INTERCOUNTRY ADOPTION AND ALTERNATIVE CARE IN SOUTH AFRICA: A MODEL FOR DETERMINING PLACEMENT IN THE BEST INTERESTS OF THE CHILD

by

GLYNIS TROW VAN DER WALT

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Promoter: Prof M Carnelley

Co-Promoter: Prof A Govindjee

Co-Promoter: Prof E Schrage

DECLARATION

I, **GLYNIS TROW VAN DER WALT,** student number 178083550, hereby declare that this thesis entitled, **"**Intercountry Adoption and Alternative Care in South Africa: A Model for Determining Placement in the Best Interests of the Child", submitted in fulfilment of the requirements for the degree of Doctorate of Laws, at the Nelson Mandela University, in December 2018, is my own work and that it has not previously been submitted for assessment or completion of any post-graduate qualification to another University or for another qualification.

Signed at PORT ELIZABETH on the 7 December 2018.

Glynis Trow Van der Walt

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For every child who lacks family care.

To God my heavenly Father – In you all things are possible.

For Mom

“All things bright and beautiful,

All creatures great and small;

All things wise and wonderful;

The Lord God made them all.”

GLOSSARY

Acronym/Abbreviation	Description
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACPF	African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of the Child
AD	*Anno Domini* (in the year of the Lord – the year Jesus was born)
AJA	Acting Judge of Appeal
BC	Before Christ
CA	Children's Act (South Africa)
CARA	Central Adoption Resource Agency
CCA	Child Care Act (South Africa)
CCI	Charitable Children's Institute (Plural: CCIs)
CDG	Care Dependency Grant (South Africa)
CFCS	Cluster Foster Care Scheme (Plural: CFCSs)
CHH	Child-Headed Household (Plural: CHHs)

CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CSG	Child Support Grant
CWC	Child Welfare Centre (India)
CYCC	Child and Youth Care Centre
DBE	Department of Basic Education
DCS	Department of Children Services (Kenya)
DHA	Department of Home Affairs
DHE	Department of Higher Education
DJCD	Department of Justice and Constitutional Development
DSD	Department of Social Development (South Africa)
EPC	Evangelical Protestant Christians
FCG	Foster Care Grant
FPG	Foster Parent Grant
GA	General Assembly
GWA	Guardian and Wards Act
Hague Convention	Hague Intercountry Adoption Convention (1993)
HAMA	Hindu Adoption and Maintenance Act
HIV/AIDS	Human Immune Deficiency
HRC	Human Rights Committee

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISS/IRC	International Social Service/International Reference Centre for the Rights of Children Deprived of their Family
JJCPA 2000	Juvenile Justice Care and Protection Act, 2000 (India)
JJCPA 2006	Juvenile Justice Care and Protection Act, 2006 (India)
JJCPA 2015	Juvenile Justice Care and Protection Act, 2015 (India)
NACSA	National Adoption Coalition
NCCS	National Council for Children Services (Kenya)
NGO	Non-Governmental Organisation
NPA	National Plan of Action
NPC	National Policy for Children
NPO	Non-Profit Organisation
OAC	Orphaned and/or Abandoned Child (Plural: OACs)
OAU	Organisation of African Unity
RACAP	Register of Adoptable Children and Parents
SAA	The Social Assistance Act 13 of 2004 (South Africa)
SALRC	South African Law Reform Commission
SANCO	South African National Civic Organisation
SASSA	South African Social Security Agency

The 1965 Convention	The Convention on Jurisdiction on Applicable Law and Recognition of Decrees Relating to Adoptions
The 1968 Convention	The European Convention on the Adoption of Children
The 1924 Declaration	The Geneva Declaration of the Rights of the Child (1924)
The 1948 Declaration	Universal Declaration of Human Rights in 1948
The 1959 Declaration	The Declaration of the Rights of the Child (1959)
The 1986 Declaration	The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986)
The 1979 Declaration	The Declaration on the Rights and Welfare of the African Child (1979)
The 2011 Green Paper	Green Paper on Families Promoting Family Life and Strengthening Families in South Africa
The 2013 White Paper	White Paper on Families in South Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNG	United Nations Guidelines for the Alternative Care of Children
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
VCA	Voluntary Co-ordinating Agency

KEY CONCEPTS

The following are terms that are used frequently in the childcare and protection arena:

Abandoned

A child:

(a) who has obviously been deserted by the parent, guardian or care-giver;

(b) who has, for no apparent reason, had not contact with the parent guardian or care-giver for a period of at least three months; or

(c) in respect of whom the whereabouts of the parents are unknown or who cannot be traced.

Adoption

A judicial process that conforms to statute, in which the legal obligations and rights of a child toward the biological parents are terminated, and new rights and obligations are created between the child and the adoptive parents. Adoption involves the creation of the parent-child relationship between individuals who, usually, are not naturally related. The adoptive family gives the adopted child the rights, privileges, and duties of a child and heir. Under the United Nations Guidelines on Alternative Care, adoption is understood as permanent care.

Alternative care

Defining the meaning of “alternative care” is challenging as the standards provided for in the Convention on the Rights of the Child and the United Nations on Alternative Care Guidelines respectively differ in a potentially significant way. Neither the Convention on the Rights of the Child nor the United Nations on Alternative Care Guidelines defines “alternative care”, but article 18 of the Convention of the Rights of the Child provides that the “parents, or, as the case may be, legal guardians, have the

primary responsibility for the upbringing and development of the child". Article 20 mandates that alternative care be provided when a child is "temporarily or permanently deprived of his or her *family environment*". However, the Guidelines, however, imply that a child's right to alternative care arises when he or she is deprived of "parental care".

Article 20(2) of the Convention on the Rights of the Child accords the right to "alternative care" to children temporarily or permanently deprived of their family environment, and to children who, in their own best interests, cannot be allowed to remain in that environment. States Parties are required to ensure alternative care for such children in accordance with their national laws. Article 20(3) of the Convention of the Rights of the Child provides that alternative care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption, or if necessary placement in suitable institutions for the care of children. Alternative care may be:

- **Informal care**

  This is a private arrangement in a family environment, in terms of which the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care). The initiative is that of the child's, the child's parents, or another relevant person. An administrative or judicial authority or a duly accredited body does not order the arrangement.

- **Formal care**

  This kind of care is provided in a family environment that is ordered or authorised by a competent administrative body or judicial authority. This includes all care provided in residences, including private facilities, regardless of administrative or judicial measures. Formal kinship care refers to those arrangements that have been ordered or authorised by a competent administrative body or judicial authority. This type of care generally involves an assessment of the suitability of the family for the child and, in certain instances, the provision of some kind of continuing support and monitoring. The kinship carer may be an approved foster carer and subject to fostering regulations.

Best interest's criterion

The best interest's criterion is found in both the Constitution of the Republic of South Africa and the Children's Act. In terms of the Constitution, the best interests of the child are of paramount importance in all actions concerning the child. This is so whether action is taken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies. The Children's Act underscores this principle, stating that the child's best interests are of paramount importance in all matters concerning the care, protection and well-being of a child. Section 7 of the Children's Act provides the following detailed list of factors to be considered when determining whether a decision serves the child's best interests:

(a) the nature of the personal relationship between –

  (i) the child and the parents, or any specific parent;

  (ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards –

  (i) the child; and,

  (ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child or any separation from –

  (i) both or either of the parents; or

  (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need of the child –

  (i) to remain in the care of his or her parent, family and extended family; and

  (ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's –

  (i) age, maturity and stage of development;

(ii) gender;

(iii) background; and

(iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by –

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;

(m) any family violence involving the child or a family member of the child; and

(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

Child and Youth Care Centre

A facility for the provision of residential care to more than six children outside the child's family environment ordered by the Children's Court in accordance with a residential care programme.

Cluster foster care

A scheme providing for the reception of children in foster care, managed by a non-profit organisation and registered by the provincial head of social development for this purpose.

Country of origin

The country of nationality of the child.

Department of Social Development

The Department of Social Development is the South African government department responsible for actions aimed at supporting family life and the strengthening of families in the country.

Family

A family is a group of persons united by the ties of marriage (civil, customary or religious) blood, adoption or cohabitation, characterised by a common residence (household), interacting and communicating with one another in their respective family roles, maintaining a common culture and governed by family rules.

Formal residential care

Formal residential care varies in type and quality. It encompasses state institutional care, which includes orphanages, places of safety used for emergencies, and all short- and long-term residential care facilities. Group homes are included under this form of care.

Formal foster care

Foster care entails a competent authority placing the child with a family other than the children's own family. The family is selected, qualified, approved and supervised for providing such care.

Kafalah

Under Islamic law, *kafalah* is an alternative means of childcare for children deprived of their family environment (for example, abandoned or orphaned children). Under *kafalah*, a family may take a child to live with them on a permanent, legal basis, but that child is not entitled to use of the family's name or to inherit from the family.

Kinship care

Kinship care is family-based care in the child's extended family or with close family friends who are known to the child. An extended family is a multigenerational family

that may or may not share the same household. It includes family members who share blood relations, relation by marriage, cohabitation and/or legal relations. Kinship care, which can be formal or informal in nature, is the care for children up to the age of 18, who are, by legal definition, children “in need of care”. Kinship care is a form of alternative care of a child within the child’s extended family or, in some instances, with close family friends who are known to the child. Kinship carers therefore may include relatives of the child, members of the tribe or clan into which the child is born, godparents, stepparents, or any adult who has a kinship bond with a child.

Orphan

An orphan is defined as a child under the age of 18 years whose mother, father, or both mother and father have died. This includes those instances where it is reported that the living status of the biological parents is unknown.

Permanency

The term is used when establishing family connections and placement options for a child in order to provide a lifetime of commitment, continuity of care, a sense of belonging and a legal and social status that goes beyond the child's temporary placement.

Placement

Placement is a social work term for the arranged out-of-home accommodation provided for a child or young person on a short- or long-term basis.

Residential care

Care provided in a non-family-based group setting is “residential care” and can be defined as: “A group-living arrangement for children in which care is provided by remunerated adults who would not be regarded as traditional carers within the wider society.” Today the definition of residential care is more inclusive than it once was. It includes “children’s homes” that are run as family-type group homes, and that accommodate a number of children of no relation to the person running the home. The

staff may be volunteers or related to the person in charge. Some of these homes are not registered with a government department.

Small group home

This is a family-styled home that caters for between 5 and 14 children. Generally, full-time consistent caregivers are appointed to care for the children.

States Parties

States Parties are those sovereign states that have ratified or are otherwise party to an international convention.

Subsidiarity

The principle of subsidiarity requires that intercountry adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth. In terms of this principle, intercountry adoption may only be considered as a placement option after the possibilities for adoption in the country of birth have been considered, and it is established that intercountry placement is in the child's best interests.

Vulnerable child

A child is vulnerable if his or her safety, well-being and development are, for various reasons, threatened.

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

1 1 BACKGROUND AND RATIONALE FOR THE STUDY

The concept that the family forms the foundation of our society is well established in national and international law.[1] The family unit provides a child with a sense of security and identity.[2] Moreover, the family as a unit plays a pivotal role in the upbringing of children, enabling them to develop to their full potential.[3] Children who have inadequate or no parental care are clearly at risk of being denied such a nurturing environment. Harden opines as follows:

> [C]hild development can be understood as the physical, cognitive, social, and emotional maturation of human beings from conception to adulthood, a process that is influenced by interacting biological and environmental processes. Of the environmental influences, the family arguably has the most profound impact on child development.[4]

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1 Department of Social Development Republic of South Africa *Green Paper on Families: Promoting Family Life and Strengthening Families in South Africa* (2011) 73. See also Department of Social Development Republic of South Africa *White Paper on Families in South Africa* (2013) 3.

2 Moyo *The Relevance of Culture and Religion to the Understanding of Children's Rights in South Africa* (LLM dissertation, University of Cape Town) 2014 15; Amoateng, Richter, Makiwane and Rama *Describing the Structure and Needs of Families in South Africa: Towards the Development of a National Policy Framework for Families* (2004) 4.

3 Amoateng *et al Describing the Structure and Needs of Families* 4, opine when referring to the importance of a "family" as follows: "Families are the primary source of individual development and they constitute the building blocks of communities."

4 Harden "Safety and Stability for Foster Children: A Developmental Perspective" 2004 14(1) *The Future of Children: Children, Families, and Foster Care* 33.

The large number of orphaned children following the devastating effects of World War II highlighted the serious need for countries to consider appropriate alternative placement for such children.[5] Recognising the importance of the family unit, the Universal Declaration of Human Rights (UDHR) expressly acknowledges the family as the "natural and fundamental group unit of society".[6] Article 16 of the UDHR further states that the family unit is entitled to protection by the state and society.[7] However, the vulnerability of parents, families and children has been intensified by recent global, regional and national developments, including the global economic crisis, devastating consequences of the HIV/AIDS pandemic, widespread poverty,[8] unwanted pregnancies,[9] child abandonment,[10] rapid urbanisation, and the increased migration of adults and children into and within South Africa in search of economic and political refuge.[11] In particular, the impact of the HIV pandemic on children in South Africa cannot be understated. South Africa has the largest percentage of HIV/AIDS-infected

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5 Blackie *Sad, Bad and Mad: Exploring Child Abandonment in South Africa* (Masters of Anthropology dissertation, University of the Witwatersrand) 2014 20; Fronek and Cuthbert "History Repeating ... Disaster Related Intercountry Adoption and the Psychosocial Care of Children" 2012 11(3) *Social Policy and Society* 429; King "Owning Laura Silsby's Shame: How the Haitian Child Trafficking Scheme Embodies the Western Disregard for the Integrity of Poor Families" 2012 25 *Harvard Human Rights Journal* 1; Bergquist "Implications of the Hague Convention on the Humanitarian Evacuation and 'Rescue of Children'" in Gibbons and Rotabi (eds) *Intercountry Adoption: Policies, Practices and Outcomes* (2012) 43; *AD v DW* 2008 (3) SA 183 (CC) par 40.

6 United Nations General Assembly *Universal Declaration of Human Rights* (10 December 1948) 217 A (III), hereinafter referred to as the UDHR.

7 Art 16 of the UDHR.

8 Smart *Children Affected by HIV/AIDS in South Africa: A Rapid Appraisal of Priorities, Policies and Practices* (2003) 3.

9 Blackie *Sad Bad and Mad* 19.

10 Vorster "Abandoned Children: South Africa's Little Dirty Secret" (2015) *Daily Maverick* http://www.dailymaverick.co.za/ (accessed 2017-05-31). Vorster refers to the fact that as of 2015, approximately 3 500 children are abandoned annually in South Africa. The National Adoption Coalition estimate that while there are no statistics available, there is reason to believe that the number of abandoned children has increased http://www.adoptioncoalitionsa.org (accessed 2017-05-31).

11 Department of Social Development *South Africa's Child Care and Protection Policy* (2018) https://www.sacssp.co.za/NDSD_CCPP_19_ DECEMBER.docx 47 (accessed 2019-01-01).

persons in the world, resulting in many children in South Africa being deprived of a family environment.[12]

The importance of family and the role it must play in caring for a child cannot be doubted, and both the national law of South Africa and international law bear testimony to this. Accordingly, it is understandable that the biological family remains the primary favoured unit of care for a child. Where, for whatever reason, the natural family fails or is unavailable to care for the child concerned, national and international law make provision for the care of an orphaned and/or abandoned child (OAC). Family forms are changing around the world, and South Africa is typical in several respects. Diverse family arrangements and household forms are recognised as providing a family-type environment for a South African child. In understanding the meaning of "family" in South Africa it must be noted that the family may extend beyond the biological parents of a child to a multi-generational network of people who are linked by blood, including grandparents, aunts, uncles and cousins. Relationship can also include non-blood relationships as in the instance of relationship through the ties of marriage or ties of co-residence. Whilst not exclusive to South Africa, it must also be noted in South Africa under apartheid regime, policies and practices were designed specifically to protect the nuclear family. The Department of Social Development (DSD) drafted the White Paper on Families and this was approved in 2013. The White Paper made conscious strides in granting recognition to a diversity of family forms in South Africa. It departed from the assumptions held of Western or nuclear families only as a norm. It is in light of this diversity that the concept "family" must be read in this research.

