the repugnancy or consistency clause. Customary law that can acceptably be administered and applied by customary courts is those practices, rules and usages which are not inconsistent with any statute, other written law and not contrary to morality, humanity and natural justice<sup>89</sup> Practices or customs that tend to barbarity, immorality or cruelty would be struck down as contrary to humanity and morality.<sup>90</sup> Natural justice on the other hand imports procedural fairness. Thus any rules of customary law that permits the head of the family to order a family member to adopt a deceased relative's child without giving the person a chance to be heard in opposition would not be valid.

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<sup>85</sup> Article 9.

<sup>86</sup> Article 19.

<sup>87</sup> Section 10, Customary Law Act [Cap 16:01], Law of Botswana.

<sup>88</sup> Roberts, N58 at 14.

<sup>89</sup> Section 7 Customary Court Act [Cap 04:05] Law of Botswana and Section 2 Customary Law Act [Cap 16:01] Law of Botswana.

<sup>90</sup> Nsereko, N33, at 202.

The repugnancy clause remains a provision in the Customary Law Act<sup>91</sup> and Himsworth<sup>92</sup> doubts the relevancy of the clause in a statute enacted by an independent country such as Botswana. The clause empowers judges to strike down outmoded customary rules and practices. Judicial structures created by the post colonial administration's legal system allow appeals and review of the customary courts decisions by the High Court.[fn-check cust ct act] It is through these appeals and reviews that the High Court is expected to check the consistency of customary law practices with morality, humanity and natural justice, statute law and other written law such as international and regional child's rights instruments. The High Court also develops customary law in this manner. It may be obvious that in including the clause in the Act<sup>93</sup> the colonialist intended to subject African cultures to their own morality and values, thus undermining the Tswana laws and customs. The clause has however become useful in the development of customary law. Customary law, as a part of the legal system, need to be consistent with all the other laws in the legal system, including Botswana human rights law. The clause therefore acts as a check and balance of customary law, which is applied by customary courts not falling under the Administration of Justice.

The High Court is however hindered from responding creatively to modification of customary law and testing its consistency with statutory and human rights laws because Batswana are non-litigious. They do not take any interest in questioning decisions of the courts, especially where the decision is from their tribal leader,<sup>94</sup> through appeal or review. The result is that customary law practices that are harmful to children's rights remain unexposed, undeveloped and unmodified to make them fit in with human rights based laws of the country.

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<sup>91</sup> [Cap 16:01] Laws of Botswana.

<sup>92</sup> CMG Himsworth, *The Botswana Customary Law Act*, (1969), Vol. 16, No. 1, 4, at 5, *Journal of African Law*.

<sup>93</sup> Customary Law Proclamation.

<sup>94</sup> JL Comaroff and S Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context*, (1981), 26. ( where it is stated 'the chiefly decisions announced at the end [of a dispute] are expected to reflect the weight of manifest opinion... such decisions are binding as the chiefs word is law. This culture is still observed under the principle "lefoko la kgosi ke molao le agelwa mosako"' meaning the chiefs word is law it must be respected.)

### 3.4 CUSTOMARY COURTS

Botswana customary courts are the successors to courts that existed prior to the colonial period. They survived in a different form. These courts were tied to the socio-political organisation of pre-colonial Tswana societies, not regulated by statute. Today customary courts are regulated by statute,<sup>95</sup> they are classified under Local Government not Administration of Justice and it is the Minister of Local Government who establishes or recognises an already existing court by warrant.<sup>96</sup> Courts administered by headmen are also recognised officially. This recognition by the state of customary courts approves of the vital role customary courts play in the legal system. While customary courts are, (since 1934) required to keep a record of their proceedings, customary courts in most remote rural areas administered by headmen do not keep records of their proceedings.<sup>97</sup> In most villages depending upon the effects of socio-economic change upon ward cohesion, the customary courts headed by headmen have been upgraded and given more powers by warrant.<sup>98</sup>

Customary courts have jurisdiction to entertain any matter justiciable under any law they are authorised to administer.[fn-act] Generally in the interest of legality and certainty customary law is excluded from the domain of criminal law.<sup>99</sup> Customary law is restricted to civil matters, which would apparently be disputes between tribesmen. Even here its application depends on the transaction in question. Customary law applies mostly to matters of personal status such as customary marriages, succession and tribal land transactions.<sup>100</sup> It also applies to adoption cases as they are civil matters and logically because adoption in Botswana originated in customary law.

The Act also seeks to facilitate the preservation of some prestine features of the Tswana indigenous courts in its provision for the constitution of customary courts in

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<sup>95</sup> Section 7 Customary Court Act [Cap 04:05] Law of Botswana.

<sup>96</sup> Ibid

<sup>97</sup> Molokomme, N58, at 28

<sup>98</sup> Ibid

<sup>99</sup> Section 11 (6) Customary Law (Application and Ascertainment) Act No. 51 of 1969, Law of Botswana (currently Customary Law Act of 1969 [Cap 16:01]).

<sup>100</sup> Nsereko, N33, at75.

accordance with customary law.<sup>101</sup> Participation of traditional leaders in the administration of justice continues to play an important role in the operation of customary courts. The openness and informality of the procedures and the participation of the members of the public in the proceedings all ensure the preservation of the indigenous customary law form. This clearly means that the decision of customary courts is that of the members of the public who participate in the proceedings. The question is whether these would be in a position to take into account the child's best interests in matters affecting the child's rights? Traditionally, it is believed that they do.

Traditional rulers are lacking in human rights awareness. Customary law on the other, while recognising child welfare does not allow direct participation of children in decision making in matters affecting them. Participation is through intermediaries such as aunts, uncles or even grandparents. This has its advantage in that, even children of the age below ten years (which is the age the Adoption of Children Act prescribes as being age when child can be consulted) are consulted through intermediaries for their views and opinions. Public members who participate in customary courts proceedings may therefore be able to take into account the best interests of the child since they are mostly parents who under customary law are the ones representing the child and have the responsibility to have the child's needs at heart in all actions they take concerning their children.

### **3.5 TYPES OF CUSTOMARY LAW ADOPTIONS**

There are different types of customary law adoptions, categorised according to classes of persons involved in the adoption of children namely, adoption by non-relatives and adoption by relatives

#### **3.5.1 Adoption By Non-Relatives**

These may be applied for before a customary court. However, with the deployment of magistrate courts in the villages including the remotest of villages by the Administration of Justice in an attempt to achieve its goal of 'Taking Justice to the

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<sup>101</sup> Section 8 of the Customary Court Act, 1968, [Cap 04:05], Laws of Botswana.

People,<sup>102</sup> customary courts nowadays rarely hear cases of adoption. Customary courts in villages where there is or near which there is a magistrate court have adopted a procedure whereby they would refer such cases to the magistrate court. The reason given for such a referral is that adoption by non relatives required an alteration of the Birth Register to change the child's surname to that of the adoptive parents<sup>103</sup> which process is outside the application of customary law. The Birth Register can only be altered for the purposes of an adoption on production of an adoption order<sup>104</sup> which order customary courts do not issue to the adoptive parents. It was therefore difficult for non relatives who had adopted a child to change their adopted child's surname after obtaining an order of adoption from customary courts. Adoptions by non relatives are mostly private arrangements between parents.

As explained earlier in this dissertation, adoptions under customary law do not sever the parent-child relationship. The adoption is impermanent and uncertain, as it could be terminated anytime by the natural parent or the child. This creates uncertainty in the inheritance rights of the adopted child in relation to the adoptive parents' estate and for those children adopted by non-relatives it becomes more difficult for the adopted child to assert his or her inheritance rights where the adoptive parents have other children. Where the arrangement prevail up to the death of the person assuming control over the child, the child may be allowed to inherit from the deceased estate, although his or her claims are not of a legal nature. They are dependant on the will of the other natural heirs of the deceased.<sup>105</sup>

Customary courts in the most remote rural areas with no magistrates' courts within reasonable distance still hear adoption cases and since they rarely keep any record of the proceedings information on the adoption may not be available. This does not only deny the High Court the opportunity to review and develop customary law but denies the child the protection he or she would get from any safeguards intended by the CRC and the African Children's Charter.<sup>106</sup> This is another area where potential abuses and trafficking in children are likely to be domestically achieved.

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<sup>102</sup> Administration of Justice Strategic Plan, 2001, p3.

<sup>103</sup> Section 13 Adoption of Children Act 1952, [Cap 28:01] Law of Botswana.

<sup>104</sup> Ibid.

<sup>105</sup> Schapera, N33, at 175.

<sup>106</sup> Preamble, African Children's Charter.

Some adoptions are purely a private affair between parents. A child may by agreement be placed indefinitely under the care of some other person by his or her own parents to bring up as their own in the same way as in the indigenous Tswana way of adoption.<sup>107</sup> This is illustrated by the case of *In Re OM [an infant]*<sup>108</sup> This case has a history of customary law adoption, child in need of care, foster care and adoption under the Adoption Act. Relevant to this part is the customary law adoption. The facts of the case revealed that the infant OM was given to a very old, half blind woman in Mahalapye together with her sister who was 12 years for the old woman to bring OM up and for her sister to assist the old woman with house hold work, since all the adoptive parents children were grown up and living somewhere else with their families. The agreement concerning OM's sister was that the adoptive parent would occasionally send the natural parent some money in consideration for the help the child gave with household work. This arrangement clearly has an element of exploitation for labour and illegal sale of the child for a consideration to be made to the child's mother. The customary court was not involved in the adoption.

The agreement in relation to OM's elder sister is difficult to describe as a customary law adoption by a non-relative. It was more of a crime of subjecting her to child labour and unlawful exploitation than an adoption.<sup>109</sup> The case gives an example of a situation in which customary law adoption process is abused, which in most cases go unnoticed.

The natural tie in such adoptions was never wholly terminated nor replaced by an artificial parent-child relationship formed by adoption. For the duration of the arrangement the person assuming control over the child was bound to carry out the normal parental duties but the agreement may be terminated at the instance of either party or the child.<sup>110</sup> As in this case the child was neglected and when an application for adoption under the Act was made in the Magistrate court the natural mother of the

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<sup>107</sup> The old adoptions as elaborated by Roberts, Supra N63, p22.

<sup>108</sup> MH 585/2000 , (unreported).

<sup>109</sup> Section 105, Employment Act, 1982, [Cap 47:01] Laws of Botswana, (which prohibits employment of children under 15 years).

<sup>110</sup> Roberts; N29.

child was the one asked for consent for the reasons that the previous customary law adoption was not recognised by the magistrate court.

These private adoptions by non relative kind of arrangement defeat the purpose of adoption which is to provide the child with a permanent loving and caring family environment in which to grow, as the child's natural parents do not usually assess the adoptive parents' home to be sure that it will serve the best interests of the child. It does not fully benefit the child as it leaves his inheritance rights uncertain. This is another area where customary law adoptions fail to address the needs of the child.

### **3.5.1.1 Adoption Of A Child Born Out Of Wedlock By Stepfather**

A very common type of adoption by non-relatives is where a man who is not the natural father of the child born to the woman he marries takes in the child as well. At the time of marriage the husband may expressly declare that he is marrying the mother together with the child. This express declaration which is made in the presence of members of the families is preceded by an agreement between the husband and the woman he marries. The child will then move into the matrimonial home with his or her mother as the child of the husband upon the marriage of the mother. The adoption has to be completed by the change of the child's surname to that of the adoptive father. In that regard the child will be entitled to assert all the rights a child can against his or her father.<sup>111</sup>

In *Montshiwa v Montshiwa*<sup>112</sup> the court considered this type of adoption in the context of an application for the maintenance of a child by the step-father. The mother of a child and wife of the respondent, claimed maintenance from respondent for herself and her child not born of the respondent, arguing that when her husband married her he promised, undertook and expressly declared to adopt the child, under customary law. She therefore claimed that the respondent had a duty to support the child. The husband disputed adoption and argued that he could not be legally ordered to support a child who was not his child naturally. The court held that, there was no evidence that the respondent had adopted the child even under customary law and that the

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<sup>111</sup> *Montshiwa v Montshiwa* [1999] 2 BLR 216 (HC)

<sup>112</sup> [1999] 2 BLR 216

adoption is made more uncertain by the fact that the child was still using his mothers surname. The court refused to make a maintenance order in favour of the child.

### **3.5.2 Adoption By Relatives**

This covers the adoption of children by the relatives of their natural parents and by the father of children born out of wedlock who is not married to the mother of the children.