Consideration of placing a child in appropriate alternative care must be contemplated in light of the context of the human rights movement and the development and recognition of the rights of a child in his or her own right. The post-war era produced

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12 Högbacka "Maternal Thinking in the Context of Stratified Reproduction: Perspectives of Birth Mothers from South Africa" in Gibbons and Rotabi (eds) *Intercountry Adoption* 147.

increasing concern about the rights of the child. Two theoretical approaches to the rights of children can be distinguished, namely the "will" theory and the "interest" theory of rights. The former assumes that the person exercising the right must have the competence to do so. As such, the theory questions whether children can properly be described as the bearers of such rights. In opposition thereto, the "interest" theory of rights is premised on the basis that an individual, including a child, has a right where the interest of such person is sufficient so that others have a duty to give effect to such right. The right is not dependent on the capacity of the individual concerned to exercise such right himself or herself *inter alia* because of the tender age of the holder thereof. Eekelaar classifies children's rights into three categories, namely basic rights, developmental rights; and rights to autonomy.[13] The development and recognition of the child as a subjective bearer of rights can be traced through international law and contemporary international instruments. Chapter 2 deals with this development in more detail.

The Convention on the Rights of the (CRC),[14] the African Charter on the Rights and Welfare of the Child (ACRWC),[15] the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention),[16] and existing national legislation in South Africa,[17] all provide that society has an obligation to provide systems and resources to safeguard the welfare of a child in need of alternative care. The main objective of alternative care is the provision of a safe and healthy environment for a child in need of care.[18] In the drafting of the relevant conventions and legislation, attention was paid to the fact that, in addition to the loss

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13 Eekelaar "The Emergence of Children's Rights" 1986 6 *Oxford Journal of Legal Studies* 161.

14 United Nations General Assembly *Convention on the Rights of the Child* (1989) A/RES/44/25.

15 Organisation of African Unity *African Charter on the Rights and Welfare of the Child* (1990) CAB/LEG/24.9/49.

16 HCCH *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993) 32 ILM 1139, hereinafter referred to as the Hague Convention.

17 Preamble of the Children's Act 38 of 2005.

18 UNGA *Guidelines for the Alternative Care of Children adopted by the General Assembly* (24 February 2010) A/RES/64/142.

of a family environment, these children also suffered *inter alia* the loss of adult guidance and protection. Such factors needed consideration when determining a placement that could best alleviate any further harm to a child's development in reaching his or her full potential.

In South Africa, various forms of appropriate alternative care are legally recognised. Alternative-care options include:

- adoption;[19]
- foster care, both formal and informal;[20]
- child and youth care centres;[21]
- temporary places of safety;[22]
- child-headed households;[23]
- intercountry adoption;[24] and
- *kafalah.*[25]

All of the placements referred to aim to achieve a better life for the children concerned. However, the challenge remains to determine which form of placement is the most suitable for the child concerned at the time such placement is determined.

Currently, many developing countries like South Africa are experiencing a rapid increase in the number of OACs.[26] With respect to the statistics of orphans in South

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19 S 46(1)*(c)*.

20 Kinship care is included in the thesis as a form of informal placement. The distinguishing characteristic between kinship care and foster care in the general sense is that, except in exceptional circumstances, kinship care is not court-ordered.

21 S 46(1)*(a)*(ii).

22 S 46(1)*(a)*(iii).

23 S 46(1)*(b).*

24 S 46(1)*(c).*

25 Adoption is not recognised in terms of Islamic principles. Instead, *kafalah* is exercised, meaning that a child is taken care of by a family other than his or her biological family, while familial ties to the biological family remain intact.

26 Motepe *A Life Skills Programme for Early Adolescent AIDS Orphans* (PhD thesis, University of Pretoria) 2006 146.

Africa, Hall[27] states that in 2017, South Africa had 1 728 000 paternal orphans,[28] 530 000 maternal orphans,[29] and 505 000 double-orphans.[30] Single-orphan children may have a parent who is able to care for them, double-orphaned children do not. The majority of these children are absorbed into the extended family structure, but this notwithstanding; many children in South Africa are cared for in state institutions.[31] According to Hall and Sambu, the number of double orphans in South Africa more than doubled between 2002 and 2009.[32] The large number of double-AIDS orphans in South Africa has created a challenge since these children are without parental care. National adoption and international adoption may be viable placement options for children left without parental care. Statistics indicate that a significant number of South African orphans fall into this category, and it is apparent that policies and laws must be set in place to afford such children necessary protection and care.

Relevant to this research is that the overall approach of the legislature in South Africa in the past decade has changed from a parent-centred approach to a child-centred approach.[33] The plight of large numbers of children needing family, parental or alternative care is characteristically common in poorer nations. Promoting adoption as a means of permanent placement for a child could play a pivotal role in connecting a child to a safe and nurturing family relationship to last a lifetime. The Constitution of

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27 Hall "Children in South Africa" (2018) http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=1#6/-28.692/24.698 (accessed 2018-12-29).

28 A paternal orphan is a child whose father has died but whose mother is alive.

29 A maternal orphan is a child whose mother has died but whose father is alive.

30 A double orphan is a child who has lost both mother and father. See also Hall "Children Count Statistics on Children in South Africa" (2018) http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=4 (accessed 2018-11-29).

31 Blackie *Sad, Bad and Mad* 9.

32 Hall and Sambu "Demography of South Africa's Children" (2018) http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2018/Chapters/demography%20of%20South%20Africa%27s%20children.pdf (accessed 2018-11-30).

33 Compare Act 74 of 1983 with 38 of 2005; Clark and Goldblatt "Gender and Family Law" in Bonthuys and Albertyn (eds) *Gender, Law and Justice* (2007) 242; Robinson, Stewart, Ryke and Wessels "Legal Instruments to Consider in Structuring Parenting Plans" 2011 47(2) *Social Work/Maatskaplike Werk* 223; Spies and Le Roux "A Critical Reflection on the Basic Principles of Assessment of the Child at Risk" 2017 1 *International Journal for Studies on Children, Women, Elderly and Disabled* 203.

the Republic of South Africa, 1996 (the Constitution) provides for the robust protection of children's rights. Section 28 of the Constitution ensures that the "best interests of the child" are paramount in any matter concerning the child.[34] Judicial decisions confirm the paramountcy of a child's best interests as an accepted principle of South African law.[35] When considering the placement of a South African child by intercountry adoption, one must question when, and to what extent, the "best interests of a child" principle can play a role in giving more children the chance to enjoy a permanent family life, albeit abroad.

The Constitution expressly provides for a child's right to family and parental care, and to protection. Adoption has been recognised as a means of providing the child with care and protection that is unsurpassed by any other form of permanent placement. Louw confirms this approach: "[a]doption provides a child permanent placement in securing stability in a child's life."[36] She reaffirms this approach in the latest edition of the text concerned where she opines that "[adoption], more so than any other placement option, must thus in a given case be the best way of securing stability in that particular child's life".[37] Judgments followed, and these confirmed that a child's right to family care or parental care as provided for in the Constitution includes the right to be adopted.[38] International policy and national legislation have recognised adoption as a preferred solution where natural parents or guardians are unable or unwilling to provide a home for the child concerned.[39]

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34 S 28(2) of the Constitution.

35 *Fitzpatrick* 2000 (3) SA 422 (CC) par 20. See too *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par 33; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC*)* par 54.

36 Louw "Adoption of Children" in Boezaart (ed) *Child Law in South Africa* (2009) 133.

37 Louw "Intercountry Adoption" in Boezaart (ed) *Child Law in South Africa* (2017) 184.

38 *Fletcher v Fletcher* 1948 (1) SA 130 (A) 143. See also *Fraser v Naude* 1999 (1) SA 1 (CC) 5B–C, 1998 11 BCLR 1357 (CC); *Jackson v Jackson* 2002 (2) SA 303 (SCA) 317 par F.

39 UNGA *Guidelines for the Alternative Care of Children adopted by the General Assembly* (24 February 2010) A/RES/64/142. The South African Children's Act 38 of 2005 recognises the right of a child to grow up in a family environment and in an atmosphere of love, happiness and understanding. The Hague Convention recognises the right a child has to family care and further provides that intercountry adoption may offer the advantage of a permanent family to a child for

The primary aim of adoption is to provide a child who cannot be cared for by his or her own parents with a permanent family.[40] The Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with special reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration) envisages that the first measure of alternative care should resemble, as far as is possible, a "typical" family environment, and, only when such an environment is unavailable, should regard be had to other "so-considered" less desirable options.[41] Within the range of options considered to be appropriate alternative care, national adoption is generally the first choice.[42] Placing a child in adoption nationally where a child is found to be in need of care is founded on the principle that the child concerned is granted the opportunity to develop in a secure and *permanent* family environment *within* the child's country of origin. In South Africa, adoption has long been recognised as a form of alternative childcare in the field of family law. South African legislation recognises adoption in South Africa as a means of terminating the legal relationship that exists between a natural parent or parents and their child, and of establishing a new legally recognised relationship between the adoptive parent or parents and the adopted child. Given the drastic impact that adoption has on the life of a child, it is understandable that this particular aspect of family law is one of the most researched areas in child welfare.[43] In *Du Toit v Minister of Welfare and Population Development*,[44] the Constitutional Court held as follows:

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whom a suitable family cannot be founds in his or her state of origin. See South African Law Commission *Discussion Paper 103 Project Review of the Child Care Act* (2002) 1181.

40 Art 13 of the UNGA *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with special reference to Foster Placement and Adoption Nationally and Internationally* (1986) A/RES/41/85.

41 See Art 17 of the 1986 Declaration.

42 Note the discussion of the wide and narrow meaning of "alternative care" in ch 2 of this thesis.

43 South Africa has witnessed a development and evolution of adoption law over the past 90 years with the successive enactments of the Adoption of Children Act 25 of 1923, the Children's Act 31 of 1937, the Children's Act 33 of 1960, the Child Care Act 74 of 1983, and finally, the Children's Act 38 of 2005.

44 2003 (2) SA 198 (CC).

> It is clear from section 28(1)*(b)* that the Constitution recognises that family life is important for the well-being of all children. Further, adoption is a valuable way of affording children the benefit of family life which might not otherwise be available to them.[45]

This *dictum* is important; the Constitution is the supreme law of the land and any violation of its principles is invalid.[46] National adoption rates in South Africa remain low,[47] and the DSD finds it difficult to secure permanent placement for the many OACs in need of substitute homes.[48] Despite the promulgation of the Children's Act (CA),[49] and the advent of constitutionalism in South Africa, adoption as a form of alternative care for an OAC, has remained underused, and the majority of children in need of care remain in foster and/or institutionalised care.[50] While adoption is widely considered the best alternative to a child living within his or her own natural family environment,[51] all other viable forms of alternative care are considered in this thesis in an attempt to ascertain the most appropriate placement for such children in South Africa.

Following the enactment of the Constitution, the anomalies in the provisions of the Child Care Act of 1983 (CCA)[52] became all too apparent. The Constitution recognised the child's right to family and parental care and made provision that in any matter

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45 Par 18

46 S 2 of the Constitution.

47 Department of Social Development "Annual Report for the Year Ended 30 March 2015" (2015) http://pmg-assets.s3-website-eu-west-1.amazonaws.com/151014DSDAR.pdf (accessed 2017-01-30). This Annual Report indicates that there were 1 448 national adoptions in 2014. These statistics from the Department of Social Development indicate a sharp decline in national adoptions. In 2004, the DSD noted that there were 2 840 national adoptions in South Africa.

48 Mokomane, Rochat and The Directorate "Adoption in South Africa: Trends and Patterns in Social Work Practice" 2011 *Child and Family Social Work* 347 358.

49 38 of 2005.

50 Department of Social Development "Comprehensive Report on the Review of the White Paper for Social Welfare, 1997" (2016) https://www.gov.za/sites/default/files/gcis_document/201610/comprehensive-report-white-paper.pdf (accessed 2018-12-03).

51 The followers of the faith of Islam are an exception. According to the verses of the Q'uran, Allah indicates clearly that adoption is not recognised in terms of Islam. Quran 33: 4–5 states: "And He has not made your claimed sons your sons. That is your saying by your mouths, but Allah says the truth, and He guides to the way. Call them [i.e., the adopted children] by [the names of] their fathers; it is more just in the sight of Allah. But if you do not know their fathers, they are your brothers in religion."

52 74 of 1983.

concerning a child, the best interests of such child were of paramount consideration in making a determination. It was clear that the CCA was outdated and that legislative reform in South Africa was essential. Because national adoption statistics remain low in South Africa and available alternative faces certain challenges, consideration must be had to the potential of placing a child in intercountry adoption. Preceding the enactment of the CA, South Africa lagged behind the rest of the world with respect to placing a child through intercountry adoption. This is understandable since, before 2000, intercountry adoption was deemed unlawful in terms of the existing legislation.[53] In terms of the CCA, intercountry adoption was not an alternative care option, and, in addition, certain restrictions were in place where a non-South African wished to adopt a South African child. Before the CA was enacted, it was left to the judiciary to make determinations that were in line with the provisions of the Constitution. In the late 1990s and early 2000s, the judiciary, for the first time in South Africa, considered the potential permanent placement of a child in need of care by means of intercountry adoption. In South Africa, policy and laws are in the process of modification to address social change. In *Minister for Welfare and Population Development v Fitzpatrick* (*Fitzpatrick*),[54] the Constitutional Court held as follows:

> I have reached the firm view that section 18(4)*(f)* of the Act, to the extent that it absolutely proscribes adoption of a South African born by non-South Africans, is inconsistent with the provisions of section 28 of the Constitution.[55]

In light of this judgment, all intercountry adoptions are now deemed to be valid if they meet all the basic requirements set in national legislation as well as adhere to the principles relating to intercountry adoption internalised in treaties and conventions

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53 S 18(4)*(f)* of the CCA. Pre-constitutional legislation in South Africa did not recognise intercountry adoption.

54 2000 (3) SA 422 (CC). The case concerned the constitutionality of the provision of the CCA that prevented foreigners from adopting a South African child. The court held the offending provision to be invalid with immediate effect on the basis that it was contrary to the aims and objectives of the South African Constitution.

55 *Fitzpatrick* 2000 (3) SA 422 (CC) 427F–G. The Constitution confers children's rights in s 28 as follows: "(1) Every child has the right − … *(b)* to family care or parental care, or to appropriate alternative care when removed from the family environment."

ratified by South Africa.[56] Although law reform was already underway at the time of the judgment in *Fitzpatrick*, it was to take many years before the legislature promulgated the CA. In the interim, and in the absence of legislative provision for the placement of a child through intercountry adoption, the DSD assisted with effecting such placements. Although the judgment in *Fitzpatrick* created new alternatives for children in need of care, a disquieting aspect of the judgment was the finding of applicability of the CCA to intercountry adoptions in the absence of more specific legislation.[57] The concerns expressed by the Minister of Population and Social Development at the time were dismissed by the Constitutional Court, which decided that the framework of the CCA provided adequate protection for children to be placed abroad.[58] As Couzens opines, the Constitutional Court was overly optimistic and failed to acknowledge the complexities of the practice of intercountry adoptions and the highly specialised legal provisions and institutional structure necessary for safely engaging in such adoptions.[59]

In *AD v DW,*[60] it was apparent that the Constitutional Court was cognisant of the powerful considerations favouring a child growing up in his or her own country and community of birth. In terms of the principle of subsidiarity, where a parent or family is not able to provide care for a child, appropriate alternative care for such child should be sought in the country of origin of the child concerned. Where no appropriate alternative care is available domestically, intercountry adoption of such child can be

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56 Couzens "A Very Long Engagement: The Children's Act 38 of 2005 and the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption" 2009 12(1) *PER/PELJ* 55. Where a parent is unable or unwilling to care for a child, an assessment needs to be made regarding the care, and ultimately, the placement of such child. The Children's Court in South Africa has jurisdiction to decide on how best to secure stability in a child's life by means of adoption or placement in alternative care. Alternative care in South Africa is considered in this study considering such jurisdiction.

57 Couzens 2009 *PER/PELJ* 56.

58 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) 721 par 23.

59 Couzens 2009 *PER/PELJ* 56.

60 2008 (3) SA 183 (CC).

considered as a viable solution. However, in its judgment, the court held that, although the principle of "subsidiarity" was a "core factor" governing all intercountry adoptions, and that it was an important principle to be adhered to, subsidiarity was, in itself, subordinate to the principle of the best interests of the child.[61]

Another form of alternative care recognised in South Africa is foster care. Foster care entails the temporary placement of a child needing to be removed from the parental home into the custody of a suitable family or persons willing to be foster parents.[62] The placement of a child in foster care includes placement with non-family members, placement in kinship care or cluster residential care or instances where an OAC lives in a child-headed household (CHH). As of June 2014, there were 537 150 children in foster care receiving a foster care grant (FCG).[63] This number indicates an increase in the number of children placed in foster care since publication of the White Paper for Social Welfare of 1997. In South Africa, however, it is not uncommon to find abandoned children cared for informally by family or relatives, even in those instances where one or both parents are alive.[64] Whilst foster care is a popular form of alternative care, such care is considered temporary in nature. Furthermore, those involved in the foster-care process experience numerous challenges. These include, for example: a lack of guidelines for assessing prospective foster parents; a lack of contextually relevant assessment tools for assessing prospective foster parents; and the fact that placements tend to be done on a reactive basis, where the first available family is found for a child in crisis and little preparation is made with either the family or the child.[65]

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61 *AD v DW supra* par 49 and 55.

62 South African Government "Apply for Foster Care" (2018) https://www.gov.za/services/adopt-child/foster-care (accessed 2018-08-08).

63 *Ibid*.

64 Kgole *The Needs of Caregivers of Abandoned Children* (MSD: Play Therapy dissertation, University of Pretoria) 2007 1.

65 South African NGO Network "Give a Child a Family" (2016) http://www.ngopulse.org (accessed 2016-11-18).

The placement of an OAC in a Child and Youth Care Centre (CYCC) is also considered here. A CYCC is defined in the CA as a facility that provides residential care for more than six children who are not living with their biological families.[66] CYCCs include children's homes, places of safety, secure care centres, schools of industry, reformatories and shelters for street children.[67] The official data on the state of residential care in South Africa is unfortunately sparse.[68] Notwithstanding acknowledgment of the detrimental long-term impact on a child who is placed in a CYCC (especially having regard to research done into a child's neurological development when cared for in institutions), it is disconcerting to note that statistics reveal that many abused, neglected and abandoned children in South Africa end up in children's homes.[69] The DSD undertook a review of the White Paper, 1997, and the review report was published in 2016.[70] According to this report, unaudited provincial indicators from the DSD in eight of the nine provinces in South Africa noted that there were approximately 12 577 children living in state-funded CYCCs.[71] These facilities qualify as CYCCs in terms of a provision of the CA. These statistics do not include

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66 Since 1 April 2010, and in terms of s 195 of the CA, all existing government children's homes, places of safety, secure care facilities, schools of industry or reform schools were classified as CYCCs providing residential care programmes in terms of s 191(2)*(a)* of the CA.

67 Jamieson *Children's Act Guide for Child and Youth Care Workers* 2ed (2013) 9.

68 The Presidency of the Republic of South Africa "Situation Analysis of Children in South Africa" (2009) https://www.westerncape.gov.za/text/2009/5/situation_analysis_of_children_in_south_africa.pdf (accessed 2019-01-02) 102. This report states that South Africa lacks a consolidated and accessible set of statistics on the number and types of residential care facilities. The statistics indicate the number of children resident in the facility, as well as the reason for, and duration of the children's care in such institutions. The number of children in unregistered CYCCs is uncertain. See UNICEF "South Africa's Children: A Review of Equity and Child Rights" (March 2011) https://www.sahrc.org.za/home/21/files/SA%20CHILDREN%2024%20MARCH%202011%20SAHRC%20_%20UNICEF%20REPORT.pdf (accessed 2018-12-29).

69 Van IJzendoorn, Palacios, Sonuga-Barke, Gunnar, Vorria, McCall LeMare, Bakermans-Kranenburg, Dobrova-Krol, and Juffer "Children in Institutional Care: Delayed Development and Resilience" 2011 76(4) *Monographs of the Society for Research in Child Development* 8.

70 Department of Social Development of the Republic of South Africa "Comprehensive Report on the Review of the White Paper for Social Welfare 1997" https://www.gov.za/sites/default/files/gcis_document/201610/ comprehensive-report-white-paper.pdf (accessed 2019-04-15).

71 A discrepancy in the statistics concerning children placed in CYCCs is apparent when one considers a report by Blackie in 2014 that indicates that approximately 21 000 children were cared for in CYCCs.

children placed in unregistered CYCCs. According to the report, the number of children placed in CYCCs has declined since 1993.

The approach followed throughout the study is based on the child-rights approach. When determining where to place an OAC, the emphasis is on finding an alternative care solution that meets the best interests of such a child, taking into consideration the interpretation and meaning of the principle of subsidiarity.

The principle of subsidiarity was introduced into international law through the 1986 Declaration mentioned earlier.[72] The approach adopted by the 1986 Declaration to the right to alternative care was the first to create a hierarchical framework in terms of which to seek, consider and provide alternative care options. In terms of the principle of subsidiarity, placing a child in appropriate alternative care in the child's country of origin is prioritised.[73] The importance of the principle and the noted preference for domestic solutions over intercountry solutions is particularly relevant when considering intercountry adoption.[74] The suitability of placing a child through intercountry adoption must be considered in this light.[75]

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72 United Nations General Assembly *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally* (6 February 1987) A/RES/41/85.

73 The CRC provides that intercountry adoption should only be considered when no suitable alternative form of care can be found for the child in the child's country of origin. The subsidiarity principle as understood in the Hague Convention, however, indicates that intercountry adoption may be considered as an option of placement for a child for whom no "suitable family" can be found in the child's country of origin.

74 Art 21 of the CRC refers to intercountry adoption as follows: "an alternative means of child care, if the child cannot be placed in an adoptive family or cannot in any suitable manner be cared for in the child's country of origin".

75 The African Child Policy Forum "Intercountry Adoption: Alternatives and Controversies" (2012) https://bettercarenetwork.org/sites/default/files/Intercountry%20Adoption%20Alternatives%20and%20Controversies%20-%20The%20Fifth%20International%20Policy%20Conference%20on%20the%20African%20Child.pdf (accessed 2018-12-04). This report refers to a number of emerging issues with respect to intercountry adoption. One such issue is that awareness should be raised throughout the African continent regarding adoption, and that intercountry adoption should be a measure of last resort.

In terms of the accepted meaning of the principle of subsidiarity, as found in the relevant international conventions and the national legislation of South Africa, permanent solutions for a child in need of care ought to be sought firstly in the country of origin of such child. However, the conventions differ in their approach to the impact and meaning of the principle of subsidiarity.

The Convention on the Rights of the Child (CRC) provides that intercountry adoption may be considered as an alternative means of care for an OAC who cannot be cared for suitably in the child's country of origin.[76] Vité and Boechat suggest that the interpretation of the principle in the CRC leads to intercountry adoption always being considered as a last option.[77] In terms of the approach of the Committee of the CRC "intercountry adoption should be considered, in the light of article 21, namely as a measure of last resort".[78]

It seems therefore that the CRC provides that all domestic options would be considered before intercountry adoption. However, Mezmur also notes that this approach to the interpretation of the meaning of subsidiarity is not correct. He states that the interpretation of the meaning of "last resort" remains "unclear and subjective".[79] Louw suggests that while the CRC emphasises the right of a child to grow up in a *family* environment, it recognises the discretion of member states to place a child in intercountry adoption where "the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin".[80]

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76 Art 21 of the CRC.

77 Vité and Boechat "Art 21: Adoption" in Alen, Van de Lanotte, Verhellen, Ang, Beghmans and Verheyde (eds) *Commentary on the United Nation's Convention on the Rights of the Child* (2008) 45.

78 Mezmur *Intercountry Adoption in an African Context*: *A Legal Perspective* (LLD, University of Western Cape) 2009 302.

79 *Ibid.*

80 Louw "Intercountry Adoption" in Boezaart *Child Law in South Africa* (2017) 499.

Like the CRC, the ACRWC prioritises alternative care placements in the child's country of origin. As with the interpretation of the principle in the CRC, the exact meaning of subsidiarity in the provisions of the ACRWC remains unclear. While both the CRC and the ACRWC promote national solutions above intercountry adoption, a difference between the two conventions is apparent when one considers article 24(b) of the ACRWC. In terms of this article:

> States Parties which recognise the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall: … (b) recognise that intercountry adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.

The difference between the CRC and the ACRWC is evident where the ACRWC *expressly* considers intercountry adoption as a measure of last resort. The CRC makes no such express provision. The Hague Convention differs from these conventions in its interpretation of the principle and provides that where the biological or extended family (or other permanent care) cannot be found in the country of origin, intercountry adoption can, and should, be considered *if it is found to be in the child's best interests*. Intercountry adoption is not relegated to an option of "last resort" in the Hague Convention. It is clear therefore that there is a measure of disparity in the approach of the conventions as to the meaning of subsidiarity.[81]

Most of the protections and procedures established by the CRC, ACRWC and the Hague Convention are not contested, but a number of issues remain controversial. These include the fact that there is no "right to a family" (and thus to adopt or be adopted) under international law; that determining the "best interests" of children is a difficult and complex undertaking; and finally that intercountry adoption is subordinate

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81 Rushwaya *A Critical Analysis of the Legislative Framework Regulating Intercountry Adoption in South Africa and Ghana* (LLM dissertation, University of Cape Town) 2014 44 45.

to suitable domestic care solutions.[82] In light of the above, pertinent questions arise in South Africa's circumstances concerning the placement of a child in a form of care that might not be in the child's best interests. There is a debate as to whether intercountry adoption, in the absence of family care and domestic adoption options, could ever take precedence over foster care and other options.[83] The adoption of a child across national boundaries often involves many difficulties that are not limited to biological differences.

Intercountry adoption, despite offering the value of permanence, remains contentious. While proponents see intercountry adoption as a potential means of providing a home for the neediest, others oppose it based on various factors, including, *inter alia*, the uncovering of instances of child trafficking under the guise of intercountry adoption. The reverse approach has also been taken where intercountry adoption is considered to be the *least* desirable approach.[84] According to Isanga:

> Some opponents maintain that African States are wary of a new form of imperialism, allowing dominant, developed cultures to strip away a developing country's most precious resources, its children. Opponents argue that intercountry adoption forces the adopted child to assimilate into Western society in a manner that is reminiscent of colonial attempts to indoctrinate indigenous peoples into European values and learning [such that] the adopted child loses an essential aspect of the child's identity by being removed from his or her birth country.[85]

Those opposed to the practice of intercountry adoption have stated that placing a child out of his or her country of origin is a complex social phenomenon that could lead to serious abuse.[86] Human rights issues are at the heart of the debate as to the

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82 Cantwell *Adoption and Children: A Human Rights Perspective* Commissioned by the Commissioner of Human Rights: Council of Europe CommDH/Issue Paper (2011) 2 4.

83 Cantwell *The Principle of Best Interests of the Child in Intercountry Adoption* (2014) *UNICEF* 32.

84 Mosikatsana "Intercountry Adoptions: Is there a Need for New Provisions of the Child Care Act?" 2000 16(1) *SAJHR* 69.

85 Isanga "Surging Intercountry Adoptions in Africa: Paltry Domestication of International Standards*"* 2012 27 *Journal on Public Law* 244–245.

86 Mezmur "The Sins of the 'Saviours': Child Trafficking in the Context of Intercountry Adoption in Africa" 2010 *Hague Conference on Private International Law* 15.

advantages and disadvantages of intercountry adoption as an alternative care option for an OAC. Proponents for intercountry adoption maintain that adoption is inherently a better solution for a child, as it is a formal institution and permanent in nature.[87] As such, proponents contest the idea that intercountry adoption should be "subsidiary" to any form of impermanent care. It is acknowledged that opponents of intercountry adoption hold that adoption is Western-centric in its approach, and as such should not inherently always be considered to be in a child's best interests.[88] Those who follow this approach argue that legal adoption is almost unknown as a child protection measure in certain cultures or societies and that those who promote the permanence of adoption consider any solution that is not formal and/or legally binding as automatically inferior in terms of the long-term best interests of the child.[89] It is proposed that adoption applies a single vision of "suitability" to contexts where other visions may prevail.[90]

The current research acknowledges the arguments both for and against adoption and intercountry adoption. However, the focus here is the determination of the best interests of the child following a consideration of all factors and circumstances, including the suitability of current alternative care available in the country of origin. It is submitted that these factors and circumstances must be considered in order to make a placement determination that allows for the nurturing and development of a child to reach his or her full potential. Consideration is given in this study to the question whether opposing intercountry adoption potentially denies a child the fundamental human right to grow up in a nurturing family environment. Or is the contrary true? Does intercountry adoption in fact deny the vulnerable child his or her fundamental right to grow up in a nurturing family environment? It is recognised that intercountry adoption

87 Cantwell *Adoption and Children* 14.
88 *Ibid.*
89 *Ibid.*
90 *Ibid.*

comes with several concerns, some of which are serious. These concerns are discussed in chapter 5.

1 2 PROBLEM STATEMENT

Despite efforts in the international and domestic arena to enact legal means of ensuring that the best interests of the child are served, not all placements of South Africa's OACs are meeting their needs. That intercountry adoption is seldom considered as a viable option for placement of an OAC is questionable.

This thesis recognises conflicting views about the desirability of intercountry adoptions as well as the serious challenges faced by childcare services in developing countries. Decision-makers are tasked with placing a child following a consideration of the best interests of the child concerned, giving effect to the principle of subsidiarity as provided for in international instruments and national legislation, whilst taking cognisance of the prevailing debate and the practical administration of alternative care decisions. Against this background, this thesis investigates specifically:

* the problematic unclear interplay between the best-interests-of-the-child and subsidiarity principles;

* the resulting application of a hierarchy of alternative care preferences that may affect the paramountcy of a child's best interests negatively; and

* the potentially harmful impact of treating intercountry adoption as a "last resort" measure, rather than focussing on whether there is suitable other alternative care available that is in the best interests of the child.

1 3 RESEARCH FOCUS

International instruments have given effect to recognising the child as a bearer of rights. This approach, as opposed to previous paternalistic views, has had considerable impact in determining the placement of orphans and vulnerable children. The CA and its amendments and regulations make provision for the regulation of

alternative care of children in South Africa.[91] The type of care that qualifies as appropriate alternative care is questioned in light of concerns raised about the different options available and their efficacy in serving a child's needs and interests. With special reference to the realities of developing nations like South Africa, consideration is given to which factors should influence how to place a child in his or her long-term best interests. If there is no hope of family reunification for a child, it is the duty of the relevant authorities to make a determination in the child's long-term best interests. The study looks at the approach taken by South African authorities to alternative care, with a particular focus on their attitude towards intercountry adoption as an option and whether this approach really serves a child's best interests.