#### **3.5.2.1 Adoption By Relatives Of The Natural Parents**

This covers a great number of customary law adoptions. Relative of the natural parents take in children of members of the family whose are unable to care for them or whose parents have both died. A population and housing census carried out in 2001 revealed that, of the 111 828 orphaned children population, 54 percent is found in rural areas<sup>113</sup> Most of these orphans are left in the care of relatives, mostly grandparents (34 percent), with others, (11 percent) having their siblings who are minors (under 18) being family heads. In such cases, following customary law practices the head of the extended family has authority to decide that a particular member of the family would take in the orphans and bring them up. He may distribute them among the surviving members of the extended family. It is difficult to differentiate this practice from guardianship. At times this is done without taking into account the number of children and financial means the chosen member has and whether they are capable of bringing up children according to the correct family morals and social values. At times the relative is not given the opportunity to state his or her views concerning the adoption. The family head is according to custom the one who defines what is in the best interest of the child.<sup>114</sup> This practice in itself is contrary to natural justice as the adopter is not given the opportunity to accept or refuse to adopt the child. The adopter may end up neglecting or abusing the children.

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<sup>113</sup> Analysis of child Focused Indicators: 2001 Population and Housing Census, Central statistics Office 2005 Report, p9.

<sup>114</sup> Initial Report to the United Nations Committee for the Convention on the Rights of the Child, 2001, p19.

The child is also not directly consulted.<sup>115</sup> In case orphaned children are distributed among the extended family members for adoption, they grow up separated from each other. While traditionally this kind of care for orphans by the extended family is accepted for the reason that children remain within familiar family environment and cultural background, they may or may not be given good emotional support because, emotional capabilities of those on whom the adoption is imposed may be limited, especially where the adoptive relative has children of his or her own.

The separation of siblings caused by their distribution among family members because of limited resources may also not work well for very young children in terms of keeping in contact with each other. Caring for additional children constitutes additional stress which may result in children being neglected, exploited, and abused (with excessive work or physically). These are the problems that the CRC addresses through the recognition of the children's right to be adopted by persons who are capable and willing to provide them with a family environment in which to grow, in an atmosphere of happiness, love and understanding.<sup>116</sup> These adoptions meet the CRC's goal provided the relatives voluntarily take in children without being ordered by the head of family.<sup>117</sup>

Informal adoptions within the family extend to the father of children born out of wedlock who for some reasons is not able or willing to marry their mother. These adoptions are very common too.

### **3.5.2.2 Adoption Of Children Born Out Of Wedlock By Their Natural Father**

Where the father of a child does not wish or is unable to marry the mother of the child for some undisclosed reasons, but wishes to assume parental rights over the child, he can do so by adopting the child. The customary law rules common to most tribes in Botswana is that children born out of wedlock follow their mother's lineage. They take their mother's surname and can inherit only from their mother and their mother's relatives as intestate heirs. They belong to their mother's guardian. They can only

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<sup>115</sup> Social Welfare Department Internal Report 2000. ( Malebogo and her siblings were given to their aunt after their single parent mother died. They were neglected due to the poor financial status of the aunt and the children took to the streets. They were after the intervention of social workers taken by their other aunt who had originally wanted to take them when their uncle decided who was to take the children).

<sup>116</sup> Article 35

<sup>117</sup> Schapera *supra* N33, at 174.

assert maintenance rights against their natural father. Other rights like inheritance and a claim to the father's name can only be acquired through their adoption by their natural father. This is made clear in *Marman v Marman*<sup>118</sup>

The formalities to be satisfied for this type of adoption are not different from the indigenous Tswana customary law procedures on adoption.<sup>119</sup> The father of the child has to deliberately decide to assume parental rights over his child and has to formalise it by consulting his parents and other elder members of the family such as uncles and agree with them to take parental control over his child. Once they are agreed the parents of the father of the child would go to request the child from the mother's family. An agreement will be reached between the two families that the father should take his child and bring him or her up. They may also agree on the payment of bogadi<sup>120</sup> for the child. The father would take his child into his home and maintain and educate the child. He also has to give the child his surname.

Once all these formalities are met the child is adopted under customary law and is entitled to assert all the rights a child can claim against a parent including the right to inherit his or her father's estate as an intestate heir. This procedure is illustrated by the case of *Marman v Marman*<sup>121</sup>. The case involved a dispute over inheritance rights of the respondents, two children of the deceased, born out of wedlock, over his estate. It was alleged that the deceased had adopted the first and second respondents under customary law and that on the basis of such adoption they were entitled to inherit from the deceased's estate as his intestate heirs. The applicants, the deceased brother and uncles disputed the adoption, arguing that there was no adoption by the deceased of his two children born out of wedlock as under customary law there could be no adoption unless bogadi is paid. After hearing the evidence of witnesses on the adoption of these children by the deceased, the High Court held that, if all formalities for a customary law adoption are present then no one could deny the adopted children the right to inherit from their deceased parent. The court further elaborated that what constitutes adoption under customary law is an agreement to adopt along with the

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<sup>118</sup> [2003] 1 BLR 96 (HC).

<sup>119</sup> Roberts , N29, at 22.

<sup>120</sup> Means bride price. In relation to adoption it means payment of consideration for the upbringing or rearing of a child.

<sup>121</sup> [2003] 1 BLR 96 (HC).

implementation thereof. The deceased had acted in terms of such an agreement by taking in first and second respondent and changing their surname to correspond with his. The respondents had accordingly been adopted by the deceased and that such adoption entitles them to inherit from his estate. On the issue of bogadi the tribal heads who were called to assist the court in ascertaining the applicable rules of customary law stated that payment of bogadi for the children, though usually an element of adoption was not of crucial importance. Its absence did not invalidate an adoption properly done with the agreement of the parties.<sup>122</sup> The court finally held that the respondents were properly adopted under customary law and were therefore entitled to inherit from the deceased estate.

This procedure was in the past also followed by a man whose wife did not bear male children. He would adopt his male child born to a woman he did not marry by assuming his parental rights over the child in the same way the father of a child born out of wedlock would adopt his own children.<sup>123</sup> This is very rare today as the concept of male heirs to carry on the father's name is no longer of any significance.

Adoption of children by their natural father presents certain problems. The meetings at which agreements to adopt a child are made are verbal and proof is dependent on the persons present at the meeting and on their honesty in the future to testify to it. Greedy family members who intend to deprive the adopted children of their inheritance make sure that such proof is not available after the death of the adoptive parent.<sup>124</sup> The adoptions are not permanent as is the case with almost all customary law adoptions. Therefore the child status in the adoptive family, and inheritance rights hang in the balance. Where the child has assumed the surname of the adoptive parents the adoption can still be revoked and terminated or denied by those who wish to deny the children their rights to be maintained by their fathers or to inherit from their father's estate. All depends on the parties involved in the adoption process.

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<sup>122</sup> *Marman v Marman* [2003] 1 BLR, 96 (HC), at 98.

<sup>123</sup> Roberts, N29, at 22.

<sup>124</sup> *Marman v Marman* [2003] 1 BLR 96 (HC).

### 3.6 BEST INTERESTS AND CONSIDERATION OF THE CHILD'S VIEWS

The application of the concept of the best interest of the child under customary law is negligible since customary law in the traditional sense does not treat the rights of children or any other group separately from the rights of the family as a unit. The best interests of the child are determined as part of the interests of the family unit by the head of the family. This is done by taking into account the values of the family and their cultural and religious background.<sup>125</sup> Section 6<sup>126</sup> makes provision that “in any cases relating to the custody of children the welfare of children shall be the paramount consideration irrespective of which law or principle is applied.” The provision introduced the concept to specifically apply to custody cases. Adoption can properly be classified as a custody case as the parent assumes parental power and custody of the adopted child. The Act does not make reference to the best interest of the child but the terms welfare and best interest have been interpreted as being synonymous by the courts in custody and adoption cases.<sup>127</sup> The Act applies to all custody cases whether of children born in or out of wedlock. A precise definition of welfare has not been elucidated although the concept has been consistently applied in custody cases.

Children's views are taken into account indirectly under customary law. The parents are expected to have the best interests of their children at heart in all actions affecting their children and are regarded as the spokes persons and representatives of their children in all matters by customary law. The Botswana Child Monitor has observed that many parents are negligent when it comes to general supervision, rearing and disciplining of children and are failing to become role models for their children.<sup>128</sup> This underscores the fact that in their representation of children they may not convey the child's views effectively. If parents are not so responsible and the child is not, as per customary law, allowed to participate directly in decision making and air their views on matters affecting their welfare, their best interests will obviously not be served. However, parents are usually concerned with their children's interests even

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<sup>125</sup> Initial Report to the Committee on the Rights of the Child on the Implementation of the CRC, 2001.

<sup>126</sup> Customary Law (Application and Ascertainment) Act, 1969, [Cap 16:01] Law of Botswana.

<sup>127</sup> *In Exparte Veen, In re Infant Otlogetswa Ofentse* 1978 BLR 43 (HC), (the court considered this requirement and stated that it applied even in adoption cases.)

<sup>128</sup> Botswana Child Monitor, 2005, 6.

though extreme cases cannot be ruled out. For example, in OM's case the mother of the child was obviously concerned with her own interests, not those of her daughters.

The High Court in its original and appellate jurisdiction has as the upper guardian of all minors, considered the welfare or best interests of the child as being paramount and has affirmed this principle in judicial pronouncements in cases appealed from customary courts and those that involved the application of customary law in adoption issues.<sup>129</sup> The concept as judicially interpreted is given an all embracing approach that seeks to protect the general welfare of the child, such that all relevant circumstances are taken into account in determining what is best for the child in a customary law adoption.

The recognition of human rights for children brought in a new dimension in the perception of adoption even under customary law. The CRC<sup>130</sup> and African Children's Charter<sup>131</sup> require that the views of the child be considered and they be allowed to participate in decision making in matters that affect their rights. The Constitution of Botswana<sup>132</sup> enshrines the right to communicate ones ideas and information. Children are not technically restricted from exercising this right although they would have some problem ensuring it is respected given their status as minors.

In Setswana culture respect for the views of the child is not regarded as a right. Children do not generally attend and speak at the kgotla<sup>133</sup> where issues of significance in a community have traditionally been and continue to be discussed.<sup>134</sup> Therefore a culture of believing that adults know what is best for the children and that they are in a position to articulate the views of the children holds the fort. This idea has seen parents or other relatives communicating the views of the child in adoption matters, thus acting as intermediaries and not giving the child a direct forum to state their views and wishes about the adoption.

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<sup>129</sup> *Marman v Marman* [2003] 1 BLR 96 (HC).

<sup>130</sup> Article 12.

<sup>131</sup> Article 7.

<sup>132</sup> Section 12, Constitution of Botswana.

<sup>133</sup> Meaning Customary Court.

<sup>134</sup> Initial Report to the Committee on the Rights of the Child, 2001.

### 3.7 CONCLUSION

Although child welfare is made part of the Customary Law Act, the application of the concept in child's rights issues before customary courts and in family decision is negligible. Children's views are heard indirectly. The head of the family or the parent or guardian per custom, is regarded as the one who knows what is in the best interest of the child and speak the child's views on his or her behalf. However, having seen<sup>135</sup> that some harm is caused by the natural parents themselves to their children their ability to represent their child is doubtful.

The flexible, informal and cost free procedures allow most of Batswana to adopt children under customary law than under the Adoption Act. Adoption by relatives which accounts for a greater number of customary law adoptions allows a child to grow up in a familiar environment and within his cultural background. These customary practices implement the international and regional child rights treaties requirements for the harmonious development of the child.

Different tribes apply their own customary law to adoption cases and the High Court on appeal has to deal with these similar issues on adoption applying the different customary laws in each particular case. The jurisprudence developed from such cases is a mixed and contradictory one. It does not properly guide courts on the protection and promotion of children's right to a family life, through the development and modification of customary law practices. This is aggravated by the fact that customary courts follow customary law rules, practices and usages which ever changing. This is one reason why codification of customary practices that are similar among tribal communities should be encouraged.

Customary courts and customary law are administered by traditional leaders who are lacking in human rights awareness and child rights. Their training on human rights will advance child rights promotion and protection. The non permanency of customary law adoptions also poses problems with inheritance rights of the adopted

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<sup>135</sup> In Re OM [An Infant] MH 585 of 2000 (unreported)

child as an intestate heir of the adoptive family. Child status in the adoptive family is therefore uncertain.