Given the important role played by adoption in caring for an OAC, a historical perspective of the development of adoption in South Africa is undertaken. Adoption is compared with other forms of alternative care. The legal recognition of adoption as an institution in South Africa has undergone major changes, particularly in light of the enactment of the Constitution and subsequent child law reform. Factors affecting adoption, and subsequently intercountry adoption, as a recognised legal institution are addressed to determine the legal position in current-day South Africa.

The system of alternative care in South Africa is considered against the backdrop that South Africa is struggling to place the large number of OACs resulting particularly from HIV/AIDS. One form of alternative care appears to receive little attention from relevant authorities, including social workers concerned, when a determination is made to place children in need of care – namely, intercountry adoption. It is apparent that intercountry

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91 *GG* 42005 of 2018-10-29. A proposed amendment to the CA was gazetted on 29 October 2018. The proposed amendment of the CA includes *inter alia* specific amendments dealing with professional fees and adoptions. The amendments are aimed at excluding all private professionals from the adoption process in South Africa. The proposals include making it illegal for anyone working in the adoption sector to charge a fee for their services. If accepted, the proposed amendments will have a significant impact on adoption and intercountry adoption in South Africa. The amendments are considered in more detail in ch 4.

adoption of children from African countries has attracted increased media attention in recent years, particularly following their adoption by high-profile persons.[92]

The placement of a child in terms of intercountry adoption remains controversial and ambiguous. Opponents of intercountry adoption often consider themselves to be defenders of children's human rights. This approach is followed by Smolin who suggests that the placing of a child through intercountry adoption "reduces children to objects which are sold to the highest bidder, thereby providing an incentive for corrupt practices such as kidnapping, baby-buying and trafficking."[93] Some question whether an OAC has a right to be raised in a family environment. This must be considered since for some, even if only a few, institutional care may be considered to be in a child's best interest.[94] However, should the right to a "family" environment not be sought, even internationally, where domestic permanent placement is not possible?

As from 2004, a decline in intercountry adoption placements has been noted worldwide.[95] Whilst the number of couples wishing to adopt a child from abroad has not declined, there is a shortage of children available to be adopted. Furthermore, certain critics opine that the Hague Convention has contributed to the decline of placements because of its stringent standards that are difficult for some countries to

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92 Annu "African Children Menaced by European (Organ Harvesting) Charity Agencies – The Zoe's Ark Project" (2008) https://www.africaresource.com/rasta/sesostris-the-great-the-egyptian-hercules/african-children-menaced-by-european-organ-harvesting-charity-agencies-the-zoes-ark-project/ (accessed 2017-06-01).

93 Smolin "Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children" 2006 52 *Wayne Law Review* 116.

94 Louw "Intercountry Adoption" in Boezaart *Child Law in South Africa* (2017) 500. Louw refers to Smolin who opines that in certain instances, taking into consideration factors that include *inter alia* language, culture, nationality and age of the child concerned, institutionalisation of a child may be preferable to placement abroad.

95 Mignot "Why is Intercountry Adoption Declining Worldwide?" (2015) https://halshs.archives-ouvertes.fr/halshs-01326717/document 3; Montgomery and Powell "International Adoptions Have Dropped 72 Percent Since 2005 – Here's Why" (2018) http://theconversation.com/international-adoptions-have-dropped-72-percent-since-2005-heres-why-91809 (accessed 2018-12-03); Selman "Parents are Forced to Look Elsewhere" (2017) https://www.chathamhouse.org/publications/twt/adoption-across-borders-declines (accessed 2018-12-03).

meet.[96] Countries have divergent views on the benefits and disadvantages of intercountry adoption. Domestic legislation concerning the rights of the child varies from country to country and what is deemed to be in the best interests of the child (where intercountry adoption is recognised) remains vague.

With regard to the decrease in placements of OACs abroad, Montgomery and Powell state as follows:

> When countries with high rates of international adoptions suddenly put an end to the practice, officials usually cite examples of abuse. The policy change, they say, is in "the best interest of the child." In 2012, when the Russian parliament voted to ban adoptions by Americans, for example, lawmakers named the new law after 2-year-old Dima Yakovlev, who died in 2008 after being locked in a hot car by his adoptive father. Ethiopian lawmakers likewise recently invoked the 2012 case of a neglected Ethiopian 13-year-old girl who died of hypothermia and malnutrition in the U.S. to justify their new ban on international adoptions. Such events, though high profile, are rare. Of 60,000 adoptees from Russia to the U.S., only 19 have died from abuse or neglect in the last 20 years, according to The Christian Science Monitor. That's an abuse rate of about 0.03 percent. In Russia, the rate of child abuse is higher. Such statistics call into question whether "the best interest of the child" is really why countries cancel international adoptions.[97]

While it is clear that any form of abuse of a child who has been placed abroad must be considered in a serious light with respect to the continued practice of intercountry adoption and the regulation or lack thereof after the placement abroad, it must be noted that such incidences are rare. The concerns of opponents to intercountry adoption often relate to a lack of protection for children against child trafficking and profiteering, illicit financial gain by parties concerned, falsification of the required consent to the adoption of the child, and child stealing.[98] These are real concerns and justify taking

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96 Baird "Stuck in the Pipeline: An Analysis of the Hague Convention and Its Effects on Those in the Process of International Adoptions" 2013 3(2) *Journal of International and Comparative* Law 222.

97 Montgomery and Powell http://theconversation.com/international-adoptions-have-dropped-72-percent-since-2005-heres-why-91809.

98 Ryan "Intercountry Adoption: Past, Present and Future Concerns Regarding its Existence and Regulation" 2008 *Australian Journal of Gender Law* 139.

all steps to prevent such exploitation. However, it is submitted, in light of the stringent regulations and minimum standards drafted into the Hague Convention, and incorporated into national legislation, policies and regulations, children's rights have been granted much more protection than in the past.

Since the reporting of certain abuses concerning children placed through intercountry adoption, debate regarding the interpretation and application of the subsidiarity principle has intensified. International law, including the CRC, the ACRWC, and the Hague Convention, accepts the principle of subsidiarity, but the hierarchy to be applied in making a placement determination varies. Also unclear is when and where intercountry adoption will be considered as an appropriate alternative care option. Proponents and opponents of intercountry adoption argue their case. Following consideration of both approaches, this research concludes that intercountry adoption must be considered as a potential solution to serving the best interests of an OAC.

The *de facto* meaning of "last resort" is pertinent when considering viable options to place a child in alternative care. It is submitted that its meaning must be considered with respect to what actual alternative care is available in the country of origin. The reality in South Africa is that domestic adoption is not common.[99] Poverty and disease greatly decrease the chances of a child being adopted domestically in a developing country.[100] In this context, this research focusses specifically on applying the "best interests of the child" criteria to the consideration of intercountry adoption as an option of care, and more specifically, not necessarily merely as an option of "last resort".

The principle of subsidiarity (as provided for in the international instruments) and the principle of the best interests of a child, are weighed up and considered in giving effect

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99 Rochat, Mokomane, Mitchell and The Directorate "Public Perceptions, Beliefs and Experiences of Fostering and Adoption: A National Qualitative Study in South Africa" 2016 30 *Children and Society* 121.

100 Selman "Intercountry Adoption in the New Millennium; The 'Quiet' Migration Revisited" 2002 21(3) *Population Research and Policy Review* 205.

to the provisions of international law. The Hague Convention emphasises the right of the child to be given the opportunity to develop to his or her own potential within a stable "family" environment. It is submitted that the meaning of "family" includes a suitable family found in a country that differs from the country of origin of the child. One must consider the circumstances in which many vulnerable, orphaned and abandoned South African children find themselves.

A review of the intercountry adoption placements by two other countries is undertaken. Potential lessons from India (a multi-cultural developing nation like South Africa) and Kenya (an African developing nation) are considered. Attention is given to principles and approaches that could inform the practice of placing an orphaned or abandoned South African child, with the focus being on serving the best interests of the child concerned.

This is particularly important considering the global human rights movement. The question posed is whether adoption *per se*, be it national or international, can be considered to be in the best interests of a South African child who is currently in need of alternative care. If so, to what extent will intercountry adoption be considered as an option within the spectrum of appropriate alternative care options? Will the determination of "appropriate" care be based on the individual human rights of the child, as a bearer of rights? In other words, will his or her best interests be a priority when a decision is made? Alternatively, to what extent could the rights and culture of the community be considered relevant when such a determination is made?

Furthermore, political voices in certain counties criticise giving up their own country's children to the so-called imperialist nations.[101] There is also a notion that it is shameful to be sending one's OACs abroad instead of caring for your own. Likewise, an overly restrictive legal system that aims to protect its children from the potential dangers

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101 Bartholet "International Adoption: Current Status and Future Prospects" 1993 3(1) *JSTOR* 90.

associated with intercountry adoption can form a barrier to placing the child in a family environment. In such instances, Bartholet opines that the law may fail to take cognisance of the potential dangers associated with a child growing up on the streets or being placed in a child institution.[102] A restrictive/cautious approach to intercountry adoption does not necessarily increased protection for the children concerned. Consequently, if focused solely on the potential dangers of placing a child abroad, the law could in fact fail to serve the best interests of the child. Furthermore, the hurdles created by certain countries' laws and policies create unnecessary hurdles with respect to intercountry adoption, immigration and citizenship when placing a child abroad.[103]

Recommendations are proposed for assessing the placement of an OAC that best serves the child's interests. These appear in chapter 7 in the form of a model and provide practical guidelines when considering placement in intercountry adoption in light of alternative care options. Measures to clear the obstacles identified are suggested.

1 4 RESEARCH QUESTIONS

The following research questions are considered in the thesis:

1. To what extent is the South African legal framework with respect to a child's right to family, parental or appropriate alternative care, consistent with international standards?
2. What is the role played by adoption (both national and intercountry adoption) as a form of alternative care in South Africa?
3. To what extent does the principle of subsidiarity influence a decision to place a South African child in national alternative care instead of intercountry adoption?

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102 Bartholet 1993 *JSTOR* 91.
103 Bartholet 1993 *JSTOR* 99.

4. To what extent is South Africa compliant with the principle of subsidiarity in international conventions?
5. To what extent is South Africa compliant with the application of the principle of a child's best interest with respect to:
   a) international law; and
   b) the Constitution
6. What lessons on alternative care can be learnt from the approach of India, a multi-cultural "sending" country, and from Kenya, which is a developing African country?

1 5 LIMITATIONS

The current research is limited to the following extent:

- The focus is placed on the rights of a child, as opposed to so-called "group" rights. Where a South African child is orphaned and/or abandoned, the placement of the child will be considered with respect to the child as a subjective bearer of rights. Where a child is found to be orphaned and/or abandoned, the focus is on the fact that such child might need care. A possible debate regarding the relevance of the age of such a child is not engaged with in this thesis.
- The research specifically considers the plight of OACs in South Africa, thus restricting the consideration of vulnerable children to those who are orphaned and/or abandoned. A "vulnerable" child is provided for more broadly in the CA than an OAC.

1 6 AIMS AND OBJECTIVES OF THE STUDY

The thesis proposes a legal framework in the form of a model to be used by relevant authorities when making a decision as to which form of care meets the best interests of a particular child. It is submitted that such a model will assist in providing protection and safeguards when a decision is made regarding appropriate alternative care as it creates a reliable, transparent legal framework for the protection of the best interests of the child.

1 7 RESEARCH METHODOLOGY

This research comprises a literature study and is not empirical in nature. In the research, use is made of both primary and secondary sources of data and the study is accordingly of a qualitative nature.

The primary source is literature in the form of legislation, treaties and conventions, published books, and relevant court decisions. The secondary sources include journal articles, guides to adoption, and other electronic sources.

The research undertakes a comparative study, encompassing India and Kenya to determine the structures in place to effect adoption, and specifically intercountry adoption. Special focus is placed on the local follow-up procedures adhered to where intercountry adoption has taken place. Each country was chosen to serve a function as a comparator:

(a) India is a multi-cultural, multi-lingual, multi-religious, “sending” developing nation much like South Africa. Lessons (positive and negative) from the practice of intercountry adoption in India are considered for application in the current South African situation.

(b) Kenya, as a “sending” country on the African continent, and as a country that has ratified the relevant international instruments concerning alternative care (and intercountry adoption in particular) is considered for its importance as an African state.

A brief exposition of the position in each of these countries is considered to extract principles concerning the practice and position of intercountry adoption as a form of alternative care. A comparison is drawn between the substantive legal rules of the countries in question, especially in determining the best interests of the child concerned. The main objective of the comparison is to determine whether South African law on intercountry adoption can draw from foreign jurisdictions in a way that will benefit the interpretation and development of the position in South Africa.

The research also includes a discussion on the historical background of adoption and its development. It refers too to the changes in society's approach to adoption, and specifically interracial adoption, over a period that spans the *apartheid* regime and the current constitutional democracy. The sources are analysed. Where possible, solutions to aid the placement of a child in need of care, as indicated in the sources researched, are discussed and evaluated in a model in chapter 7.

1 8 OUTLINE OF RESEARCH

Chapter 1

Chapter 1 serves to introduce the focus of the research. A discussion and exposition of the problems identified is undertaken. This chapter sets out the questions to be addressed in the research and provides an outline of the chapters that follow.

Chapter 2

International instruments relevant to alternative care are considered in chapter 2. The development of international law in recognising and ensuring the rights of an OAC to alternative care is traced. Provisions in the CRC, the ACRWC, and the Hague Convention are considered and special focus is given to the similarities and differences among their provisions. Harmonisation of the different instruments with their apparently conflicting provisions is dealt with in this chapter. The chapter concludes with an interpretation of the instruments that acknowledge the child as a bearer of rights with reference to the human rights movement. This in turn establishes the notion of the paramountcy of the best interests of the child. The conclusion of this chapter is important and will be drawn on in the final chapter where a model is recommended with a view to ensuring that a child's best interests are met when a determination of alternative placement is made.

Chapter 3

The concept of "alternative care" is introduced and the various respective advantages and challenges of the different forms of alternate care are highlighted. Chapter 3

focuses on the alternative care of an OAC in South Africa, the development of alternative care in international law, and the importance of seeking a solution that has the securing, recognition and protection of the best interests of the child at heart. The recognised available forms of alternative care in South Africa for a "child in need of care" are explored in more detail. Extended family care or kinship care, foster care, cluster foster care, CHHs, CYCCs and temporary safe care are explained. In each instance, the concerns about each type of alternative care are highlighted. The chapter concludes with a synopsis of the prevailing challenges in implementing alternative care in South Africa. A model is proposed in chapter 7 to guide decision makers in selecting the most appropriate type of alternative care for an OAC in South Africa.

Chapter 4

In chapter 4, adoption is considered as a form of alternative care that provides an element of permanency for a child in need. This chapter considers the concept and practice of adoption from a historical perspective as well as in the current South African legal sphere. It is submitted that the model proposed in chapter 7 will assist the relevant authorities to select the form of alternative care that best meets the interests of the child concerned.

Chapter 5

Following the legalisation of intercountry adoption in South Africa, it is apparent that it is an underused form of alternative care, notwithstanding that it offers a child the opportunity to grow up in a permanent, stable family environment. In chapter 5, an explanation of the development of intercountry adoption law in South Africa is undertaken. The efficacy of the system is also evaluated. Possible reasons for the underuse of intercountry adoption in South Africa are identified and addressed. In particular, the practical application of "subsidiarity" is discussed and the "best interests" of the child is flagged. A guide to assist in determining what constitutes the best interests of a child in a particular instance is proposed in the model in chapter 7.