## **CHAPTER FOUR**

### **LAWS AND PROCEDURES UNDER THE ADOPTION OF CHILDREN ACT**

#### **4.1 INTRODUCTION**

The Adoption of Children Proclamation was adopted into the Botswana legal system in 1952<sup>136</sup> to introduce common law adoptions. As seen in the previous chapter, prior to the coming into force of the Adoption Act in Botswana customary law adoptions were predominantly the only adoptions in the country. The family needs of a child were an extended family and community concern, not a single parent's problem. The Act introduced a more nuclear family centred system of caring for children.

This chapter focuses on the adoption of children under the post-colonial Adoption of Children Act.<sup>137</sup> This will entail the examination and critical analysis of the provisions of the Act, and the extent to which the legislation is sensitive and responsive to the needs and welfare of the child. The role the courts play in the protection of child rights through the adoption process, and how well the Act and the court's practice incorporates the aspirations and objectives of the African Charter on the Rights and Welfare of the Child (the African Children's Charter) and the UN Convention on the Rights of the Child (CRC). Some inherent flaws in its provisions will be outlined and suggestions made on how the Act can be improved through interpretation and review to a state in which it can successfully achieve the implementation of the goals of the CRC and the African Children's Charter.

#### **4.2 THE ADOPTION ACT**

The Act ensures that the child and the adoptive parents are not taken advantage or unnecessarily prejudiced. It also ensures that the rights of the parents of the child being adopted are properly exercised and that no undue influence is exerted on

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<sup>136</sup> Proclamation 63 of 1952, Bechuanaland Protectorate.

<sup>137</sup> [Cap 28:01] Law of Botswana.

them.<sup>138</sup> To some degree some of the provisions of the Adoption of Children Act respond effectively to a variety of adoption situations while others do not.

#### **4.2.1 Requirements And Conditions For Adoption Of Children**

The Adoption process is triggered by an application by the prospective adoptive parents in the magistrates' court of the district in which the child resides.<sup>139</sup> The applicants should show in support of such application that they satisfy the qualifications and requirements set out in sections 3 and 4 of the Adoption Act.

##### **4.2.1.1 Who Can Be Adopted?**

The Adoption Act makes provision for persons who can be adopted, that is, the child. The Act defines a 'child' as 'a person under the age of 19 years.'<sup>140</sup> The intended purpose of the Act and the definition of the term child<sup>141</sup> gives a clear indication that under the Adoption Act only persons under the age of 19 years can be termed children and be eligible for adoption.

The High Court of Botswana in *Mbambo and Others v Ndlovu*<sup>142</sup> did not think that the definition of child in section 2 of the Act limited adoptions to children under the age of 19 years. The facts of this case reveal that the case came before a magistrate court which refused to hear the adoption application on the ground that the person to be adopted was above the age of 19 years and therefore not a child within the meaning of the definition in the Act. The magistrate referred the case to the High Court for review on that ground. The High Court held that 'since the [High] court has unlimited jurisdiction and despite that adoption matters generally should be considered by the magistrates' courts, the application of the adoption of a minor not covered by the Adoption Act can properly be brought before this[High] court.'<sup>143</sup> The effect of this decision is that the High Court with its unlimited original jurisdiction and as the upper guardian of all minors in Botswana has the power to extend the application of the Adoption Act minors who do not fall within the definition of child as given in the Act.

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<sup>138</sup> EK Quansah, *Introduction to Family Law in Botswana*, 4ed, (2006), 138.

<sup>139</sup> Section 4 (1) Adoption of Children Act, 1952, [Cap 28:01], Law of Botswana.

<sup>140</sup> Section 2, Adoption Act.

<sup>141</sup> *Ibid.*

<sup>142</sup> [2001] 2 BLR 611.

<sup>143</sup> Mbambo's case at 614.

This seems to be stretching the Act's scope of application too far outside its intended ambit.

The CRC<sup>144</sup> and the African Children's Charter<sup>145</sup> define child as a human being under the age of 18 years. In view of the definition of a child in the children's rights treaties, it is doubtful that adoption of persons over 19 years would conduce to their welfare and serve their best interests. In my view, this extension of the Act's scope of application to persons of 19 years and above can be meaningfully applied to allow the adoption of minors with mental and/or physical disabilities who, for reasons of such disabilities, would not at any time in their lives be able to care for themselves. In this manner the extension of the Act would go an extra mile in serving their best interests, especially that the Act does not make any provision for children or persons with disabilities.

#### **4.2.1.2 Who Can Adopt A Child?**

As pointed out under the objectives of adoption in chapter two, the preliminary goal of adoption is to give a child the family best placed to respond to his or her needs. The CRC<sup>146</sup> and the African Children's Charter<sup>147</sup> leave the determination of adoption matters to the authorities of member states who should carry out adoptions in conformity with the laws and procedures of the member states concerning the child's relationship with natural and adoptive parents. It is therefore essential that the law of each member state provide guiding principles and procedural rules on which to determine the qualifications and capabilities of the prospective adoptive parents to care and provide the child with love and an environment to grow in.

Section 3 of the Adoption Act,<sup>148</sup> provides such qualifications by listing the class and age of persons who are eligible to adopt a child. It makes the adoption of children open to any person in the following categories:

- a) married persons;
- b) widowed or unmarried persons; and,

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<sup>144</sup> Article 1

<sup>145</sup> Article 2

<sup>146</sup> Article 21 para. (a)

<sup>147</sup> Article 24 para. (a)

<sup>148</sup> [Cap 28:01] Law of Botswana.

c) persons separated from their spouse by judicial decree.

Persons within these classes should meet the age requirements and be capable economically and be morally fit to be entrusted with the custody of a child.

Husband and wife are required to adopt a child jointly, even when adopting a child born of one of them. The natural parent must give consent to the adoption of the child at the same time being a joint applicant in the adoption.<sup>149</sup> In practice the courts make an adoption order expressly including the natural parent as the adoptive parent. The result being that both the step parent and the natural parent become the adoptive parent. In view of the fact that adoption severs the natural parent –child relationship then the natural parent’s relationship with the child is terminated and replaced by the adoptive parent and child relationship. A parent can however, revive the natural relationship by adopting his or her own child who had been previously adopted, after a divorce or being widowed.<sup>150</sup>

Persons in the second and third categories can adopt a child on their own and they should be at least 25 years old.<sup>151</sup> In the case of a child who is 16years or more the adoptive parent must be at least 25 years older than the child and the child must be of the same sex as the adoptive parent.<sup>152</sup> These requirements do not apply;

- a) to husband and wife jointly adopting a child born of one of them. However, the husband must be 15 years older than child of his wife and the wife 10 years older than the child of her husband;<sup>153</sup> and,
- b) to widow or widower, unmarried person or a person separated from a spouse or divorced where the child being adopted is the natural child of the adoptive parent who had been previously adopted by any other person.<sup>154</sup>

These exceptions are meant to avoid a contradiction whereby a parent would be barred from assuming parental control over his or her own child because of restrictions of age and sex.<sup>155</sup>

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<sup>149</sup> Section 3 (2) proviso (i) of the Adoption Act, 1952, [Cap 28:01] Law of Botswana.

<sup>150</sup> Section 3 (2) (i)

<sup>151</sup> Section 3 (2)

<sup>152</sup> Ibid

<sup>153</sup> Section 3 (2) (ii).

<sup>154</sup> Section 3 (2) (i)

<sup>155</sup> Quansah, N131, at 139.

These provisions protect the adopted child from sexual abuse. The Penal Code<sup>156</sup> generally prohibits sexual intercourse with any child who is below the age of 16 years, but once the child attains the age of 16 years the prohibition becomes inoperative. The protection against sexual abuse therefore continues to be achieved through the mature age of the adoptive parent after the child had attained the age of 16 years. Where the adoptive parent is 25 years older than the child it is morally hoped that he or she will be more likely to perceive the adopted child as his or her own child rather than a sexual partner.

The requirement that the adopted child be the same sex as the adoptive parent is also vital in the protection of the child against sexual abuse. Botswana<sup>157</sup> shun same sex relationship and disapprove of them as being against public morals. Such relationships are legally prohibited and punishable as unnatural offences under the Penal Code.<sup>158</sup> Thus where the child is of the same sex as the adoptive parent the moral values and the legal prohibition guaranteed that there would be no attempt by the adoptive parent to have a sexual relationship with or to abuse the child sexually.

The position of same sex partners with respect to adoption of children is not certain. Human rights law recognizes and respects the right to non-discrimination and lists grounds for such discrimination which does not include sexual orientation.<sup>159</sup> The Constitution of Botswana<sup>160</sup> also prohibits discrimination on grounds which do not include sexual orientation. In *Kanane v The State*<sup>161</sup> the appellant challenged the constitutionality of section 164 and 167 of the Penal code which prohibit sexual relationships between persons of the same sex and provide criminal sanctions for them as unnatural offences. He argued that the provisions discriminated against him on the basis of gender and violated his right to freedom of association. The court of appeal held that homosexuality according to the social norms and values of Botswana has never been accepted and the time has not yet come for the decriminalisation of

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<sup>156</sup> Section 147, Penal Code, [Cap 08:01] Law of Botswana.

<sup>157</sup> *Botswana* refers to *citizens of Botswana*.

<sup>158</sup> Punished as unnatural Acts under section 164 of the Penal Code.

<sup>159</sup> Article 2 African [Banjul] Charter on Human and Peoples Rights, 1981, O.A.U. Doc.CAB/LEG/67/3 rev. (hereinafter referred to as African Charter).

<sup>160</sup> Section 15, Constitution of Botswana.

<sup>161</sup> *Kanane v The state* [2003] 2 BLR 67 (CA)

such practices in view of the fact that the Penal Code Amendment Act<sup>162</sup> broadened the scope and ambit of offences relating to sexual acts. Therefore to the constitution, as confirmed by the courts decision in this case, Botswana laws prohibiting same sex relationships are not discriminatory.

The complicated issue is whether they should be allowed to adopt a child if the adoption is in the best interest of the child and there is no alternative suitable family for the child to be placed with? This issue has never come before a Botswana court. Even though some of the applicants for adoption could have been gay or lesbians they would not reveal it for the fear of being criminally sanctioned and stigmatised. The international and regional human rights position on the issue of homosexuals is not so certain especially in the African Region where generally homosexuality is seen as a practice that erodes moral values of the society. In South Africa the interpretation of the constitution has made a break through for same sex marriages and partnerships when the constitutional court held that the criminalisation of sodomy or unnatural sexual acts committed between consenting males constituted unfair discrimination on the basis of sexual orientation under the Constitution.<sup>163</sup>

Once the Court has satisfied itself that the applicants are eligible in terms of section 3 to adopt a child, it further has to ensure:

‘That the applicants are of good repute and fit and proper persons to be entrusted with the custody of a child and also that they are possessed of adequate means to maintain and educate the child.’<sup>164</sup>

The elements of good repute, fitness, and the possession of adequate means to maintain and educate the child are factors that determine the welfare of the child and shall be dealt with under that heading.

#### **4.2.1.2. Child Welfare Considerations**

The determination of Child welfare and his or her best interests is the court’s call. The court needs to be sensitive to the broad spectrum of needs that should be met if children are to cope effectively with the demands of life. In considering the welfare of

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<sup>162</sup> Act No. 5 of 1998.

<sup>163</sup> National Coalition For Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC).

<sup>164</sup> Section 4 (2) (b) of the Adoption of Children Act 1952.

the child, the court should look at the long term basis as a determining factor. The Adoption Act does not make any provision for this important requirement. The point was considered *In Re C (L)*<sup>165</sup> where Lord Diplock LJ, in showing the broad view that should be taken of the child welfare said:

‘one must look at the whole future of the child, not merely temporary unhappiness or grief, however acute, if it is transient; not to mere material affluence in childhood or a better chance through educational advantages to achieve affluence later.’

It is the spirit of the international and regional child rights conventions that disruption of a child’s life should not be taken lightly. If it is likely to be transient it has to be regarded in the light of the increased recognition given to the importance of continuity for the secured and stable upbringing of a child.<sup>166</sup> Legislation should therefore specifically make provision for the determination of child welfare on a long term basis, which the Adoption Act does not do.

The CRC<sup>167</sup> and the African Children’s Charter<sup>168</sup> require that in considering solutions for the care of a child, due regard must be paid to the desirability of continuity in the child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background. Since the responsibility to love, care, give moral guidance and security to the child is transferred from the natural parent and vested in the adoptive parent as a means of ensuring the child’s continuous survival and development,<sup>169</sup> the law should make provision for adequate procedural safeguards to ensure that children are given to the right parents through the adoption process.

The morality of the adoptive parent in relation to cultural practices, norms, values and belief systems must be beyond reproach. Parents act as role models for their children. Children guided by morally stable parents are frequently able to discriminate effectively between wrong and right and thus able to formulate meaningful relationships with the society and on their own to develop a positive self-esteem.<sup>170</sup> It

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<sup>165</sup> 1965 2 QB 449 at 447.

<sup>166</sup> Preambles, CRC and African Children’s Charter, paras 5.

<sup>167</sup> Article 20.

<sup>168</sup> Article 25.

<sup>169</sup> LG Balanon, *A Child’s Journey Across International Frontiers: The Asian Experience* in Doek J et al, (eds) *Children on the Move: How To Implement Their Right To Family Life*, (1996), at 123.

<sup>170</sup> A Hoffman and BK Pincus, *The Law of Custody*, 1989, p25

is therefore very vital that the court is satisfied that children are adopted by parents who adhere to such moral standards.

To make a process of change less traumatic for a child, he or she must not be subjected to pressures of a cultural or religious change as this would undermine his or her self-esteem and fragment his or her sense of identity. The change of the child's environment must be one that will look after his or her moral and spiritual welfare. The responsibility to take care of the religious upbringing of the child and the right to decide upon the form that that religious upbringing will take, is transferred by adoption to the adoptive parents. Children who are old enough to adhere to religious faith should have their original religious persuasion continued and the court must ensure that the adoption order specifies that. *In re OM [An Infant]*<sup>171</sup> the natural parent of the child objected to her adoption by a family of the Kalanga tribe who were of Christian religion. Her argument was that the child was of the Kgalagadi tribe not used to sophisticated type of life and had never been exposed to any religion. The court, considering the child's age (8years), the fact that she had not been exposed to any religion before and that her mother had neglected and abandoned her child in Mahalapye going back to Hukuntshi, held that the child was still very young to easily adjust and adapt to the new environment and that the adoptive parents were responsible for her moral and spiritual upbringing.

The character of the applicant is also an important consideration. Persons with criminal records who are not rehabilitated cannot be entrusted with the custody and upbringing of a child. The same goes for an irresponsible parent.[fn-s4] *In Exparte Moalosi In re [Application for Adoption of a Minor Child]*<sup>172</sup> application was made by an unmarried man for the adoption of his sister's son. The investigations by the Social Worker revealed that the applicant had a son born out of wedlock for who he had been ordered by the magistrate court to pay maintenance. He did not comply with the order, fell in arrears and was convicted for failing to pay maintenance. The magistrate hearing the adoption application stated that the applicant did not only have a criminal record but was not fit to be entrusted with the custody of the child since he

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<sup>171</sup> MH 585 of 2000.(unreported)

<sup>172</sup> FM 473 of 2003.(unreported)

cannot provide for his own natural child's maintenance. The adoption was refused, the courts stating it would not conduce to the welfare of the child.

The adoptive parents are also required to be possessed of adequate means to maintain and educate the child.<sup>173</sup> An essential element in the development of a child and a factor that plays a major role in his or her ability to cope with the realities of life is the knowledge that he or she has a stable and secure environment to grow up in. Adoptive parents should therefore be able to provide their children with all the necessities of life and a positive model to go by, based on the ability to care for themselves, to value themselves, as people in their own right, to achieve in life and to cope with realities of life in a positive and constructive manner.<sup>174</sup> The court has a duty to ensure that the child is adopted by parents who will meet his or her basic needs.

These requirements are intended to ensure that persons who adopt children are of good character, with no criminal antecedents of any kind including child abuse and exploitation in all its forms. The provisions of sections 3 and 4 of the Adoption Act meet the CRC's and the African Children's Charter's objectives of ensuring that the child grows up in a family environment in an atmosphere of love, care and happiness and protected from all forms of exploitation and abuse.<sup>175</sup>

#### **4.2.1.3 Best Interest of the Child**

CRC<sup>176</sup> and the African Children's Charter<sup>177</sup> require the best interest of the child to be a primary consideration in all actions concerning the child. It is emphasized in article 21 of the CRC and article 24 of the African Children's Charter as a paramount consideration in the system of adoption. Even though not spelled out in clear terms in the Adoption Act, the best interest principle underlies the decisions of the courts and the social welfare department in adoption matters. The court before granting or refusing an adoption order must consider whether the adoption will serve the interests and conduce to the welfare of the child.<sup>178</sup> The best interest has been interpreted in its widest sense to include emotional needs and ties of affection also have to be regarded

<sup>173</sup> Section 4 (2) (b) of the Adoption of Children Act 1952.

<sup>174</sup> Hoffman and Pincus, N158, at 24.

<sup>175</sup> Preambles and Article 34 of CRC, and Article 27 of the African Children's Charter.

<sup>176</sup> Article 3 (1).

<sup>177</sup> Article 4 (1)

<sup>178</sup> Section 4 (2) (c ), Adoption of Children Act.

and in the case of older children their wishes in the matter cannot be ignored.<sup>179</sup> In *Attorney General v Harrison Thipe and others*<sup>180</sup> the court on the best interest of the child held that the benefits the child obtain from the adoption outweighs the fraudulent means by which the adoption order was obtained. Further that the court should uphold the best interest of the child in an adoption case even if the procedures followed to obtain the order violates the fundamental national and international legislative provisions on adoption.<sup>181</sup>

In an effort to implement the CRC and improve the Children's Act, the legislature enacted the Child in Need of Care Regulations<sup>182</sup>, in which is identified a number of salient elements representing the best interests of the child, which courts should consider in the placement of children in places of safety, foster care and adoption. The regulations provide that in determining the best interests of the child the court should have regard to the wishes and feelings of the child considered in the light of the child's age and understanding; physical, educational and emotional needs of the child, the likely effect of the change in his or her environment; the harm the child has already suffered and the harm likely to be caused by change of environment.<sup>183</sup>

The provision of a loving environment for a child is a variable that need to be met if the developmental needs of the child are to be accommodated. A loving environment should be one that guarantees security and emotional needs of the child. Thus the court must primarily be concerned with the likely effect of the change in the child's environment and how the child is doing in the new adoptive family environment. The child should feel welcome, wanted and loved.<sup>184</sup> The interests of the natural and adoptive parents are subservient to those of the child.<sup>185</sup> In assessing the best interests of the child, the court should further consider factors like the child's attachment to the

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<sup>179</sup> Child in Need of Care Regulations, Statutory Instrument No. 8 of 2005.

<sup>180</sup> [1972] 2 BLR 6 (HC). (The natural parents of the child had applied for citizenship for the child which application was not approved. Facing a declaration of statelessness, they agreed with the adoptive parents to adopt the child so that he can acquire citizenship of Botswana through adoption).

<sup>181</sup> Ibid at 14. See also *Van Deijl v Van Deijl* 1966 4 SA 260 (R) at 261.

<sup>182</sup> Child in Need of Care Regulations Statutory Instrument No. 8 of 2005.

<sup>183</sup> Regulation 7.

<sup>184</sup> Preambles, African Children's Charter and CRC.

<sup>185</sup> R Mays, *Child and Family Law : Cases and Materials*, (2001), at 78.

prospective adopters; lack of suitable alternatives making it more acceptable for the child to be adopted by the applicants.<sup>186</sup>

Since the primary aim of adoption is to provide a child with, a normal family background which in most cases he or she would otherwise lack and it is usually thought that that can be achieved only if there is a complete break of links with the natural parent, adoption should therefore be allowed only when it is in the best interests of the child or would conduce to his or her welfare.<sup>187</sup> The Adoption Act makes the best interest an underlying principle and the courts and other decision makers are required to make the best interest of the child a paramount consideration in all actions concerning children.<sup>188</sup>

#### **4.2.1.4 Consent To Adoption**

The adoption of the child must be with the consent of all persons who are required to give such consent under the Act.<sup>189</sup> The requirement is that the consent must be in writing by, both parents of the child or one of them if one is deceased or have deserted the child, in the case of a child born in wedlock, the mother of a child born out of wedlock, a guardian appointed specifically for the purposes of the adoption of deserted children, or orphaned children or whose parents are not capable of giving consent by reason of mental disorder or defect. There are no provisions for the parties giving consent to be counselled and advised so that they can give free informed consent which works against spirit of human rights laws.<sup>190</sup>

The Adoption Act incorporates the right of the child to have their views taken into account in adoption cases. Though not detailing out how such views should be taken account of, the Act makes provision that where the child is 10 years old or more, he or she must consent to the adoption in writing.<sup>191</sup> Consent is required to be in writing, signed and attested to by a District Commissioner if given within Botswana.<sup>192</sup> There

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<sup>186</sup> Ibid.

<sup>187</sup> Section 4 (2) ( c ), Adoption of Children Act; Articles 3 and 4 CRC and the African Children's Charter respectively.

<sup>188</sup> Article 3, CRC and Article 4, African Children's Charter.

<sup>189</sup> Section 4 (2) (d) of the Adoption of children Act 1952.

<sup>190</sup> Article 21 CRC and Article 24 African Children's Charter.

<sup>191</sup> Section 4 (2) (e) Ibid.

<sup>192</sup> Section 4 (3) Ibid.

is no certainty that a child of ten years can swear to an affidavit. The courts, to confirm his or her ability to consent inquire into such matter by calling evidence and examining the child by way of admonition.<sup>193</sup> The CRC<sup>194</sup> and African Children's charter<sup>195</sup> require that children's views be heard according to their ability to make such views or opinions known. The provision of section 4 implements this goal except that it specifies the age at which a child may be consulted which may result in children capable of giving their own views at an age earlier than 10 years being left out.

There is potential danger of child sale or trafficking in the issue of consent, since consent to adoption may be induced by fraud or undue influence in the form of payment. The legislature having realised such a possibility made provision prohibiting any payment or giving of consideration for adoption.

#### **4.2.2 Prohibition Of Payments In Connection With Adoption**

Trading in children is unlawful.<sup>196</sup> In order to prevent the adoption of children for purposes of financial gain it is necessary to prohibit the exchange of money or other valuable consideration in relation to an adoption. The Adoption Act,<sup>197</sup> recognises the potential dangers posed to adopted children.

and makes it unlawful to give any person or receive any payment or reward or for and in consideration of:

- a) the adoption by that person of a child;
- b) the grant by that person of any agreement or consent required in connection with the adoption of a child;
- c) the transfer by that person of the actual custody of a child with a view to her adoption; and,

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<sup>193</sup> Section 4 (6) Ibid.

<sup>194</sup> Article 12.

<sup>195</sup> Article 7.

<sup>196</sup> Article 35, CRC.

<sup>197</sup> Section 12 provides "If any person who has obtained or applied for an order of adoption of a child gives or undertakes to give or, except with the consent of the court which made the order or to which application for the order is made, receives or contracts to receive any consideration in respect of the adoption, or if any parent or guardian of a child receives or contracts to receive or, except with such consent as aforesaid, gives or undertakes to give any consideration in respect of the adoption of that child, he shall be guilty of an offence."

d) the making by that person of any arrangements for the adoption of a child.<sup>198</sup>

Any of these acts amount to a criminal offence which is committed by both the person making or offering the payment and the intended recipient. Adoption must serve the best interest of the child. Consequently the court is forbidden from making an adoption order if the prohibition against payment has been infringed. The court may, where the applicant has infringed the prohibition, remove the child from the custody of such person and put him or her in a place of safety till he or she can be placed for adoption legally.<sup>199</sup>

The prohibition does not apply to any payment by a parent or guardian or prospective adoptive parent made in respect of expenses reasonably incurred by the person in connection with adoption or to any payment or reward authorised by the court, such as payments made by the adoptive parent in respect of legal or medical expenses incurred by them in connection with the application for adoption and court fees.

As a criminal offence the prohibition does not have extra territorial effect. All payments made outside the country in respect of an adoption to take place in Botswana cannot be punished under the Act. Such a situation would arise in cases of inter-country adoptions which are also the kind of adoptions in which trafficking is rife. Botswana, being a non contracting state may not be able to seek assistance from Central Authorities in other countries established under the Hague Adoption Convention. A child adopted in accordance with the requirements of the Adoption Act is for all intents and purposes regarded as the legitimate child of the adoptive parents.