Chapter 6

In this chapter, the obstacles to intercountry adoption and attendant challenges are considered, as experienced in other jurisdictions, particularly India and Kenya. Possible solutions to problems that may also be applicable in the South African setting are highlighted. This chapter considers how countries apply the best-interests-of-the-child principle in the face of subsidiarity and the notion of a hierarchy of alternative care and seeks to draw conclusions valuable to the South African context. India is in a unique position where personal law and secular legislation are in operation. In both countries, the important and activist role the judiciary has played in ensuring safe intercountry adoption in the best interests of the child will be highlighted. The lessons from this chapter will be summed up in the conclusion to the chapter.

Chapter 7

Chapter 7 constitutes the conclusion to this thesis and recommends a model to assist in decisions when a child is considered for placement in alternative care; the model uses the best-interests-of-the-child principle to decide what form of alternative care is the preferred option for a child in need thereof. The applicability of the best-interests principle is traced when considering alternative care, adoption, and finally, intercountry adoption. Principles are distilled to determine in which cases intercountry adoption will be in the best interests of a child, having reference to the weaknesses of the other forms of alternative care. Recommendations based on best practices are suggested as a guideline to be used in determining the best interests of a child in a given instance. The chapter concludes with a recommendation that after considering/applying *both* the principle of a child's best interests and that of subsidiarity, intercountry adoption is still a viable option.

CHAPTER 2

INTERNATIONAL INSTRUMENTS AND ALTERNATIVE CARE OF CHILDREN

2 1 INTRODUCTION

Over the past decades, international law has experienced important reform in its approach to the rights of children. Originally, the widely held view was that children were mainly *quasi*-property and economic assets and they were regarded as mere "mini-humans".[104] The change to this approach was first noted in the late nineteenth century, following opposition by the children's rights protection movement to the existing "children-as-objects approach".[105] With progress in the acceptance of children as bearers of rights, dramatic changes were evident in the approach of the drafters of international declarations and conventions. Viewing children as bearers of subjective rights, rather than "passive recipients", is therefore a fairly recent development in the child law sphere.[106] Where alternative care for a child is concerned, the recognition of children's rights had a decided impact on the drafters of later conventions.

Presently, international human rights law recognises children as bearers of rights and when ratified, international conventions create obligations that ratifying states are bound to respect. Upon ratification, States Parties are obliged to take positive action to facilitate the enjoyment of the human rights protected in the particular convention. The most significant international human rights instruments concerning alternative

104 Ministry of Foreign Affairs Finland "Children are not mini-human Beings with mini human Rights" (2013) http://www.finlandun.org/public/default.aspx?contentid=271364&nodeid=35880 (accessed 2017-08-05).

105 Phillips *Encyclopedia of Educational Theory and Philosophy* (2014) 124.

106 Viljoen "J Sloth-Nielsen Children's Rights in Africa: A Legal Perspective" 2009 9 *AHRLJ* 353.

care are the CRC, the ACRWC and the Hague Convention.[107] In addition to obligations incurred by South Africa through ratification, it is clear that the Constitution requires that international law must be considered in interpreting its provisions.[108]

It is relevant to note that India and Kenya, the two comparative jurisdictions in this thesis, have ratified both the CRC and the Hague Convention and as such the provisions of these conventions have been incorporated into the national legislation of these countries. As a regional convention, the ACRWC is of specific importance to the position of OACs on the African continent. Kenya, like South Africa, has ratified the ACRWC.[109] An outline follows of the covenants and declarations that mark the development of human rights pertaining to children as bearers of rights.

2 2 THE DEVELOPMENT OF CHILDREN'S RIGHTS: A HISTORICAL PERSPECTIVE

A historical perspective of the development of international law provides an important contextual background for an understanding of the evolution of children's rights worldwide, and in South Africa in particular. The declarations and conventions that set the foundation for the recognition of children's rights are considered first. A more detailed consideration of the conventions relevant to alternative care, including adoption and intercountry adoption, are considered after this outline.[110]

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107 Assim *Understanding Kinship Care of Children in Africa: A Family Environment or an Alternative Care Option?* (LLD thesis, University of the Western Cape) 2013 75.

108 S 39(1)*(b)* of the Constitution.

109 African Commission on Human and Peoples' Rights "Ratification Table: African Charter on the Rights and Welfare of the Child" (undated) http://www.achpr.org/instruments/child/ratification/ (accessed on 2019-01-22).

110 Alternative care in the narrow sense excludes the consideration of adoption and intercountry adoption.

2 2 1 THE GENEVA DECLARATION OF THE RIGHTS OF THE CHILD (1924)

In 1924, the first inter-governmental organisation for the maintenance of world peace, the League of Nations, adopted the Geneva Declaration of the Rights of the Child (1924 Declaration).[111] Although the 1924 Declaration was not binding on member states, the Preamble stated that "mankind owes to the child the best it has to give". While the provisions of the 1924 Declaration were formulated as moral duties of "mankind" towards children, and not as children's rights *per se*, it nonetheless constituted the first international instrument to consider issues affecting children. Consequently, the 1924 Declaration committed nations to the development, protection and raising of children. Despite its limitations, it prepared the ground for the "progressive development of international norms and standards with regard to the rights and well-being of the child".[112]

The 1924 Declaration provided a concise list of obligations targeted expressly at the well-being of children as follows:

> Article 1 The child must be given the means requisite for its normal development, both materially and spiritually.
>
> Article 2 The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and "the orphan and the waif must be sheltered and succoured".[113]
>
> Article 3 The child must be the first to receive relief in times of distress.
>
> Article 4 The child must be put in a position to earn a livelihood and must be protected against every form of exploitation.
>
> Article 5 The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

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111 1924 Geneva Convention of the Rights of the Child.

112 De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 4 *Stell LR* 293.

113 Cregan and Cuthbert *Global Childhoods: Issues and Debates* (2014) 60.

While the 1924 Declaration did not directly refer to the *rights* of children, it expressed *an appeal* to the world for the understanding and acceptance of the well-being of children.[114]

2 2 2 UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)

The existing international human-rights movement gained momentum and was strengthened in the fulfilment of its aim when the United Nations General Assembly adopted the Universal Declaration of Human Rights in 1948 (1948 Declaration or commonly referred to as the UDHR).[115] The UDHR together with the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) is considered the International Bill of Human Rights. This "Bill of Rights" is regarded as the pillar of human rights protection within the UN.[116]

Article 25 of the UDHR refers to children as "entitled to special care and assistance".[117] The UDHR was the first international declaration to articulate the basic civil, political, economic, social and cultural rights that *all* human beings should enjoy. As such, it also became the first international declaration to use the term "human rights". The UDHR is widely accepted as the fundamental standard of human rights, representing those basic and fundamental rights considered inherent to all human beings. The UDHR inspired a rich body of legally binding international human rights treaties.[118]

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114 Phillips *Child-headed Households: A Feasible Way Forward, or an Infringement of Children's Right to Alternative Care?* (2011) 35.

115 UN General Assembly *Universal Declaration of Human Rights* (1948) A/RES/217 A(III).

116 ESCR-NET "Section 5: Background Information on the ICESCR" (undated) https://www.escr-net.org/resources/section-5-background-information-icescr (accessed 2017-11-03).

117 UNICEF "The Evolution of International Standards on Child Rights" (undated) https://www .unicef.org/right site/sowc/pdfs/panels/SOWC%20all%20panels.pdf (accessed 2017-08-16).

118 United Nations "The Foundation of International Human Rights Law" (undated) http://www .un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html (accessed 2017-07-10).

2 2 3 THE DECLARATION OF THE RIGHTS OF THE CHILD (1959)

The UN's General Assembly adopted the Declaration of the Rights of the Child (1959 Declaration).[119] As the successor to the 1924 Declaration, the 1959 Declaration represents the first major international consensus achieved concerning translating the fundamental principles into rights for children. Just as the 1924 Declaration stressed that humanity owes the child the best it has to give, the 1959 Declaration acknowledged and followed the same approach. However, the principles contained in the 1959 Declaration were formulated as "rights" as opposed to mere moral obligations of adults towards children.

However, Boyd[120] points out that despite the 1959 Declaration's reference to rights, its principles can best be regarded as moral rights, merely containing moral entitlements.[121] However, the 1959 Declaration was the first of the declarations to adopt a language of entitlement recognising in effect that children were holders of rights and not mere objects.[122] The 1959 Declaration remained limited in its impact, however, as it was a mere "statement of intent" rather than a legally binding instrument. As far as caring for a child is concerned, the 1959 Declaration provided that priority must be given to raising a child in a family environment. Affirmation hereof is found in Principle 6 in the Preamble, which states:

> The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family

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119 UN General Assembly *Declaration of the Rights of the Child* (1959) A/RES/1386 (XIV). All 78-member states adopted the Declaration unanimously on 20 November 1959.

120 Boyd *The Determinants of the Child's Best Interests in Relocation Disputes* (LLM dissertation, University of the Western Cape) 2015 6.

121 *Ibid.*

122 Boyd *The Determinants of the Child's Best Interests* 7.

> and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.[123]

The provision in Principle 6 expressly states that an obligation rests on society and the relevant state authorities to extend care to a child deprived of parental care. The 1959 Declaration clearly acknowledged the vulnerability of a child who lacked parental care.

2 2 4 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) (1966)

The ICCPR followed the 1959 Declaration.[124] The UN General Assembly adopted the ICCPR on 16 December 1966, and it entered into force nearly a decade later on 23 March 1976. The ICCPR is a multi-lateral UN treaty based on the UDHR.[125] The ICCPR is an international human rights treaty, providing a range of protections for civil and political rights.[126] It contains general provisions from which children are entitled to benefit, as well as certain specific safeguards for children in the administration of justice, and as members of a family unit.

The Preamble of the ICCPR recognises the inherent dignity and the equal and inalienable rights of *all* members of the human family. The ICCPR provides that every child shall *inter alia* have the right to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the state.[127] Article 24 is of particular relevance to children in that it makes provision for the right of every child, on the basis of their status as a minor, to measures of protection on the

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123 Principle 6 had a profound effect on enacting provision 20 of the CRC.

124 UN General Assembly *International Covenant on Civil and Political Rights* (1966) A/RES/2200A/XXI. The ICCPR entered into force on 23 March 1976.

125 Bogale *Domestication of International Standards on the Rights of the Child with Specific Emphasis on the Minimum Age for Criminal Responsibility: The Case of Ethiopia* (LLM dissertation, University of the Western Cape) 2009 40.

126 The UN Human Rights Committee monitors the ICCPR. Civil and political rights are rights that limit physical and legal abuse by governments (and other parties) against children.

127 Art 24(1).

part of the family, society and the state, without discrimination on the basis of race, colour, sex, language, religion, national or social origin, property or birth.[128]

The Human Rights Committee (HRC) is the body of independent experts that monitors the implementation of the ICCPR by its States Parties. All States Parties are obliged to submit regular reports to the HRC on how the rights of the ICCPR are being implemented. The HRC examines such reports, submitted under article 40, on the basis that the States Parties concerned have agreed to give effect to the rights recognised in the ICCPR, and the HRC then evaluates such report on the progress made in the enjoyment of these rights. States Parties are required to make a note in their reports of any factors and difficulties in relation to the implementation of the ICCPR. The HRC then issues concluding observations that specify positive and negative aspects of the particular State Party's implementation of the ICCPR and any remedial action the HRC recommends.[129]

2 2 5 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR) (1966)

The ICESCR[130] is a multi-lateral treaty that was adopted and opened for signature, ratification, and accession by the General Assembly of the UN.[131] The ICESCR is part of the International Bill of Human Rights, together with the UDHR and the ICCPR. The ICESCR reflects the commitments adopted after, and in reaction to, the devastating effects of World War II. It has as its aim the promotion of social progress and better

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128 These rights are equally applicable to boys and girls.

129 Office of the High Commissioner for Human Rights (OHCHR) "Monitoring Civil and Political Rights" (undated) https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx (accessed 2019-01-30).

130 UN General Assembly *International Covenant on Economic, Social and Cultural Rights* (1966) A/RES/3/217. The ICESCR entered into force on 23 March 1976.

131 On 16 December 1966 by General Assembly Resolution 2200 A (XXI). The ICESCR became operative on 3 January 1976. The text of this covenant was finalised in 1966 along with that of the ICCPR.

standards of life, thereby reaffirming its faith in human rights and in employing the international machinery to achieve these objectives.

The ICESCR consists of a Preamble and 31 articles. It is divided into five distinct parts. Part III contains provisions relating to family life,[132] among others. The Preamble to the ICESCR recognises the indivisibility of human rights, and as such, it is equally applicable to children's rights. The ICESCR places an obligation on states to promote a universal respect for, and observance of, all human rights and freedoms concerning economic, social and cultural rights. Article 2 specifically imposes a duty on all parties to take steps

> [t]o the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 10(1) makes specific provision for children and provides:

> The States Parties to the present Covenant recognise that:
>
> The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

Further, article 10(3) provides that parties must take "special measures" to protect children from economic or social exploitation, including setting a minimum age for employment and barring children from dangerous and harmful occupations. Specific reference to children's rights is likewise found in article 12, which addresses the right of all to "enjoyment of the highest attainable standard of physical and mental health", to be fully realised by, among other measures, States Parties providing "for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child".

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132 Art 6–15 of ICESCR.

The ICESCR creates legally binding international obligations for those states that have agreed to be bound by the standards contained in it. Furthermore, where a state has ratified or acceded to the ICESCR, it is subject to the scrutiny of its compliance with the standards and norms as provided for in the ICESCR by an international committee of independent experts – namely, the Committee on ICESCR. South Africa signed the ICESCR on 3 October 1994 and ratified it on 12 January 2015.[133]

2 2 6 THE DECLARATION ON THE RIGHTS AND WELFARE OF THE AFRICAN CHILD (1979)

The year 1979 marked the International Year of the Child.[134] Poland submitted a proposal in the same year for the enactment of a treaty specifically dedicated to the rights and concerns of children. This proposal set in motion the process for the drafting of the CRC.[135] In the same year, the Organisation of African Unity (OAU, now known as the African Union) also promulgated the Declaration on the Rights and Welfare of the African Child (1979 Declaration).[136] This declaration had specific relevance to the rights of the African child. The 1979 Declaration is significant in several ways:

In the first place, it followed the approach of the 1959 Declaration by formulating its principles in terms of "a rights-based language in the context of children's rights."[137] Principle 2 indicates that the 1979 Declaration went further than the 1959 Declaration by insisting on the need for states to embark on law reform "relating to the rights of children". The approach was progressive and set the foundation for the globally

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133 OHCHR "Ratification Status for ICESCR" (undated) https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en (accessed 2019-01-30).

134 See UN General Assembly *International Year of the Child* (18 October 1979) A/RES/34/4.

135 Council of Europe *The Best Interests of the Child: A Dialogue Between Theory and Practice* (2016) 19.

136 Kamchedzera "The Complementarity of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" in Verhellen (ed) *Understanding Children's Rights* (1998) 550.

137 Principle 2 of the 1959 Declaration.

recognised rights-based approach that is characteristic of child law reform today.[138] Secondly, the 1979 Declaration expressly states the obligations of an African State towards its children.[139] In the context of the importance of a family environment and the right to alternative care, the 1979 Declaration emphasised the strong link between the welfare of the child and that of his or her parents, including the welfare of the extended family.[140] Article 24, for example, provides for the right of every child, based on his or her status as a minor, to measures of protection on the part of their family, society and the state without discrimination on the basis of race, colour, sex, language, religion, national or social origin, property or birth.