#### **4.2.3 Effect Of Adoption**

An adoption order irrevocably and completely terminates the rights and responsibilities of the natural parents and creates in its place an analogous relationship between the child and the adoptive parents. Adoption severs all legal ties a child had with the natural parent. The right of the child to inherit as an intestate heir from his or her natural parent is however not terminated by an adoption order.<sup>200</sup> This financial or

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<sup>198</sup> Ibid.

<sup>199</sup> Reg. 7, Child in Need of Care Regulations, Statutory Instrument No. 8 of 2005.

<sup>200</sup> Section 6 (3) of the Adoption Act, 1952. [Cap 28:01] Laws of Botswana.

proprietary benefit remains intact because the blood ties upon which intestate succession is based are not terminated by the adoption of the child<sup>201</sup>

An adoption order confers the surname of the adoptive parents on the adopted child and for all intents and purposes the child is deemed in law to be the legitimate child of the adoptive parents.<sup>202</sup> However, the adopted child does not by virtue of the adoption, become entitled to any property devolving on any child of his or her adoptive parents by virtue of any instrument executed prior to the order of adoption whether the instrument takes effect *inter vivos* or *mortis causa*, unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child.<sup>203</sup> Further the adopted child cannot inherit as an intestate heir from any relatives of his or her adoptive parents.<sup>204</sup> This provision though not quite safeguarding the rights of the adopted child tries not to impose upon the will of the testator the heirs he or she should include in his or her will. The part excluding the child inheriting from the relatives of the adoptive parents as an intestate heir is also understandable as intestate heirs are determined by blood relationship under Tswana Customary law.<sup>205</sup>

The Act does not prohibit or permit marriage between the adopted child and other persons including adoptive parents and their relatives, which would not have been prohibited or permitted if the adoption had not taken place.<sup>206</sup> The Penal code prohibits sexual relations between persons related within the prohibited degrees.<sup>207</sup> If a child is adopted within the extended family then marriage relationships will be prohibited, not by reason of adoption but by the blood relationship between the adoptive parent and the child. Where the adoptive parents are not related to the adopted child, then marriage between them is not prohibited because there is no blood relationship between them. The only protection the law affords the child in this case is through the proviso which states that: 'no marriage shall be contracted between an adopted person who is under 21 years and his adoptive parent. This protection is

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<sup>201</sup> Section 3, Succession (Rights of Surviving Spouse and Family Inheritance Provisions) Act, [Cap 31:01] Laws of Botswana.

<sup>202</sup> Section 6 (1) of the Adoption Act, 1952, [Cap 28:01] Laws of Botswana.

<sup>203</sup> Section 6 (2) Adoption Act.

<sup>204</sup> *Ibid*, Section 6 (2) (ii).

<sup>205</sup> Section 3 of the Succession (Rights of the Surviving Spouse and Inheritance Family Provisions) Act, 1970, [Cap 31:02], and Section 7, Customary Law Act 1969 [Cap 16:01] Laws of Botswana.

<sup>206</sup> Section 14 Adoption Act.

<sup>207</sup> Section 168, Penal Code. ( Punished as a crime of incest)

insufficient in that it only prohibits the adoptive parent from marrying the adopted child before the child is 21 years and leaves out the rest of the family members of the adoptive parents free to indulge in all kinds of sexual relations with the adopted child including marriage. The non application of the prohibition to the relatives of the adoptive parents leaves the adopted child vulnerable to sexual abuse by them.

Adoption does not prohibit under criminal sanction any carnal intercourse between the adopted child and any other person which would not have been so prohibited if the adoption had not taken place.<sup>208</sup> It has been explained earlier on in this chapter that the Penal Code prohibits sexual intercourse with any child who is under the age of 16 years, and that after the child has attained the age of 16 years it is no longer a criminal offence to have consensual intercourse with him or her. The provision implicitly means that the adoptive parents or any of their relatives can have sexual intercourse with the adopted child after he or she attains the age of 16, since they are not blood relatives of the child. It is only where the adoptive parents are relatives of the adopted child that the prohibition on sexual intercourse continues to apply even after adoption by virtue of the prohibited degrees of consanguinity. Clearly these provisions fail to protect the adopted child from sexual abuse and exploitation, and do not meet the objectives of the CRC<sup>209</sup> and the African Children's Charter.<sup>210</sup>

#### **4.2.4 Access And Visitation Rights**

The court is given discretion to order access and visitation rights in favour of the natural parent or guardian of the adopted child, for a period not exceeding two years as from the date of the adoption. The conditions and the time and place for the exercise of these rights are fixed by the court and the direction for access or visitation rights may be rescinded or varied on the application of parent or guardian or any other person affected by the direction of the court.<sup>211</sup>

Adoption is intended to provide a permanent family environment for a child. Upon the issuance of the adoption order the natural parent of the child relinquishes his or her parenthood which is then vested in the adoptive parent. A direction or order for access

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<sup>208</sup> Section 14 (b) Adoption of Children Act.

<sup>209</sup> Article 34.

<sup>210</sup> Article 27.

<sup>211</sup> Section 7 Adoption of Children Act.

or visitation rights for a period of two years after the order for adoption negates the object of the adoption. It is important that the child, after adoption, be given a transition period during which bonding between the adopted child and the adoptive parents should be facilitated. Allowing access for two years cannot be in the best interest of the child. While the CRC<sup>212</sup> and African Children's Charter<sup>213</sup> require contact to be facilitated in situations where a child is separated from his or her parents, they do not require the same in adoption cases. Parents can however to agree on contact and visitation.

The provision is more suitable for custody and guardianship orders where the natural parents retain their rights in the child. What is necessary after the adoption order is an order for the monitoring of progress the child is making in the custody of the adoptive parents, by the social welfare department, which the Act fails to provision for.

#### **4.2.5 Rescission Or Revocation Of Adoption Order**

Adoption is intended to be a permanent placement of a child with the adoptive family. Any provision for its revocation may be viewed as a counteraction to the objective of adoption intended by international and regional human rights instruments. The Adoption of children Act does not allow for rescission or revocation of an adoption order except on the grounds set out in section 8.<sup>214</sup> A parent of a child or a guardian appointed under section 5 or the adoptive parent or the Minister may apply to the court by which the order was made for the rescission of such order on any of the following grounds:

- a) The parent or guardian, that he or she did not consent to the adoption and that the order should not have been granted without such consent;<sup>215</sup>
- b) The adoptive parent, that his or her adoption of the child was induced by fraud, misrepresentation or Justus error, or that the child is a mentally disordered or defective person, and that the mental disorder or defect existed at the time of the making of the order;<sup>216</sup> and by,

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<sup>212</sup> Article 9.

<sup>213</sup> Article 19 para.2.

<sup>214</sup> Adoption of Children Act.

<sup>215</sup> ibid Section 8 (1) (a)

<sup>216</sup> Section 8 (1) (b)

- c) The Minister, that for reasons set out in the application the adoption is to the detriment of the child.<sup>217</sup>

There is a time limit within which the application for rescission on the above grounds is to be made. For the first ground the application must within six months from the date the parent became aware of the fact that an order for the adoption of his or her child had been made and not later than five years from the date the order was made.<sup>218</sup> In the case of an application by the adoptive parent it must be made within six months from the date the applicant became aware of the ground for rescission, and for an application made under the third ground above it must be made within a period of two years as from the date upon which an order of adoption was made.<sup>219</sup> The Act also requires that due notice of the application be given to the affected parties.<sup>220</sup>

Taking the time limits given within which the application to rescind the order may be made, there is no doubt that for the first ground the period (five years) is too long. The child would have bonded and settled with the adoptive family such that the rescission of the order may amount to another uprooting of the child from his newly established environment. If because of the absence or the fraudulently obtained consent the child has been abused, sold or trafficked, damage would have been long done and the child would need to be rehabilitated. On the other had the provision is a good one as it ensures that consent to adoption is given freely without any undue influences on the natural parent.

In the event the adoption is obtained by fraud misrepresentation or non disclosure that the child was mentally defective the application for rescission must be made within two years from the time the adoptive parent became aware of the defect. Non disclosure of material facts either affecting the child or the natural parents makes the assessment of the adoptive parent's ability to take care of the child unsatisfactory and less connected to the child's special needs. Adoptive parents have a choice of adopting a child suiting their own needs. If that is not met the adoption may not be in the best interests of the child. As for the rescission by the Minister there is no

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<sup>217</sup> Section 8 (1) ( c)

<sup>218</sup> Section 8 (1) (i)

<sup>219</sup> Section 8 (1) (ii).

<sup>220</sup> Ibid, proviso to section.

guidance in the Act as to what factors to consider in determining that the adoption is detrimental to the child. All is left to the court to decide.

The court may confirm or rescind the order. The court cannot however rescind an adoption order on the application of a natural parent of the adopted child if it is satisfied that the applicant is unfit to have the custody of the child and that it is in the interest of the child to have the order confirmed.<sup>221</sup> In the event the order is rescinded the child shall for all intents and purposes be restored to the position in which it would have been had the order of adoption not been made, but will not affect anything lawfully done while the order of adoption was in force.<sup>222</sup>

#### **4.3 ADMINISTRATIVE INSTITUTIONS**

The Adoption Act clearly indicates that the adoption of children is a judicial process. The Act vests the jurisdiction to hear adoption matters in the magistrate courts.<sup>223</sup> It is also clear that competent authorities envisaged by the CRC<sup>224</sup> and the African Children's Charter<sup>225</sup> include the courts as well as adoption service agencies such as the Department of Social Welfare. The courts are the ones holding the key to the adopted child's future and their decisions determine whether it will be a future of a normal safe childhood or a harmful one.

The absence or insufficiency of courts and administrative services to ensure the proper implementation of the enacted legislation significantly increases the chances of a child being adopted by the wrong parents. The Act requires the court to satisfy itself as to the qualifications of the applicants and whether they are fit and proper to be entrusted with the custody of a child.<sup>226</sup> In discharging this duty the court is given discretion to take evidence on oath either by affidavit or viva voce concerning any matter which it is required to satisfy itself or any matter which might appear relevant.<sup>227</sup> The courts rely heavily on the investigations of Social Workers, their

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<sup>221</sup> Section 8 (5) Adoption Act.

<sup>222</sup> Ibid, Section 8 (6).

<sup>223</sup> Section 4 (1).

<sup>224</sup> Article 21.

<sup>225</sup> Article 24.

<sup>226</sup> Section 4 op cit note.

<sup>227</sup> Section 4 (6).

reports and their recommendations. *Moalosi's* case demonstrates the court reliance on social workers in investigating adoptive parents. It was through such investigation that the court got information on his criminal record and irresponsibility.

The Social welfare Department is however unable to carry out this task efficiently for the reason that they lack facilities and not clearly mandated to place children apart from those under their care for adoption. There is no central authority established to deal with adoptions nationally and internationally. A combination of a judiciary with no special training on child rights issues and an administrative institution not properly established to deal with the adoption of children leaves the children who are at the centre of it unprotected. The Adoption Act should be explicit in its provisions for the establishment of a central authority and expressly provide its functions and duties concerning the adoption of children.

#### **4.4 CONCLUSION**

The Adoption Act provides sufficient procedures for national adoption of children. At least at the time it was enacted in 1952 it was suitable for the circumstances prevailing then, which is not exactly the case today. As we have seen, after the introduction of the Act, Botswana got its independence and there were social and political changes experienced which changed the context of the Tswana society. The recognition of human rights for children in Botswana also changed the way the adoption of children was perceived by the indigenous Tswana society. Though most of its provisions are still very relevant and effective some of the provisions are not protective of the adopted children's rights. It needs to be reviewed and brought fully into conformity with the international human rights standards through the incorporation of CRC and African Children's Charter into domestic law. The Act is more lacking in its provisions on inter-country adoptions. The next chapter will demonstrate these shortfalls and analyse them in the light of the international requirements and procedures on inter-country adoption. It will also show how the Act can be improved in its provisions on inter-country adoptions.

## CHAPTER FIVE

### INTERCOUNTRY ADOPTION<sup>228</sup>

#### 5.1 INTRODUCTION

The discussion on national adoption in the preceding chapter has shown that the Adoption Act even without substantive development since 1952, a few of its provisions effectively protects the rights of the adopted child and satisfies the international child rights standards. It makes substantive effective rules of procedure for adoption which facilitates the protection of adopted children within the country.