In the African context, the 1979 Declaration shows the value that is placed on the family unit, especially regarding the important role played by the family in respect of the care and upbringing of a child. The 1979 Declaration therefore laid the foundation for the eventual enactment of the ACRWC as a regional instrument supplementary to the CRC.[141]

2 2 7 THE DECLARATION ON SOCIAL AND LEGAL PRINCIPLES RELATING TO THE PROTECTION AND WELFARE OF CHILDREN, WITH SPECIAL REFERENCE TO FOSTER PLACEMENT AND ADOPTION NATIONALLY AND INTERNATIONALLY (1986)

In 1986, the UN General Assembly formally adopted the Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration). In the Annexure to the 1986 Declaration, the General Assembly recalled

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138 Sloth-Nielsen "Domestication of Children's Rights in National Legal Systems in African Context: Progress and Prospects" in Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 53.

139 Sloth-Nielsen "Children's Rights in Africa" in Ssenyonjo (ed) *The African Regional Human Rights System* (2012) 162.

140 Assim *Understanding Kinship Care of Children in Africa* 83; Preamble of the 1979 Declaration.

141 Preamble of the ACRWC.

the international law that preceded and was relevant to the drafting of the 1986 Declaration. The 1986 Declaration is especially important to this research as it affirms Principle 6 of the 1959 Declaration concerning the importance of children being raised by their parents in an atmosphere of affection and of moral and material security and the 1986 Declaration recognises the positive effect that a stable family environment has on a child.[142]

In terms of article 3 of the 1986 Declaration, it is a matter of priority that the parents raise their child. Only where the parents cannot care for their child, should alternative care be considered.[143] Therefore, according to the 1986 Declaration, the first choice for alternative care should resemble, as far as possible, a "typical" family environment and only when such an environment is unavailable, should other alternative options be considered. The 1986 Declaration notes with concern the large number of OACs.[144]

As far as placement in adoption is concerned, the 1986 Declaration provides that the primary aim of adoption is to provide a child in need of care with a permanent family.[145] Article 15 expressly notes the importance of reaching a decision for the placement of a child as early as possible as this is important for the future of the child. Clearly, the 1986 Declaration has considered the long-term effects on a child who is removed from his or her own family environment. Furthermore, sufficient time and adequate counselling should be given to the child's own parents, the prospective adoptive parents, and, as appropriate, the child, to reach a decision regarding the placement of the child.[146]

The 1986 Declaration clearly recognises the importance of the family, and provides that there is an obligation on each state to give high priority to the institution of the

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142 Preamble of the 1986 Declaration.

143 Art 4.

144 The 1986 Declaration specifically refers to violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems causing such increase in numbers of OACs.

145 Art 13.

146 Art 15.

family and child welfare.[147] Furthermore, it states that child welfare in essence is dependent upon good family welfare.[148] The 1986 Declaration clearly recognises the importance of the family, and provides that it is an obligation on each state to give high priority to the institution of the family and child welfare.[149] Furthermore, it states that child welfare in essence is dependent upon good family welfare.[150] Assim likewise refers to the fact that "child welfare depends upon good family welfare", and that the 1986 Declaration further highlights the double vulnerability of children deprived of a family environment, thereby underscoring the importance of the right to alternative care.[151] The first priority for a child is to be cared for by his or her own parents.[152] When considering the needs of a child, the 1986 Declaration provides that these factors must be considered as of utmost importance before a decision is made. The 1986 Declaration provides for instance that when considering where a child should be placed, the child's "need for affection and right to security and continuing care" must be carefully considered.[153]

Only where care by the child's own parents is not a viable option[154] or is unavailable or inappropriate, should consideration be given to finding care by relatives of the child's parents, or by another substitute such as foster care or adoption or, if necessary, by an appropriate institution.[155] Referring more specifically to kinship care, article 4 provides that "[w]hen care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute – foster or adoptive – family or, if necessary, by an appropriate institution should be considered."

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147 Art 1.
148 Art 2.
149 Art 1.
150 Art 2.
151 Assim *Understanding Kinship Care of Children in Africa* 79.
152 Art 3.
153 *Ibid*.
154 Family care could be unavailable or inappropriate in a given circumstance.
155 Art 4.

The 1986 Declaration provides that all determinations to place a child in foster care or adoption shall be based on the consideration of the principle of the child's best interests. When placing a child in alternative care, the best interests of the child are a paramount consideration in making such a determination.[156] The 1986 Declaration provides that the "primary aim of adoption is to provide a child who cannot be cared for by his own parents with a *permanent* family"[157] (my emphasis).

Article 6 further provides that persons responsible for placing a child in foster care or adoption should have received professional or other appropriate training to assist them when making such determinations.[158] Law should regulate foster placement of children,[159] and although foster care is temporary in nature, such foster care may in fact continue until the child concerned reaches adulthood.[160] Article 12 of the 1986 Declaration provides that a competent authority or agency should be responsible for supervision to ensure the welfare of a child placed in foster care or through adoption.[161] Article 15 expressly notes the importance of reaching a decision for the placement of a child as early as possible as this is important for the future of the child.

The 1986 Declaration took cognisance of the fact that Islamic parties do not recognise adoption as a potential form of alternative care for Islamic children**.** Recognition and acceptance of *kafalah* as practised in Islam represents a compromise in an attempt to accommodate the differences within the religious sphere as to what is acceptable with regard to alternative care. This shows an acceptance and accommodation of alternative care for followers of Islam. The 1986 Declaration accordingly provides that the provisions would not affect the existing alternative institutions such as *kafalah* in certain legal systems.

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156 Art 5.
157 Art 13.
158 Art 6.
159 Art 10.
160 Art 11.
161 At no time should foster care preclude the return of the child to the family environment.

The 1986 Declaration also recognises some general principles as being important, not only to the realisation of the right to alternative care, but also to the realisation of children's rights generally – namely, the principle of prioritising the best interests of the child and the principle of child participation.[162] These principles were subsequently incorporated in the CRC. In light of the above, it is clear that the 1986 Declaration set the standard for the conventions that were to follow concerning the placement of an OAC in alternative care.[163] Article 21 of the CRC on intercountry adoption and the provisions of the Hague Convention are also traceable to articles 17 to 24 of the 1986 Declaration. Twenty-four articles of the 1986 Declaration deal with adoption.[164]

Article 17 recognises the potential role that intercountry adoption could play in providing a permanent placement for a child in need. The 1986 Declaration subscribes to the principle of subsidiarity and states: "If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family".[165] States have an obligation to ensure that policy, legislation and effective supervision is in place for the protection of children when placed in intercountry adoption.[166] The 1986 Declaration was the first to create a hierarchy of preference for the manner in which alternative care options should be sought, considered and provided.[167]

As indicated above, the best interests of the child are considered important at all times when reaching a decision as to where to place an OAC.[168] Particular emphasis is placed on a child's need for affection and right to security and continuing care and it is

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162 Art 13.
163 Such as the CRC (1990); the Hague Convention (1993) and the ACRWC (1999).
164 Art 13–24 of the 1986 Declaration. Four of these articles focus on adoption generally, while the remaining eight are devoted to placement in terms of intercountry adoption.
165 *AD v DW supra* par 37.
166 Art 4.
167 Art 17.
168 Art 5.

incumbent on the government concerned to determine the adequacy of its national child welfare services and consider appropriate actions.[169]

2 3 REGULATION IN TERMS OF THE CRC, ACRWC AND HAGUE CONVENTION

This research focuses on the determination of an appropriate and most suited placement for a child in need of care where care by his or her parents is not viable. Following the first democratic national elections in 1994, South Africa has achieved international acceptance in the world. One of many consequences has been the ratification of several treaties by South Africa, *inter alia* those that specifically relate to the rights and welfare of children. The conventions and charter discussed below are directly applicable to this research in as much that they provide guidance where alternative care is under consideration for OACs. Given the issues in determining what form of alternative care best meets the needs of the child concerned, the importance of the conventions and charter is evident. As such, these international instruments are considered in some detail. In determining the most appropriate placement of a child, special regard is had to the principle of the best interests of the child and the principle of subsidiarity. Where relevant, specific guidelines and other comments are considered.

Of the more recently ratified conventions that relate directly to the rights of children to family and parental care, the CRC, ACRWC and Hague Convention are the most important. The aims of these instruments are diverse,[170] and cover a variety of issues. Following South Africa's acceptance into the community of nations, the then-Minister of Justice identified the CRC as the primary treaty to be ratified by South Africa. One of the first announcements made by Nelson Mandela after becoming President of the

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169 Art 7.

170 UN Department of Economic and Social Affairs: Population Division *Child Adoption: Trends and Policies* (2009) 53.

Republic of South Africa related to the domestic application of the principles enshrined in the CRC.[171] Mr Mandela stated:

> There can be no keener revelation of a society's soul than the way in which it treats its children.[172]

These instruments are important and are by nature representative of a common pool of wisdom that is the culmination of efforts by the relevant parties to ensure the recognition of the right to, and protection of, children's rights. In no instance did the internationalisation of human rights replace domestic rights, but rather international rights supplemented domestic rights.[173] The international instruments provide a framework for states parties to operate within and, further oblige States Parties (after ratification) to bring their domestic legal policy, law and practice in line with, the provisions of the relevant international instrument or instruments.[174]

The result is that states are seen as moving towards a "global normative consensus".[175] Ratification and accession to these conventions have confirmed South Africa's commitment to human rights efforts worldwide, as well as its aim to protect children in accordance with the standards set by such international declarations and conventions.

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171 Abrahams and Matthews *Promoting Children's Rights in South Africa: A Handbook for Members of Parliament* (2011) 3.

172 *Ibid.*

173 OHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (2010) 16. See also Elkins, Ginsburg and Simmons "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice" 2013 54 *Harvard Journal of International Law* 61.

174 Obitre-Gama *The Application of International Law into National Law, Policy and Practice* Paper presented at The WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control, New Delhi (7–9 January 2000) http://www.who.int/tobacco/ media/en/JUDY2000X.pdf (accessed 2018-07-05).

175 Viljoen "The African Charter on the Rights and Welfare of the Child" in Boezaart *Child Law in South Africa* (2009) 332. The latest edition of Boezaart does not refer to this sentiment.

These three important international instruments namely the CRC, the Hague Convention and the ACRWC, are discussed in greater detail below under the following headings:

(a) the origin of the particular convention;

(b) an overview of the provisions of the particular convention; and

(c) the particular regulation of alternative care and/or intercountry adoption by the particular convention.

2 3 1 THE CONVENTION ON THE RIGHTS OF THE CHILD (1989)

After a decade of work and negotiation among governments and non-governmental organisations, the UN General Assembly unanimously adopted the CRC on 20 November 1989. The CRC, which has been hailed as a "watershed in the history of children",[176] is of utmost importance globally. India, Kenya and South Africa, the countries considered in this research, have all ratified the CRC. South Africa became a signatory to the Convention on 29 January 1993[177] and ratified it on 16 June 1995.[178]

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176 Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law" 1995 *SAJHR* 401 states that "[t]he Convention has been hailed as a watershed in the history of children. It followed, and was developed as a consequence of, the 1979 International Year of the Child, South Africa has aligned itself to the ACRWC, which sets out an unlimited definition of age of majority for a child contrary to the limitations found in the Conventions. The age of majority in South Africa is accepted to be 18 years of age. This is in line with the age of majority as determined by the Constitution. Section 41, which provides that the CRC shall respect the domestic legislation of a country that provides superior protection of a child, reconfirms the fact that South African children receive maximum protection until they turn 18 years of age. In terms of this Article, the provisions of the convention do not overrule any domestic provisions or international law that binds a particular state. It is relevant to mention here that this domestic legislation does not take cognizance of the fact that a large portion of our citizens acknowledges that childhood ends and adulthood begins on the completion of certain recognised customs, and rituals can be traced back to a quest which has lasted for a century".

177 Mr Josiah Jele, Ambassador to the UN, signed the CRC.

178 Kenya ratified the CRC on 30 July 1990, and India ratified the CRC on 11 December 1992. The expectation on ratification of an international instrument is that all States Parties undertake legislative and other concomitant measures for the implementation of the rights enshrined in the CRC.

Prior to the adoption of the CRC, children who lacked a family environment were a focus of international concern, but through non-binding declarations. As discussed above, previously, children's legal position was determined based mainly on their "needs" as opposed to their "rights".[179] Vigorous negotiations between the drafters and various states took place before the CRC was adopted. The first draft of the CRC, which was submitted by Poland to the UN Commission on Human Rights, made no mention of adoption.[180] Comments made by Barbados and Colombia were submitted and these comments subsequently formed the foundation of article 21. In the *Travaux Preparatoires*, a note was made of the two comments of these countries. Barbados made the following comment:

> It has been observed that no article deals directly with the adoption of children where this is desirable and in their best interest. If this is to be accepted then provision should be made whereby an adoption should not take place without the consent of the parent. However, such consent may be dispensed with by a competent court if the person whose consent is to be dispensed with: a) has abandoned, neglected or persistently ill-treated the infant; or b) cannot be found or is incapable of giving consent or is withholding his consent unreasonably.[181]

Colombia commented as follows:

> Having analysed articles I to X, we find that they reproduce the content of ten articles of the Declaration of the Rights of the Child which were adopted by the United Nations General Assembly in 1959, and to which the following might be added … a child who is adopted by nationals of a country other than his country of origin shall enjoy the same rights as are accorded to children of the country in which he is adopted.[182]

In consideration of these comments, it is apparent that while Barbados dealt with adoption in general, Colombia focused on the placement of a child in terms of intercountry adoption. The comments made by Colombia were further developed

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179 Mezmur "The African Children's Charter *versus* the UN Convention on the Rights of the Child: A Zero-sum Game?" 2008 23(1) *SA Public Law* 1 29; Vandenhole, Desmet, Reynaert and Lembrechts (eds) *Routledge International Handbook of Children's Rights Studies* (2015) 50.

180 Vité and Boechat in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 3.

181 See *Travaux Preparatoires* UN Doc.E/CN.4/1324/Add.2.

182 *Ibid*.

following a proposal by Norway, suggesting that the state must carry the responsibility to establish policies and promulgate legislation that will ensure: the protection of the children concerned; that all adoptions are processed through agencies that have been authorised to process such adoptions; that there is an obligation not to discriminate between national and intercountry adoptions; that the consents and proceedings of the countries involved in the intercountry adoption process are validated; and finally that the child's right to his or her name, nationality and a legal guardian are safeguarded.[183]

Never before had a human rights treaty taken effect within months of adoption by the UN General Assembly,[184] and never before had a human rights instrument received near universal ratification.[185] Doek states that "[n]o other human rights treaty comes that close to universal ratification" and "the CRC is at the same time the human rights treaty with widest coverage".[186] The CRC is the second youngest of the seven human rights treaties and is generally considered the most successful of all.[187] One of the main advances of the CRC was the express elevation of children's rights.[188] As Buck suggests the CRC did more than establish an authoritative text of children's rights; it provided the international community with a "powerful vehicle to institute programmes of action and shape policy initiatives to further advance their practical implementation".[189] The CRC creates a comprehensive compilation of children-

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183 Vité and Boechat in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 4.

184 The CRC came into effect within nine months of the adoption thereof.

185 Kaime "The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections" 2005 5(2) *AHRLJ* 221. See also Lee "Child Rights and Child Well-being" OECD World Forum (2009) 2 http://www.oecd.org/site/progresskorea/44137252.pdf (accessed 2015-07-07); Beier *The Militarization of Childhood: Thinking Beyond the Global South* (2011) 47; Smith *Texts and Materials on International Human Rights* (2013) 63.