This chapter focuses on the provisions of the Adoption Act dealing with inter-country adoptions, which provisions shall be analysed with a view to determining whether they provide sufficiently for inter-country adoption. Despite the non ratification of the Hague Adoption Convention by Botswana, the provisions of the convention will be examined to shown how they can be used in bringing the laws and procedures of Botswana on inter-country adoption to the international and regional human rights standards. The discussion will cover a brief analysis of the CRC and the African Children's Charter on inter-country adoption. The chapter will also engage in a critical analysis of the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption 1993,(the Hague Adoption Convention) and create a hypothetical context in which the Adoption Act could apply since Botswana is not party to the Convention.

#### 5.2 CRC AND AFRICAN CHILDREN'S CHARTER

The CRC and the African Children's Charter guarantees the protection of the child's right to a family environment in which to grow.<sup>229</sup> This guarantee is given effect by

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<sup>228</sup> Inter-country Adoption is the adoption of children from one country by the non nationals of the child's country of origin and the removal of the adopted child from his or her country of origin to the country of the adoptive parent for permanent settlement in the latter's country. It involves a change in the child's habitual residence and sometimes a change in the cultural and social background of the child. It is an international trans-cultural and trans-racial adoption of children.

<sup>229</sup> Preamble.

the Hague Adoption Convention.<sup>230</sup> They lay out their aspirational goals on inter-country adoption.<sup>231</sup> The CRC and the African Children's Charter signify the globalization of child law in their general and open-ended provisions, which are less likely to have a direct impact on the day-to-day cross border issues relating to the adoption of children.<sup>232</sup> It is for the member states to ensure the implementation of the CRC's and African Children's Charter's aspirational goals on inter-country adoptions through the enactment of legislation that achieve these goals and through bilateral and multilateral agreements. These treaties lay down principles requiring inter-country adoption to be authorised by competent authorities and to be an alternative means of child care if the child cannot be suitably cared for in the country of origin.<sup>233</sup> The member states are also required to ensure that children placed for inter-country adoption enjoy the same safeguards and standards as in national adoption<sup>234</sup> and that placement of children does not amount to financial gain.<sup>235</sup> The CRC<sup>236</sup> and the African Children's charter<sup>237</sup> are also committed to preventing child abduction, sale or trafficking.

Botswana, through its Adoption Act makes provision, although not so clear for inter-country adoptions. These provisions are expected to regulate inter-country adoption in a manner equivalent to the standards set by the CRC and the African Children's Charter for the protection and promotion of the rights of the child. The Hague Adoption Convention gives the CRC goals an operational focus. These three treaties require inter-country adoption to be allowed only as a last resort measure for children for whom no suitable alternative care is available within the country for those countries that allow adoption.<sup>238</sup> Botswana allows the adoption of children both nationally and inter-country.

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<sup>230</sup> Preamble

<sup>231</sup> Article 21, CRC.

<sup>232</sup> Silberman N46.

<sup>233</sup> Article 21 para (b), CRC and Article 24 para (b), African Children's Charter.

<sup>234</sup> Article 21 para © CRC and Article 24 para ©, African Children's Charter

<sup>235</sup> Article 21 para (d) CRC and Article 24 para (d) African Children's Charter.

<sup>236</sup> Article 35.

<sup>237</sup> Article 29.

<sup>238</sup> Article 21 (b) of the CRC, and Article 24 (b) of the African Children's Charter.

### 5.3 THE HAGUE ADOPTION CONVENTION

The Hague Adoption Convention was adopted by the Hague Conference on Private International Law in 1993. It entered into force on 1 May 1995, having been ratified by three states and signed by 14 states.<sup>239</sup> It has so far been ratified by about 75 states.<sup>240</sup> The Hague Convention on Adoption has an operational focus. It provides specific rules and institutes particular mechanisms for achieving its objectives and the aspirational goals of the CRC. It is a Convention designed to put into action the principles regarding inter-country adoption which are contained in the CRC.<sup>241</sup> The Hague Adoption Convention aims:

- a) to establish safeguards to ensure that inter-country adoptions take place in the best interest of the child and with respect for his or her fundamental rights as recognised in international law;<sup>242</sup>
- b) to establish a system of cooperation among contracting states to ensure that those safeguards are respected and thereby prevent abduction, the sale of, or trafficking in children;<sup>243</sup> and,
- c) to ensure the recognition in contracting states of adoptions made in accordance with the convention.<sup>244</sup>

The Hague Adoption Convention provides proper procedures and seeks to shape the practice of inter-country adoption. The cloak for trafficking being inter-country adoption, the establishment of mechanisms to regulate inter-country adoptions through international legislation and cooperation of contracting states controls malpractices leading to sale or trafficking of children.<sup>245</sup> The adoption of Hague Adoption Convention was intended to solve these problems posed by inter-country adoptions.

The Hague Adoption Convention recalls that the child for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,<sup>246</sup> and emphasize the best interest

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<sup>239</sup> Ratified by Mexico, Romania and Sri Lanka; and signed by Costa Rica, Brazil, Colombia, Uruguay, Israel, the Netherlands, the United Kingdom, the United States American, Canada, Finland, Burkina Faso, Ecuador, Peru and Cyprus.

<sup>240</sup> UNICEF Innocent Digest : Intercountry Adoption, 5. Available on <http://www.unicef.org/media>, p5. assessed on 20 January 2008.

<sup>241</sup> Articles 20 and 21, which set the basic framework of the Hague Adoption Convention.

<sup>242</sup> Article 1 para. (a).

<sup>243</sup> Article 1 para. (b).

<sup>244</sup> Article 1 para. ©.

<sup>245</sup> G Parra-Anguren, History Philosophy and General Structure of the Hague Adoption Convention in Doek J et al (eds) *Children on the Move: How To Implement Their Right to Family Life*, (1996), 63.

<sup>246</sup> Preamble.

principle as a paramount consideration and that the views of the child must also be considered according to their age and maturity.<sup>247</sup> The Hague Adoption Convention addresses important aspects relating to children, such as exposing and eliminating abuses in inter-country adoptions by establishing certain minimum safeguards and promoting cooperation and communication between states. This regulates inter-country adoptions by deterring abductions and sale or trafficking.<sup>248</sup>

The Hague Adoption Convention sets up a mechanism for international cooperation to give practical effect to the provisions of the CRC relating to inter-country adoptions.<sup>249</sup> It provides for responsibilities to be shared between the states of origin and the receiving states while respecting organisational diversities and national legislation.<sup>250</sup> It sees adoption as a social and legal measure for the protection of the child rather than an individual affair to be left exclusively to child's birth parents and prospective adopters. Consequently procedures for inter-country adoption should ultimately be the responsibility of the states involved, which must guarantee that adoption corresponds to the best interests of the child and respects his or her fundamental rights.<sup>251</sup>

The convention turns the principle of subsidiarity into a rule recognising that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin.<sup>252</sup> It reflects the internationally recommended policy concerning different child care measures which while recognising that each child is special and that decisions on the child's life must be based on a full respect for his or her uniqueness sets out a hierarchy of options, which generally safeguard the long-term best interests of the child such as preferring placement of the child with the birth family, foster family or adoptive family to institutional placement, and inter-country adoptions.<sup>253</sup>

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<sup>247</sup> Hague Adoption Convention, preambular para. 4.

<sup>248</sup> Silberman, N46.

<sup>249</sup> Hague Adoption Convention, Article 1 (b).

<sup>250</sup> Ibid, Articles 4 and 5.

<sup>251</sup> UNICEF *Innocent Digest*, N227.

<sup>252</sup> Preamble.

<sup>253</sup> UNICEF *Innocent Digest*, N227.

The Hague Adoption Convention expressly requires the applications for inter-country adoption to be made through Central Authorities established by Contracting States.<sup>254</sup> This controls and minimises the risks encountered with private inter-country adoptions.<sup>255</sup> The Central Authorities are the main bodies through which states perform their responsibilities under the convention. Public authorities may also be set up to carry some of the duties under the convention.

By allocating responsibilities between sending state<sup>256</sup> and the receiving states<sup>257</sup> and instituting formal mechanism for cooperation,<sup>258</sup> the Hague Adoption Convention seeks to avoid duplication of processes and conflicts, and also to protect both the adopted child and the adoptive parents from being subjects of illegal adoptions in their different countries. Consent to adoption is an important factor.

Consent to adoption has to be obtained after due counselling and information as to the nature and effect of such consent and concerning the termination of the legal relationship between the child and the family of origin, and particularly that the child is leaving the country to settle with a new family in another country.<sup>259</sup>

The convention further makes provision for the recognition of foreign adoption orders by operation of law.<sup>260</sup> This basically entails the recognition of the legal parent-child relationship created by adoption between the child and his or her adoptive parents, parental responsibility of the adoptive parent for the child, the termination of pre-existing legal relationship between the child and the natural parents, depending on whether the adoption has such effect in the contracting state where it was made, and gives the child the right to enjoy all rights and benefits arising from the adoption.<sup>261</sup>

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<sup>254</sup> Article 6

<sup>255</sup> Private adoption refers to the independent adoption of children in which the natural or birth parent directly places children with adoptive parents, sometimes with the assistance of facilitators or attorneys, that is, not through state authorities designated to place children for adoption.

<sup>256</sup> Hague Adoption Convention, Article 4.

<sup>257</sup> Article 5.

<sup>258</sup> Article 7.

<sup>259</sup> Article 4

<sup>260</sup> Article 23.

<sup>261</sup> Article 26.

#### 5.4 ADOPTION ACT

The tragic side of the inter-country adoption crisis is the failure of any system to handle adoptions in a way that facilitates the safe placement of needy children. Inter-country adoption offers the only viable opportunity for many of these children.<sup>262</sup> The Adoption Act implicitly provides for inter-country adoption.<sup>263</sup> There are no express provisions and rules of procedure for inter-country adoption. Section 10 of the Act<sup>264</sup> has been interpreted by the courts as a provision intended to control and regulate adoption of children by foreigners who are to be removed from the country to settle in another country. Inter-country adoption is further inferred from the provisions on the form consent to adoption should take.<sup>265</sup> The Act envisages consent being given or made outside the country, which could be by a natural parent of a child adopted by a Botswana citizen from another country. This is interpreted as applying to adoption by Botswana nationals of children from other countries.

Botswana has no Central Authority to provide adoption services and there is in reality no placement of children for adoption, whether inter-country or national. The Act does not provide for the establishment of an adoption service agency either. As a result most of the inter-country adoptions are private adoptions where the application is brought directly to court by the adoptive parents or on representation by their attorneys.<sup>266</sup> Without formal mechanisms on cooperation in place within Botswana legal system, there is a potential of inter-country adoption being plagued by malpractices leading to trafficking of children.

There being no clear provisions in the Act as to the procedures and requirements for inter-country adoption, the courts, have applied procedures on national adoptions to applications for inter-country adoptions in determining the eligibility of applicants to

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<sup>262</sup> UNICEF Innocent Digest, N227.

<sup>263</sup> Section 10.

<sup>264</sup> Which provides 'Any person who, without the consent in writing of the Minister removes an adopted child from Botswana before the expiration of 12 months as from the date of the order for its adoption, shall be guilty of an offence.'

<sup>265</sup> Section 4 (3), Adoption of Children Act [Cap 28:01] providing that, 'The consent mentioned in subsection 2 (d) and (e) shall be in writing and shall if given within Botswana be signed by the person or persons giving the consent in the presence of a District Commissioner, who shall attest to the consent and if given outside Botswana shall be signed and attested in the manner prescribed.

<sup>266</sup> Examples: in *Nhidza and Another v Monde Pasiya* MFT 10 of 2007, (unreported) the parties were not represented by lawyers and in *Crawford* MFT 28 of 2006, (unreported) the parties application was brought through their legal representative; both cases there was no placement by the Social welfare Department it was private placement.

adopt a child, consent and other requirements.<sup>267</sup> There is, however a disparity in the interpretation of the Act on inter-country adoption. In *Ex parte Dube, In re [Adoption of a Minor]*<sup>268</sup> A Zimbabwean national, a husband whose wife was a national of Botswana, jointly applied for the adoption of the children of the wife who were to be removed to Zimbabwe after the adoption as the husband's employment contract in Botswana had been terminated. The magistrate refused to hear the application holding that the Act did not provide for inter-country adoptions. However, the majority view is in favour of the interpretation that the Act provides for inter-country adoptions.