186 Doek "The Protection of Children's Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges" 2003 22 *St Louis University Public Law Review* 235; See also Mezmur 2008 *SA Public Law* 23; Mandlate *Assessing the Implementation of the Convention on the Rights of the Child in Lusophone Africa (Angola and Mozambique)* (LLD thesis, University of the Western Cape) 2012 55.

187 Mandlate *Assessing the Implementation of the CRC* 3.

188 The Preamble of the CRC.

189 Buck *International Child Law* (2014) 88.

specific rights. The adoption of the CRC led to a paradigm shift in how the world considered children; they were no longer "mini-human beings with mini-rights" but were now *bearers* of rights.[190]

The adoption and recognition of rights to protect children were integral to the articles of the CRC. Zermatten states that the CRC created a "new democratic dynamic".[191] Today, all members of the UN, with the exclusion only of the United States of America, have ratified the CRC.[192] The CRC is particularly significant to this research because it enshrines "for the first time in binding international law, the principles upon which adoption is based, viewed from the child's perspective".[193]

2 3 1 1 THE ORIGINS OF THE CRC

Before the adoption of the CRC, the 1959 Declaration was the only main international instrument that had as its focus the rights of the child. This declaration is seen as the "parent document" to the CRC.[194] The CRC became operative on 2 September 1990, following ratification of the CRC by 20 states. Although there were several provisions in international law that were relevant to children, until the adoption of the CRC by the UN, there was no comprehensive and binding treaty dealing with children's rights.[195]

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190 Fokala *Implementing Children's Right to Participation in Family Decision-Making Processes in Africa* (2017) 15; Van Bueren *The International Law on the Rights of the Child* (1995) 1–2.

191 Zermatten "The Best Interests of the Child Principle: Literal Analysis, Function and Implementation" 2010 18(4) *International Journal of Children's Rights* 2.

192 Mehta "There is Only One Country That Hasn't Ratified the Convention on Children's Rights" (20 November 2015) https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens (accessed 2018-12-06).

193 Van Bueren *The International Law on the Rights of the Child* 10–11.

194 Many of the provisions of the CRC that established rules and safeguarding of children during adoption were already provided for in the UN *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*. UN Resolution 41/85 adopted this declaration in December 1986.

195 See the 1924 *Geneva Declaration on the Rights of the Child*, the 1959 *Declaration on the Rights of the Child* and the 1986 *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*.

The CRC was an attempt by the drafters to highlight human rights that were specifically applicable to the protection of children.[196]

During the UN World Conference on Human Rights in 1993, a call was made for the universal ratification of the CRC by 1995.[197] Simultaneously, in the Vienna Declaration and Programme of Action, the Conference proclaimed that, for the full and harmonious development of a child's personality, he or she should grow up in a family environment, which thus merits broader protection.[198] The importance of the family environment and the family as a social unit that caters for the well-being of the child was thus reaffirmed. The CRC has set the international standard against which domestic legislation and policies are measured.[199]

2 3 1 2 OVERVIEW OF THE CRC'S PROVISIONS

The CRC includes an extensive Preamble and consists of 54 articles. These articles can be subdivided into three main themes: articles 1-41 provide for substantive matters in which the rights of the child and the obligations of the States Parties are defined; articles 42–45 provide procedures for monitoring the implementation of the CRC; and articles 46–54 express formal provisions governing the entry into force of the CRC.[200] The Preamble provides a frame of reference for the CRC and it is in light of the Preamble that all articles of the CRC must be interpreted. The Preamble makes it clear that children are entitled to the same basic rights as every person, but that they are, at the same time, entitled to special care and assistance.

The CRC established a set of human rights applicable to all children below 18 years of age. The CRC defines a child as a human being below the age of 18 years, unless

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196 Abrahams and Matthews *Promoting Children's Rights* 24.

197 UN General Assembly *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF.157/23 https://www.refworld.org/docid/3ae6b39ec.html (accessed 2018-12-07).

198 *Ibid*.

199 *Brandt v S* [2005] 2 All SA 1 (SCA) 7.

200 Verhellen "The Convention on the Rights of the Child" in Vanderhole *et al* (eds) *Routledge International Handbook* 48.

the national law of a particular country allows a person to attain majority status at a younger age.[201] The definition of a child provides the scope of the application of the CRC. Mezmur suggests that stipulating a specific age in the definition creates a norm that can assist to escape the "ambiguities and contradictions of other definitions of a child, as it gives predictability regarding which rule or provision will apply to whom".[202] Article 1 of the CRC provides that "a child" means any individual below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier. The reference to the fact that a child being under 18 years old is protected "unless the national law of a particular country allows a person to attain majority status at a younger age" may be seen as an implication that, where a country has a lower age of majority set in terms of its national law, and the child concerned has reached this age, the child is not considered "a child" in terms of the CRC. The individual will accordingly not receive the protection afforded to a child in terms of the CRC.[203]

However, the Committee on the Rights of the Child (the Committee)[204] disagrees with this approach, and has encouraged states to increase the level of protection for *all* children under 18 years.[205] Mezmur furthermore contends that expressing age as a criterion "has contributed to the construction of a uniform identity of the child".[206] This approach is in line with the fact that the CRC is a legally-binding international agreement setting out the civil, political, economic, social and cultural rights of *every* child, regardless of race, religion or abilities.

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201 Art 1 of the CRC.

202 Mezmur *Intercountry Adoption in an African Context* 108.

203 Melchiorre *A Minimum Common Denominator? Minimum Ages for Marriage Reported Under the Convention on the Rights of the Child* Submission on child, early and forced marriage, Women's Human Rights and Gender Section, OHCHR (2013) 3.

204 The Committee is discussed in more detail at 2 3 1 2 (ii).

205 UN Committee on the Rights of the Child (CRC) *General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)* (17 April 2013) CRC/C/GC/15.

206 Mezmur *Intercountry Adoption in an African Context* 108.

The CRC provides for four general principles (often referred to as the "four pillars" of the CRC). These four principles constitute the basic values of the CRC. [207] They are the following:

1. The law must also ensure equal access for all children to the rights and protections offered by domestic legislation.[208]

2. The best interests of the child shall be a *primary* consideration in every matter relating to a child, whether undertaken by private or public social welfare.[209] What constitutes the "best interests" of the child may vary from case to case, country to country or culture to culture. As each case is decided on an *ad hoc* basis, attempts can be made to structure the determination of what constitutes a child's best interests in such a way as to ensure a more uniform application of the criteria of best interests.

3. The child must be given an opportunity to air his or her own views whenever the child is able to do so.[210] This entails granting the child the right to have his or her views heard and ensuring that due weight is accorded to these views, taking into consideration the age and maturity of the particular child.

4. The child has the right to survival – namely, the right to life – and the child is entitled to his or her development.[211] Development must be interpreted in a broad sense in that the law, policy or administrative action of the state must provide not only for the mere survival of the child but also take cognisance of the emotional, social, and cultural development of the child.

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207 Mezmur "The African Children's Charter *versus* the UN Convention on the Rights of the Child: A Zero-sum Game?" 2008 23 *SA Public Law* 3; De Bruin *Child Participation and Representation in Legal Matters* (LLD thesis, University of Pretoria) 2010 225–226.

208 Art 2.

209 Art 3.

210 Art 12.

211 Art 6.

The four pillars of the CRC declare the object and purpose of the Convention and these pillars of the CRC, as well as, the principle of "the evolving capacities of the child"[212] must be regarded when the provisions of the Convention are considered. A brief discussion of the four pillars follows.

Provision for the principle of non-discrimination is made in article 2 of the CRC. It is a general principle of fundamental importance for the implementation of the CRC. Article 2 provides:

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The principle of non-discrimination is often identified with the principle of equality.[213] Mezmur states in this regard that both principles – namely, equality and non-discrimination – are in fact "positive and negative statements of the same principle".[214] The Committee noted that the principle of non-discrimination is applicable irrespective of the budgetary resources of the state. The principle of non-discrimination is particularly important for the purpose of this research in respect of the consideration of intercountry adoption. Non-discrimination often manifests itself in three particular instances with respect to the adoption of a child, whether domestic or in terms of intercountry adoption:

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212 Mezmur *Intercountry Adoption in an African Context* 102.
213 Morag "The Principles of the UN Convention on the Rights of the Child and Their Influence on Israeli Law" 2014 22(2) *Michigan State International Law Review* 551.
214 Mezmur *Intercountry Adoption in an African Context* 135.

1. The principle is intended to address some of the main causes that deprive a child of his or her family environment.
2. The principle was created to cater for the needs of vulnerable children so that such children can also benefit from a family environment, albeit through adoption.
3. The principle is also intended to guarantee equal rights and protections for all children who are adopted, nationally or internationally.

In its Preamble, the CRC recognises that "in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need *special consideration* …" An example hereof is found with respect to *inter alia* policies involving vulnerable groups of children who are infected by HIV/AIDS, street children or children belonging to a certain race, ethnic, religious or linguistic group, must be consistent.

The general principle providing for the best interests of a child is provided in article 3 of the CRC. While the CRC did not introduce the principle in international law for the first time, the Convention did transform the principle beyond the scope of the principle found in earlier international law.[215] The principle is found in a number of the articles of the CRC, but the meaning of the principle remains indeterminate and arguably, the concept has been the subject of more academic analysis than any other concept in the CRC. Article 3 is the umbrella provision on the best interests of the child. Article 3(1) provides as follows:

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

The reference to the child's interests as a "primary consideration" is indicative that the drafters recognised that the interests of the chid do not form the only consideration

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[215] Commission for Human Rights "The Principle of the Best Interest of a Child- What it Means and What it Demands from Adults" https://rm.coe.int/16806da95d (accessed 2019-03-10).

when a determination is made concerning the child, but rather that other competing interests must also be considered. Buck notes that at a theoretical level one could argue that the provisions of the CRC have transformed a child's 'interests' into 'rights' and as such the determination affecting the child is in fact a claim against specific rights.[216] The controversy surrounding the principle is aggravated by the fact that the legal meaning of the best interests of the child means different things to different people, leading to polarised and contradictory notions of what in fact constitutes a child's best interest in a given instance. The Committee has made recommendations as to the interpretation of the principle in its General Comments.[217] An example hereof is found in General Comment 5 in which the Committee recommends that the "every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are and will be affected by their decisions and actions".[218] However, the practical application of the standards provided for in the CRC warrants specific attention to a child's best interests in order to contextualise the rights of the CRC. The use of the word "shall" in article 3(1) is not qualified, and as such it enjoins states parties to take affirmative actions to provide for the rights enumerated in the provision. On the other hand, the use of the word "undertake" in article 3(1) could indicate a lesser degree of obligation on member states, since the promise to "undertake" an obligation, arguably, "requires only a good faith effort for a state party to be in compliance and does not necessarily require success".[219] The principle is of central importance to the current research and is discussed is discussed in more detail at. 2 3 1 3 (i).

Article 12 of the CRC provides for the right of a child to be heard as follows:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child,

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216 Buck *International Child Law* 59.

217 The General Comments of the understandings of the CRC Committee of the best interests' principle only serve as general guidance in interpreting the principle.

218 Par 12.

219 Mezmur *Intercountry Adoption in an African Context* 116.

the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

An obligation rests on State Parties to effect measures to ensure that the child is afforded the right to participate in a decision-making process that affects him or her. Article 12 must be interpreted with reference to the fact that the provision is made to respect the right of a child to express his or her views in all instances where such child is of an age to express his or her views, and article 12 also expressly directs that the voice of the child be heard in any judicial and administrative proceedings affecting such child. The right to be heard is a manifestation of the participation rights of children. One of the main points of contention in the children's rights debate pertaining to participation rights is to find a balance between, on the one hand, the child's lack of full autonomy and capacity, and, on the other, the recognition that the child is an active subject of human rights, with an own personality, integrity and ability to participate freely in society.[220] The principle outlined in article 12 is inextricably bound to other rights of children, including *inter alia*: the right to express their views and have access to adequate information;[221] freedom of thought, conscience, and religion;[222] association and peaceful assembly;[223] privacy;[224] and access to information from diverse national and international sources.[225] Due weight is to be placed on the view of the child in accordance with the age and maturity of such child. These rights are to be realised voluntarily, including children's right to refuse to participate or express their views, if so they prefer.

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220 Casares, Collins, Tisdall and Grover "Children's Rights to Participation and Protection in International Development and Humanitarian Interventions: Nurturing a Dialogue" 2017 21(1) *The International Journal of Human Rights* 1 13.

221 Art 13.

222 Art 14.

223 Art 15.

224 Art 16.

225 Art 17.

Given the importance of article 21 of the CRC, attention is given to its implications below in light of the scope of the article, the principle of best interests, permissibility of adoption, competent and accredited authorities, intercountry adoption as an alternative means of care, the principle of non-discrimination, improper financial gain in intercountry adoption, and bi-lateral and multi-lateral arrangements between states where a child is placed in intercountry adoption.

2 3 1 2 (I) ARTICLE 21

Fenton-Glynn states that article 21 was one of the most controversial articles in the drafting process of the CRC.[226] Article 21 includes, for the first time in human rights law, principles pertaining to good adoption practice for an OAC. Article 21 provides:

> States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
>
> (a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
>
> (b) Recognise that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
>
> (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
>
> (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
>
> (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

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226 Fenton-Glynn *Children's Rights in Intercountry Adoption: A European Perspective* (2014) 13.

Within its first subparagraph (a), article 21 refers to the adoption of a child in general, and the following subparagraphs namely (b), (c), (d) and (e), focus on intercountry adoption. Vité and Boechat refer to the predominance of the focus on intercountry adoption in article 21, suggesting that this emphasis makes it apparent that children's rights must be protected when and where intercountry adoption is practised. Since both intercountry and national forms of adoption are considered in Article 21, Vité and Boechat opine that the "[q]ualitative and quantitative development of the latter is … indispensable in assuring respect for the subsidiarity of intercountry adoption". A discussion of the relevant subsections of article 21 follows.

(a) Scope of Article 21

Article 21 is only applicable to those states that recognise and/or practise adoption. Article 21 recognises that not all countries recognise adoption, and in those instances, adoption as a form of care is not forced on the country concerned. From this provision it is clear that where, for example, States Parties follow Islamic law, adoption is not made mandatory in recognition and acceptance that the Q'uran does not recognise the legal adoption of a child. In this respect, Burman states her concern regarding the CRC's recognition of a particular society's approach to adoption as opposed to an approach based on the rights of the individual child under consideration.

Buck notes that in instances where the wording of article 21 left any doubt about the intention of the drafters of the CRC, a state could lodge a reservation.[227] The CRC made specific reservations (mainly for Latin American countries) requiring the establishment of a mechanism to prevent trafficking in children when intercountry adoption occurs[228] and where, in terms of article 21(b), intercountry adoption may be

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227 *Ibid.*

228 See United Nations Treaty Collection "Chapter IV Convention on the Rights of the Child" https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (accessed 2019-03-09). African Child Policy Forum (ACPF) *Intercountry Adoption: Alternatives and Controversies* Report from the Fifth International Policy Conference on the Africa Child, Addis Ababa (2012).

considered as an alternative means of care for a child.[229] Where countries do recognise the practice of adoption, the CRC grants intercountry adoption express recognition as a potential solution for an OAC. The CRC does not make provision for a *right to be adopted*, nor does any person have *the right to adopt* a child. In this regard, the CRC has been criticised for appearing to negate the role of the family – in both its nuclear and extended forms.[230]

(b) Article 21: the best interests of the child

The best-interests principle has been known and used since the nineteenth century[231] and the CRC is therefore not credited with inventing the principle. The principle also already appeared in the 1959 Declaration as well as in the Convention on the Elimination of All Forms of Discrimination against Women.[232] Article 21 begins with an imperative that States Parties recognising or permitting the system of adoption must ensure that the best interests of the child shall be the paramount consideration. The applicability of this principle is of utmost importance in this thesis and the principle and its application will be discussed in 2 3 1 3 (i) below.