The uncertainty among the courts as to whether inter-country adoption is part of the Adoption Act stems from the absence of rules of procedure and express provision on inter-country adoption in the Act. Without guiding legislation, courts only have to do what they believe justice demands and what they found from the facts to be in the best interest of the child.

In some cases, owing to the absence of specific rules of procedure, there has been confusion as to whether the case was treated by the court as an inter-country or simply national adoption and consideration of appropriate rules to be applied to the case. Recently the magistrate court in *Nhidza and Nhidza v Monde Pasiya*<sup>269</sup> ordered the adoption of a child by a married couple. The husband is a Zimbabwean national residing in Botswana while the wife who is South African works and resides in South Africa. The child adopted was the biological child of wife's deceased sister and is also South African. It is evident from facts that all the parties to this application were non nationals of Botswana including the child who was being adopted. The case was classified as inter-country because the parties were nationals of other countries and the court assumed jurisdiction because adoptive father was resident in Botswana, in particular in Francistown. This is not in accordance with the Adoption Act which gives jurisdiction over adoption cases to courts of the district in which the child resides.<sup>270</sup> The child, who was over the 16 years old, was on holiday with his aunt, the adoptive mother in Botswana. There is no explanation why the adoption was not done in South Africa, the child's country of habitual residence, which according to the

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<sup>267</sup> Qualifications and requirements as listed in Sections 3 and 4 of the Adoption of Children Act.

<sup>268</sup> FM 337 of 2001.(unreported)

<sup>269</sup> *Nhidza and Nhidza v Monde Pasiya* , MFT 10 of 2007.(unreported)

<sup>270</sup> Section Adoption Act.

Hague Adoption Convention<sup>271</sup> is the right forum, as the child's country of origin or Zimbabwe, the adoptive parents country of origin. The absence of legislation defining inter-country adoption and laying out procedural requirements and the considerations the courts should take into account in determining the eligibility of the parties to adopt, and the right forums, makes inter-country adoption a daunting task for the courts which produces bad orders.

Most of the inter-country adoptions which have come before the courts are private adoptions by natural parents of the child adopting jointly with a foreign spouse. In such cases due to the absence of a central authority to assist in the investigations in the foreign adoptive parent country of origin the social workers depend on the natural parents' knowledge of the capabilities of her or his spouse. The courts in such case have also taken comfort in the presence of the natural parent of the child to accompany the child to his or her new home in the foreign state even though not so safe, to easily grant the adoptions.<sup>272</sup> These private inter-country adoptions are an affront for illegal acts and malpractices in inter-country adoption.

The Hague Adoption Convention though not signed nor ratified by Botswana but can still be used to influence and shape the Adoption Act provisions on inter-country adoptions. The provisions of the Hague Adoption Convention which can be used to improve the provisions of the Adoption Act and shape into conformity with international human rights standards on inter-country adoptions shall be discussed below in the areas of legislative enactments, recognition of foreign adoption orders, central authorities, courts and immigration laws.

#### **5.4.1 Legislation**

A sound legislative base is fundamental to prevent abuses of inter-country adoptions. The Adoption Act as the legislative base for inter-country adoptions in Botswana should contain provisions which comprehensively safeguard the fundamental rights of the child and ensure their protection from abuses. As alluded to earlier in this chapter, Botswana legislation on inter-country adoption make inadequate provision on the subject. This inadequate legislative protection creates a climate favourable to child

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<sup>271</sup> Article 14.

<sup>272</sup> *Ex parte Crawford, In re [Application for Adoption of a Minor]*, MFT 28 of 2006. (unreported)

trafficking and abuse. The Adoption Act regulates the adoption of children in Botswana. It lays out the qualifications and requirements for adoption conforming to those required by the Hague Adoption Convention to be met.<sup>273</sup> Magistrates' courts are the courts vested with jurisdiction to administer the Adoption Act.<sup>274</sup> And there are no provisions for automatic review of cases heard in the magistrate courts by the High Court. Therefore there is little jurisprudence from the High Court on inter-country adoptions. The result is non development of the Adoption Act through judicial activism.

The CRC<sup>275</sup> and the African Children's Charter<sup>276</sup> recognise a child's right to a name and to be registered immediately after birth. Children who do not legally exist are more vulnerable to malpractices and illegal acts in inter-country adoptions.<sup>277</sup> Legislation must therefore effectively provide for the compulsory registration of births. This helps in protecting children from abductions and illegal adoptions. The Hague Adoption Convention requires the compilation and preservation of information on the adoption of a child and the allowance of access to such information by the child and other authorised bodies.<sup>278</sup> This helps in exposing and eliminating illegal inter-country adoptions. The Births and Deaths Registration Act<sup>279</sup> provides for the compulsory registration of births. After the adoption of a child, national or inter-country, the Births register must be altered to reflect the change in the child's surname and the family particulars to reflect the particulars of the adoptive family and the fact that the child is to be removed from the country to some reflected country and address.<sup>280</sup> This in addition to the compilation and preservation of information on the adoption, helps control the removal of children from Botswana and facilitates the tracing of these children in the country of their adoptive parents if need be. Such information is of vital importance to the adopted child in tracing his or her origin in the event the adoption process fails or is disrupted. With such information the member states can take measures to prevent the child from being rendered stateless.

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<sup>273</sup> Hague Adoption Convention, Article 5.

<sup>274</sup> Section 4 (1), Adoption of Children's Charter.

<sup>275</sup> Article 7, CRC.

<sup>276</sup> Article 6, African Children's Charter.

<sup>277</sup> UNICEF *Innocent Digest*, N227 at 8.

<sup>278</sup> Article 30.

<sup>279</sup> [Cap 30:01] Law of Botswana. Section 4.

<sup>280</sup> Section 13, Adoption of Children Act.

#### 5.4.2 Court And Administrative Structures

The absence or insufficiency of courts and administrative structures in a position to ensure the proper implementation of enacted legislation significantly increases risks to adopted children who are to cross the borders. Magistrates' courts are overwhelmed with work, and may not be in a position to make careful considerations of important facts in an application for adoption. The courts' decisions on inter-country adoption may therefore be a mere rubber-stamping exercise rather than a careful examination of the situation and documentation on the matter.<sup>281</sup> The pressure of work coupled with the absence of specific rules to guide the courts on inter-country adoptions present some risks to the adopted child's welfare. Incompetence in the field of child rights law and lack of sensitivity to child issues is another major problem.

The case of *Mbambo v Ndlovu*<sup>282</sup> revealed through the applicants' affidavits, that both applicants were of Zimbabwean nationality resident in Botswana by virtue of their employment. Their residence permits were for three years. This meant that at some point in time in the event their employment contracts were not renewed they would have to return to Zimbabwe where the adoption order by the Botswana High Court would need to be recognised and given effect to as a foreign adoption order. The court does not appear to have taken account of that fact.. Fortunately the case never came back to court for the finalization of the adoption for reasons of the adoptive minor's age which was over 19 years.

The court in exercising their judicial activism can adopt the human rights approach of proactive stance and use the Hague Adoption convention to interpret the Adoption Act despite the fact that Botswana has not ratified the convention in a way that promotes the spirit of international human rights law on the rights of the adopted child to a family life. The Adoption Act should make provisions vesting in the High Court, the power and jurisdiction to hear inter-country adoptions, as the High court that has the power to interpret legislation and strike down all laws that are in conflict with the fundamental rights and principles of the constitution. It may then recommend that the legislature enact legislation that is consistent with the constitution and human rights

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<sup>281</sup> UNICEF *Innocent Digest* N227 at 8.

<sup>282</sup> [2001] 2 BLR 611 (HC).

laws.<sup>283</sup> The other advantage of this suggestion is that the High Court is also able to employ the provisions of international and regional human rights conventions to interpret the provisions of the Act. In this way the national law will be made by the courts interpretation to conform to those international and regional human rights laws which have been ratified by the state but not incorporated into national law.<sup>284</sup>

The absence of a Central Authority and rules regulating inter-country adoptions means that ordinary social workers with no expertise in issues of inter-country adoptions have to deal with adoption with no guiding rules. These social workers are also not in a position to furnish the courts with the relevant and reliable information needed to reach a decision on an adoption serving the best interest of the child.

#### **5.4.3 Central Authority And Adoption Services**

Duties imposed by the Hague Adoption Convention on contracting states, such as investigations, counselling, the placement of children for adoption, monitoring and general supervision of the adoption process are performed by Central Authority and other public bodies established under the convention.<sup>285</sup> Even in states which are not party to the Hague Adoption Convention, a Central Authority is a vital body in the adoption process. The coordination and communication between states through this body controls and prevents trafficking of children which may involve the collusion of a large network of individuals. The involvement of legally established state authorities and other adoption services reduces the number of private inter-country adoptions which are a cloak of trafficking.<sup>286</sup>

Local authorities in Botswana, act as adoption agencies as there are none, governmental or private, established in the country. The Act makes no provisions requiring the local authorities or any administrative authority dealing with child issues to establish and maintain an adoption service or Central Authority to ensure that adoption procedures are not abused and safeguard the rights of children who have been or may be adopted and removed from the country. The CRC<sup>287</sup> and the African

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<sup>283</sup> Attorney-General v Dow 1992 BLR 119 (CA) at 167.

<sup>284</sup> Ibid, p169

<sup>285</sup> Article 6.

<sup>286</sup> UNICEF *Innocent Digest*, N227, at 9.

<sup>287</sup> Article 21 para.(a).

Children's Charter<sup>288</sup> supported by the Hague Adoptions Convention<sup>289</sup> require adoptions to be authorised only by competent authorities after determining in accordance with the applicable laws and procedures and on the basis of all pertinent and reliable information that the adoption is permissible and in the best interest of the child. The absence of a Central Authority means that the investigations, placement, monitoring and counselling in adoption is left to the natural and adoptive parents and there may be no reliable information gathered on the adoptive and natural parents and other information pertinent to the adoption.

The local authorities under the Ministry of Local Government are currently providing adoption services through social workers deployed to deal with child issues. Taking into consideration the guidelines on the composition of a Central Authority and an Adoption Service,<sup>290</sup> the composition of the Social Welfare Department is not anywhere near being a Central Authority or Adoption Service envisaged by the Hague Adoption Convention. There are no provisions guiding social workers in the Adoption Act. The legislature need to review is necessary to make provision for the establishment of this important body.<sup>291</sup> The other important role played by the Central Authority is to decide on the continuance of the adoption process and assisting with immigration formalities like visas and residence permits for the adopted children.<sup>292</sup> This vital role ensures that adopted children are expeditiously transferred to their new homes and make the transition less traumatic.<sup>293</sup>

Botswana is not a contracting state and thus not obliged to cooperate with contracting states in matters of inter-country adoption. However, the Social Welfare Department under the Ministry of Local Government works closely with the International Social Services Offices in Geneva to monitor the welfare of children adopted and removed from Botswana to settle in other countries. The Geneva Office provides progress reports on such children for a period of 2 years from the date of the adoption order.<sup>294</sup>

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<sup>288</sup> Article 24 para.(a)

<sup>289</sup> Articles 4 and 5.

<sup>290</sup> As provided by Richardson, N18 at 60.

<sup>291</sup> Article 15, Hague Adoption Convention.

<sup>292</sup> Ibid, Article 18.

<sup>293</sup> Article 19.

<sup>294</sup> Department of Social Welfare Information. Available at <http://www.gov.bw/mlg> assessed on 21 January 2008.

This is actually sufficient monitoring but it is not the case with children adopted and removed to settle in neighbouring countries. For those children there is no monitoring at all after adoption.<sup>295</sup> The Social Welfare Department also does the same for other countries with children who have been adopted or placed in international foster care with parents residing in Botswana. They monitor and report progress on welfare of the child through the same Geneva office to the sending states.<sup>296</sup> This corresponds with some of the duties a Central Authority is intended to perform under the Hague Adoption Convention.

The Social Welfare Department is responsible for the well-being of all children in need of care, orphans and destitutes. Their duty to place children for adoption does not extend to all children who are adopted in Botswana. Their responsibility is to place and facilitate the adoption of any of those children under their care, that is, registered orphans, children taken in as children in need of care or placed in foster care and destitutes. The Social Welfare Department, as a matter of policy,<sup>297</sup> only place a child for adoption with those who voluntarily indicate their interest in adopting one or more of the children in the care of the department. The rest of the children are placed by their natural parents and relatives, hence the large number of private adoptions in the country.

While appreciating that adoptions carried out by accredited or official agencies cannot be guaranteed as being totally abuse free, it seems clear that by far the worst and most frequent problems arise in the context of private adoptions.<sup>298</sup> The absence of legislative provisions on monitoring after adoption in private inter-country adoptions increases the risk of illegal adoptions and child trafficking. The establishment of a central authority and a provision in the Adoption Act requiring adoption application to be made through this authority may reduce private adoptions.

The provisions of section 10 seem to provide some safeguard for the adopted child for 12 months after the adoption. If the child remains in Botswana for that period the Social Welfare Department will be in a position to monitor his or her welfare during

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<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> UNICEF *Innocent Digest*, N227.

that period. Where the child to be adopted is under the care of the social welfare the policy<sup>299</sup> requirement is that the child should be placed in the foster care of the adopters for a period that is at the discretion of the court, which ranges between three and twelve months. During that period the social workers supervise and monitor the relationship between the child and the prospective adoptive parents. After the adoption unless the minister consents and for sound reasons the adoptive parents have to remain in Botswana for 12 more months. This period is sufficient for the preliminary monitoring and counselling and protects the child from malpractices of inter-country adoption.

#### **5.4.4 Recognition Of Foreign Adoption Orders**

One of the objectives of the Hague Adoption Convention is to secure recognition of foreign adoptions.<sup>300</sup> Recognition is by operation of law on the presentation of a document evidencing adoption certified by a competent authority. Once recognised the adoption is treated in every respect as if it had been granted under the domestic legislation of the state which is required to recognise it. The Adoption Act does not provide for recognition of foreign adoption orders. Legislation applicable to the recognition of foreign orders and judgments is the Judgments (International Enforcement ) Act (Judgments Act).<sup>301</sup> The Judgments Act gives guidelines on the recognition and enforcement of foreign orders

According to the Hague Adoption Convention recognition of an order means the recognition of the legal parent-child relationship between the child and his or her adoptive parents, parental responsibility of the adoptive parent for the child, the termination of pre-existing legal relationship between the child and his or her natural parents if the adoption has this effect in the contracting state where it was made and the acquisition of rights the child is entitled to acquire from the adoptive parents.<sup>302</sup> The effect is the same under Botswana adoption laws. In countries where the rules on adoption and recognition correspond with Botswana law, jurisdictional parity may exist to have the adoption order registered and confirmed<sup>303</sup> With the cooperation

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<sup>299</sup> Department of Social Welfare Policy. Available at <http://www.gov.bw/mlg> assessed on 21 Jan 2008.

<sup>300</sup> Article 1 para ( C ).

<sup>301</sup> [Cap 11:01] Laws of Botswana.

<sup>302</sup> Article 26 (1).

<sup>303</sup> Section 3, Judgment (International Enforcement) Act, [Cap 11:01], Laws of Botswana.

among the commonwealth countries and the application of the principle of reciprocity in the recognition of foreign judgments and orders, adoption orders originating from these countries have been recognised in other commonwealth countries without difficulties. Even without provisions for recognition in the Adoption Act, the Judgments Act takes care of the recognition of foreign adoption orders effectively.

#### **5.4.5 Immigration Rules**

Inter-country Adoptions, being trans-racial and trans-cultural pose legal problems, with difficulties most often occurring in adoptions by families who come from other countries, largely because immigration rules and regulations are primarily designed to control and not to facilitate settlement within Botswana. Therefore any child that enters or leaves Botswana is not free from immigration rules controlling entry and departure. The child should either be the holder of a travelling document independently or it should be endorsed in one of his her parents travelling document. Adopted children are not exempted from these passport control rules.<sup>304</sup>

Immigration officers have the power and discretion to allow or refuse anyone authority to enter or leave Botswana. The conditions of departure are restrictive, adoptive parents must show that there has been a genuine transfer of parental responsibility to them on the grounds of adoption or other. The adoption order and a confirmation by the Minister that the Birth Register has been endorsed with the particulars and fact of adoption and also authorising the removal of the child from Botswana need to be produced.<sup>305</sup>

The Adoption Act requires the adoptive parents of the child to remain with the adopted child in Botswana after the adoption for at least 12 months or the minister should consent in writing if the child is to be removed from the country before the expiry of 12 months. This is one factor that should guide the immigration officer in their decision to refuse or allow departure or entry. For ease of reference the court issuing the adoption order should, advice the parties of the provisions of section 10 and have it written in the order for the immigration officer to know that the child is to

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<sup>304</sup> Section 6, Immigration Act, [Cap 25:0] Laws of Botswana.

<sup>305</sup> Department of Social welfare Policy, N284.

leave the country after 12 months or if the Minister consents before the expiry of 12 months.<sup>306</sup>

The problem with immigration law is that they apply to a totally different subject and the officers in exercise of powers vested in them may exclude genuinely adopted children from other countries and refuse the departure of those genuinely adopted in Botswana. The legislature should in addition to immigration laws, include in the Adoption Act guidelines on when and how an adopted child should be removed from Botswana and what proof should be made available to the immigration officer to authorise the departure.

## 5.5 CONCLUSION

The Adoption Act is substantially lacking in providing for inter-country adoptions. Being the only legislative enactment providing for adoption of children the Adoption Act should contain provisions safeguarding the child's rights throughout the whole process. It fails to provide procedural requirements for the placement of children with foreign adopters, counselling and monitoring. It does not require the establishment of Central Authorities to carry out inter-country adoptions in accordance with international and regional human rights standards.

These flaws in the Act create avenues for trafficking and exploitation of children which the Hague Adoption Convention aims to eliminate. The Adoption Act should make specific provisions for inter-country adoption for it to conform with the international standards especially the Hague Adoption Convention. Generally the Adoption Act does not effectively guarantee child protection in inter-country adoptions. The review of the Act would help achieve Botswana's goal for a world fit for children and its 2016 national vision which underlines the imperative to review

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<sup>306</sup> *Ex parte Crawford In re Application for Adoption of a Minor*, MFT 28 of 2006, (unreported) ( the adoptive parents needed to remove the adopted child from Botswana to the United States of America before the expiry of 12 months. The court in the order informed them of the requirements of the Act and they obtained the Minister's consent to remove the child from Botswana which they produced to Immigration officers to be granted authority to leave with the child)

those laws that are inconsistent with full enjoyment of constitutional rights to ensure conformity with international standards.<sup>307</sup>

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<sup>307</sup> Report on the Review of the Botswana's Children's Act 1981, 2003, p3.

## CHAPTER SIX

### GENERAL CONCLUSION AND RECOMMENDATIONS

What once served the interest of the rich and the childless to preserve their family name and heritage, became a social welfare means for children in need of care and their protection. Focus shifted from the interest of adoptive parents to those of adopted children. Colonisation brought with it a model of adoption which created a mirror image of the birth relationship brought about by the administrative and court procedures and resulting in the absolute and permanent severance of the natural family ties.

The introduction of the Adoption Act and recognition of human rights for children changed adoption into an international and regional law phenomena associated with the child's right to a family life. The CRC and the African Children's Charter recognise that for the child to grow up in a family environment for his harmonious development, adoption should be considered an alternative means of providing a child with a family environment, with inter-country adoption being taken as a last resort measure for those children for whom suitable alternatives of care cannot be found within their country. Thus the social institution of adoption has seen transition from a cultural practice through statutory regulation at national level, to the regional and internationally restricted procedures on inter-country adoption. This transition did not carry with it full development in the adoption laws and procedures of Botswana. Customary law on adoption remained flexible, un-codified and non-static, while the Adoption Act remained in its colonial state.

The best interest of the child is a guiding principle in adoption procedures. Under Tswana tradition the views of children can only be heard through an intermediary and the rights of the child are identified with those of the family unit. This partly satisfies the human rights requirements that children's views be heard according to their age and understanding. The human rights recognition of the child as an autonomous human being capable of making rationale choices is very negligibly under customary law. Children of whatever age are considered deficient in their decision making

capacities and deserving of protection. Decisions concerning children are made by elders on their behalf. This leaves children out of decisions affecting them. This customary law practise falls below the human rights standards.

Many customs, beliefs and traditions are inconsistent with human rights requirements. It is however not easy to hold such cultural practices unconstitutional as they are often defended through the right to participate in ones cultural activities. An approach to human rights that demands a one-sided complete change from cultural practices is often received with deep suspicion by Africans generally because of the continents history of colonialism, subjugation and oppression from external forces. The repugnancy clause is detested for this same reason, yet it plays a major role in the modification and development of customary law.

Informal, flexible and cost free procedures in customary law adoptions make it easy for many Batswana to adopt children under customary law than under the adoption Act, thus offering a simple solution to the great number of children (mostly orphans) in need of care and a family environment in which to grow. However, the fact that most customary law adoptions are a private family matter presents a greater potential for abuse of process resulting in the exploitation and abuse of children.

Customary law is continuously changing. This non-static nature of customary law, combined with the absence of fixed procedural requirements to be observed results in adoptions that have no legal force and consequences. The fact that Batswana are very slow in questioning the decisions of their chiefs has also resulted in the High Court not effectively developing customary law and checking harmful practices through the repugnancy clause. This supports the recommendation for the codification of all those customary law rules which are common to all tribal communities especially on child law. All customary law practices that are harmful to the child's best interests and welfare must be prohibited by express legislation and the introduction of automatic review of the customary law cases by the High Court. The codification of all customary practices which are common to all or most of the tribal communities would also provide information on customary law on adoption and fixed clear rules of procedure to be followed in the adoption of children. Such an approach would satisfy the children's rights treaties.

Law and policies must be carefully crafted to ensure that they are sufficiently responsive to the needs and socio-economic and cultural circumstances of the people to whom they apply. The Adoption Act is a colonial piece of legislation containing provisions which represented western ideas and values of the colonialists during the colonial period. The Act has not been substantially developed since its introduction in 1952. The amendments and reviews made to the Act at and after independence were not substantial as to adapt the provisions of the Act to suit the changing Tswana society. The provisions of the Act do not fully serve the prevailing needs and circumstances of Batswana children.

The strengths of the Adoption Act are significant in national adoptions. It effectively regulates and controls the manifold aspects of national adoption and makes sure that the rights of the adopted child are protected. The Adoption Act ensures that the child is adopted by the right parents and that it serves the child's best interests. It further ensures that adoptions are not intended for financial gain. The Act however fails to sufficiently protect the adopted child from abuse by relatives of the adoptive parents. Penal laws preventing child abduction and sexual molestation of children complement and enforce adoption laws on the qualifications and requirements for eligibility. It is, however, vital that the legislature review and amend this part of the Act.

While ensuring the control of the removal of adopted children from Botswana, the Adoption Act fails to provide fully and effectively for inter-country adoption. Child abduction, sale or trafficking of children is not a rare malpractice of inter-country adoption. There is need for proper regulation and coordination of procedures to control or prevent abuses. This calls for a comprehensive review of the Adoption Act and the Children's Act. Review can be effectively done through the incorporation of the CRC and the African Children's Charter into domestic law. As a common law jurisdiction, Botswana's legislature has to enact law transforming the convention and the Children's charter into Acts of Parliament. It is also recommended that the Hague Adoption Convention be ratified and incorporated to make it part of the Adoption Act. The incorporation of the Hague Adoption Convention would enable collaboration and cooperation between Botswana and other contracting states, which would help reduce the risks and improve the Act on inter-country adoption. Another alternative is to

include express provisions on inter-country adoption in the Adoption act. The improvement, clarification and codification of specific procedural rules on inter-country adoption would help detect, avoid and prevent inter-country adoption cases which are inappropriate.

Private adoptions are part of the adoption process of Botswana. They are contrary to the CRC, the African Children's Charter and the Hague Adoption Convention, which require competent state authorities to authorise the adoption of children. The transfer of children is beyond the state's effective control. The establishment of Central Authority supervise, coordinate and communication with authorities of other states efficiently harmonises and facilitates transparency in adoption services.

An overall assessment of the national customary and legislative practices of adoption lead to the conclusion that, the three systems of adoption compliment each other in their provision for a family environment for a child to grow in and should be improved and modified to continue ensuring the survival and development of the child. The independence of each system from each other ensures continuity but not uniformity. Traditional leaders lack awareness and expertise on human and child rights issues, while magistrates' courts lack human rights awareness and sensitivity to child issues. Human rights programs should therefore incorporate the training of judicial officers and traditional leaders on human rights, particularly the rights of the child.

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