(c) Article 21(a) permissibility of adoption

Article 21(a) provides that each State Party bears the responsibility to determine whether a child is adoptable. Adoption is only permissible if authorised by competent authorities. The CRC provides that certain competent bodies must be established[233] and that such bodies must be competent in child-protection services. Furthermore, the

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229 Art 20 and 21 of the CRC ensure alternative care for children who have been removed from their families, including foster care, adoption and residential care in a facility.

230 See Moyo "Reconceptualising the 'Paramountcy Principle': Beyond the Individualistic Construction of the Best Interest of the Child" 2012 12(1) *AHRLJ* 142 177.

231 Caufmann, Shulman, Bechtold and Steinberg "Children and The Law" in Bornstein, Leventhal and Lerner (eds) *Handbook of Child Psychology and Developmental Science Vol. 4: Ecological Settings and Processes in Developmental* Systems 7ed (2015) 616 653.

232 Zermatten and Gapany *Children's Rights and the Question of Their Application* Working Report from Yangon Seminar, Myanmar (2002) 9.

233 Art 21(a).

bodies should be multi-disciplinary in nature to ensure that an informed decision is reached. The Committee has recommended that the authorities involved in the adoption process must be adequately trained in this field.[234] Furthermore, such a body must be accredited by the state and be subject to periodic inspection by the relevant national authorities. Accreditation establishes a system of control that is aimed at eliminating, *inter alia*, child trafficking.

All adoptions must be in accordance with the national legislation of the country of origin. In effect, an obligation is placed on the state to adopt appropriate adoption laws and procedures in its national legislation. In order to ensure the effective implementation of the provisions of the CRC, the Committee recommended that the State must provide sufficient human and other resources.[235] Article 21 makes express provision that, where possible, the views of the child must be taken into consideration before a determination is made with respect to his or her placement. The wishes of the adoptive parents and the biological parents are considered in light of what serves the best interests of the child.

The authorities involved in an adoption must decide after accessing all relevant and reliable information gathered on the child and his or her birth family. Such information is attained through psychological, medical, social and legal studies and serves to determine whether family reunification is at all possible, and failing this, in making a placement based on the best interests of the child. Information regarding prospective adoptive parents must also be accessed to make a decision that meets the best interests of the particular child.

(d) Article 21: intercountry adoption as an alternative means of care

Both intercountry and national adoption are dealt with in article 21, leading Vité and Boechat to point out that the "[q]ualitative and quantitative development of the latter is,

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234 CRC Committee *Concluding Observations: Panama* (1997) CRC/C/15/Add.68.
235 CRC Committee *Concluding Observations: France* (2004) CRC/C/15/Add.240 par 35.

in point of fact, indispensable in assuring respect for the subsidiarity of intercountry adoption".[236] The CRC accordingly subscribes to the principle of "subsidiarity".[237]

Accordingly, where a child cannot be cared for by his or her family, the CRC recognises adoption, foster care, placement in a state institution, intercountry adoption and, where relevant, *kafalah* as forms of alternative care. The *travaux preparatoires* suggest that intercountry adoption would only be considered as a means of placing an OAC where it was evident that no other suitable alternative care was available domestically for the child concerned.[238] The CRC considers intercountry adoption appropriate as alternative care for an OAC only where the child concerned cannot be placed in a foster or adoptive family or otherwise be *suitably* cared for in his or her country of origin.[239]

Article 21 provides that a decision to place a child in residential care should be limited to cases where "such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests".

(e) Article 21(c): the principle of non-discrimination

The principle of non-discrimination is recognised as a fundamental human right and is therefore clearly applicable to the exercise of adoption. Article 2(1) of the CRC provides that states parties must implement the provisions of the CRC without any discrimination of any kind. This principle of non-discrimination is applicable to the child

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236 *Ibid.*

237 Rosicky and Northcott *The Role of Social Workers in International Legal Co-operation: Working Together to Serve the Best Interest of the Child* Paper presented at *Seminario De Derecho Internacional Cooperación Jurídica en Materia De Familia y Niñez* DDI/Doc.11/11 (10 October 2010) 7. According to the authors, family or kin apply the principle of subsidiarity in child-welfare states where it is in the best interests of children to be raised. If immediate family or kin is unable or unwilling, domestic placement with foster or adoptive family is the next best option. Where placement within a family environment is not possible, then *permanent placement with a suitable family in another country* can be considered.

238 See *Travaux Preparatoires* UN Doc.E/CN.4/1324/Add.2.

239 See also Mezmur "Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child rather than the Right to a Child" 2009 6(10) *Sur. Revista Internacional de Direitos Humanos* 83.

and/or birth parents, or where relevant, the legal guardian of the child and concerns discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, the person's property, disability, or any other status.

(f) Article 21(d): improper financial gain in intercountry adoption

The consideration of the cost of adoption and the principle that no improper financial gain should be made when a child is adopted was provided for in article 20 of the 1986 Declaration. The reference to improper financial gain in the CRC indicates that proper costs such as medical and professional fees may be covered.[240] This principle is in line with article 32 of the Hague Convention.[241] Concerns have been raised that unless properly controlled, costs in the adoption of a child, whether national or in terms of intercountry adoption, could be used by unscrupulous parties in child trafficking and profiteering. However, a "Central Authority" must be able to effectively control and eliminate financial abuses. Authorities in both the sending and receiving countries are tasked with ensuring the elimination of improper financial gain.

(g) Article 21(e): bi-lateral and multi-lateral arrangements

The number of intercountry adoptions taking place, together with the existence of domestic and international instruments, resulted in the conclusion of several multi-lateral as well as bi-lateral initiatives.[242] These initiatives are aimed at resolving issues

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240 See the discussion of the Amendment to Children's Act Bill of 2018. See ch 4 for a discussion on the Children's Act Amendment Bill.

241 Art 32 of the Hague Convention provides as follows:
"(1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.
(2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.
(3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered".

242 ACPF report from the Fifth International Policy Conference on the Africa Child 34; Bureau of Consular Affairs (US Department of State) *2016 Annual Report on Intercountry Adoptions Narrative*.

concerned with intercountry adoption practices and aspire to ensure that the rights of the child are protected. That incidents of child trafficking and child selling were taking place, together with other irregularities, served to heighten the urgency of the need to set legally binding standards for intercountry adoptions, as well as for the establishment of a system that would supervise such standards.[243] Several international instruments drafted in this respect had as their focus the issue of intercountry adoption.[244]

2 3 1 2 (II) THE COMMITTEE

Article 45 of the CRC makes provision for both UNICEF as well as "other competent bodies" to provide expert advice on the implementation of the CRC and to assist states in any other matter relating to technical advice and assistance.[245] To this end, a treaty body, referred to as the Committee, was established in 1991. The Committee is made up of a delegation of experts who aim to monitor the progress of States Parties to the CRC. Each member of the Committee is an independent expert and is not in fact a delegate representing national interests.[246] The objective of this Committee is to examine the progress made by the various States Parties in achieving the realisation of the obligations conferred by the CRC. The Convention is mainly enforced through the ongoing monitoring by the Committee. States that ratify the CRC or one of its Optional Protocols are obliged to report to the Committee. The primary function of the Committee in complying with its objective is to receive and comment on the various States Parties' periodic reports.[247] Reports to the Committee outline the situation of

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https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/AnnualReportonIntercountryAdoptions6.8.17.pdf (accessed 2018-07-24).

243 Smolin 2006 *The Wayne Law Review* 113 115.

244 Smolin "The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs and Concerned Parties" 2013 4 *Utah Law Review* 1074.

245 UNICEF has established an office in South Africa.

246 Buck *International Child Law* 50.

247 See OHCHR "Committee on the Rights of the Child" (undated) https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx (accessed 2019-01-30).

children in the country concerned and explain the measures taken by the state to realise the rights of children.

The Committee relies on reporting procedures as provided for in the CRC. Article 44 sets a certain standard that calls upon the States Parties to submit a report that contains "sufficient" information to provide the Committee with a "comprehensive" understanding of the state's implementation of the provisions of the CRC. In terms of article 45(a), the CRC provides international authority for the Committee to consult with NGOs and to seek their contribution where the Committee examines an official state report. Where the state concerned submits data that does not comply with the standard required, the Committee may request the state to submit additional information within a stipulated time frame. In line herewith, South Africa's ratification of the CRC requires it to submit reports to the Committee on an on-going basis.[248]

2 3 1 2 (III) GUIDELINES TO ALTERNATIVE CARE

The CRC has created a legal framework, based on a child-centred approach, which includes the well-being and human and social development of the child. In so doing, the CRC provides guidelines for international communities as well as individual states to develop their own permanent bodies or mechanisms to promote the co-ordination, monitoring and evaluation of the country's activities in all sectors involved in the placement of children. The aim is to safeguard the rights of children.[249]

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248 States Parties are obliged to provide extensive data on child-related matters in their periodic reporting. The initial report from South Africa was submitted to the Committee in November 1997, and a report is expected to be submitted every five years thereafter. These reports by State Parties reflect on the progress such State Party has made with respect to achieving its obligations undertaken in terms of the provisions of the CRC.

249 Colgan "The Children's Act Explained Booklet 1: Children and Parents – Rights and Responsibilities" (2009) www.unicef.org./southafrica/SAF-recoursed_childactx.1.pdf (accessed 2015-07-07).

In 2007, the Committee initiated the Draft UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children.[250] In 2009, the General Assembly adopted the Guidelines for the Alternative Care of Children (the Guidelines).[251] In doing so, the General Assembly reaffirmed the UDHR and the CRC. The aim of the Guidelines is to augment the provisions of the CRC and other relevant international instruments that provide for the welfare of a child who lacks parental care or who is in danger thereof.[252] The Guidelines confirm the approach that a child should grow up in his or her family environment, and that all efforts should be made to keep the child in the care of their family. Where this is not possible, the Guidelines recommend as follows:

> (a) To support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption and *kafalah* of Islamic law;
>
> (b) To ensure that, while such permanent solutions are being sought, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care are identified and provided, under conditions that promote the child's full and harmonious development.[253]

The Guidelines encourage all efforts that are made to prevent the breakdown of the family. The Guidelines recognise that all determinations made regarding the placement of a child in alternative care must be based on the child's best interests, and that keeping the child within the family of birth must be prioritised.[254] The Guidelines recommend that states take all necessary measures to ensure that the legislative, policy and financial conditions exist to provide for adequate alternative care options, with priority to family- and community-based solutions. The Guidelines expressly refer to the fact that consideration must be given to the prevailing economic, social and cultural conditions in each state.[255] The Committee uses these Guidelines

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250 OHCHR "Draft UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children" https://www.ohchr.org/Documents/DraftUNGuidelines.doc (accessed 2019-03-29).

251 UN General Assembly *Guidelines for the Alternative Care of Children: Resolution / Adopted by General Assembly* A/RES/64/142.

252 Art 1 of the CRC.

253 The Guidelines 2.

254 The Guidelines 3.

255 The Guidelines 2.

as a standard against which to assess all countries' reports and to formulate its observations and recommendation to such countries.[256] The Guidelines do not establish a legally binding international instrument and as such create no legal obligation on the state or any party concerned. They are designed for the purpose of assisting and encouraging governments to optimise the implementation of the treaty.

Opponents of intercountry adoption would submit that, in accordance with the principles of the CRC, a suitable placement for the child in his or her country of origin might include an institution or some undefined means of foster care.[257] However, Isanga argues that this interpretation of the CRC is incorrect and that it is inappropriate to place a child in some form of institutionalisation purely because, despite suitable intercountry adoption potential, it is available as "a last resort" in the child's country of origin.[258] The Committee noted that the securing of a *family environment* for an OAC is preferable to institutionalisation.[259] In this sense, Guideline 21 of the Guidelines establishes: "Use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his or her best interests." This approach is confirmed in General Comment No. 3 by the Committee as follows:

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256 Cantwell, Davidson, Elsley, Milligan, Quin *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'* (2012) 3. On 7 March 2013, a handbook referred to as *Moving Forward: Implementing the "Guidelines for the Alternative Care of Children"* was developed by The Centre for Excellence for Looked After Children in Scotland under an initiative of the "Working Group" on Children without Parental Care of the NGO Group for the CRC. The handbook is a practical tool to help policy makers create national legislation and policies that reflect the provisions included in the Guidelines for the Alternative Care of Children. It also gives practical guidance on how better to support families to prevent unnecessary separation as well as on how better to protect children in need of alternative care. The handbook provides insight and encouragement to all professionals on what can be done in situations where there are few resources.

257 Isanga 2012 *Journal on Public Law* 255.

258 Isanga 2012 *Journal on Public Law* 255–256.

259 Inter-American Commission on Human Rights *The Right of Boys and Girls to a Family: Alternative Care. Ending Institutionalization in the Americas* (2013) vii.

> [a]ny form of institutionalized care for children should only serve as a measure of last resort, and … measures must be fully in place to protect the rights of the child and guard against all forms of abuse and exploitation.[260]

2 3 1 3 THE CRC'S PROVISIONS ON ALTERNATIVE CARE

The Preamble states that the family is the fundamental group in society and, as such, provides the natural environment for the growth and well-being of all members, particularly children. The Preamble accepts the principle 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".

The Preamble clearly recognises the right of a child to grow up in a family environment and any separation from a parent should always be a measure of last resort. Other articles in the CRC refer to particular services that States Parties should ensure "for the care of children". Article 18 accords the primary responsibility for the upbringing and development of a child to the parents and legal guardians and provides that the "best interests of the child will be their *primary* concern". Where a child cannot be cared for within the family home, the CRC makes express provision for alternative forms of care. In terms of article 20, the CRC provides:

> 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
>
> 2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
>
> 3. Such care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

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[260] UN CRC *General Comment No. 3: HIV/AIDS and the Rights of the Child* (2003) CRC/GC/2003/1 par 35.

Mezmur suggests that, while the CRC recognises intercountry adoption as a form of alternative care, it takes a "very limited and unclear view of when intercountry adoption is appropriate".[261] Considering article 20(3) with reference to when intercountry will be considered the most suitable option for a child's placement, Mezmur states that the provisions within the CRC are unclear with respect to the "hierarchy to be followed", and that "the place to be accorded to intercountry adoption amongst these options remains elusive".[262] The interpretation of the principle of subsidiarity in terms of international law is considered in chapter 5 of this thesis. The responsibility falls on the government concerned to take all available measures to ensure that children's rights are respected, protected, promoted and fulfilled considering the best-interests principle.[263]

Boechat refers to certain sociological factors that may have had an impact on sustaining intercountry adoption as an option of placement.[264] These factors are:

(a) the evolution of Western society: contraceptive methods, increased infertility, and the reduced number of abandoned children have limited the opportunity for national adoptions;

(b) the social conception of family life: the importance of having children in order to be considered a family, which lead to the "right to a child concept" emerging in the 1980s, although then strongly denied by professionals and by the European Court of Human Rights;

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261 Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 85.

262 *Ibid.*

263 Cantwell *The Principle of Best Interests of the Child in Intercountry Adoption* UNICEF 23 opines as follows: "The principle of the best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children's rights and interests".

264 Vité and Boechat in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 2-3.

(c) new family models: the increasing acceptance of "single parenthood" paved the way for single parent adoptions and today, the question of conceding adoption to homosexual couples is being debated all over the Western world and some legislators, such as in the Netherlands, Quebec and Sweden, have already accepted it;

(d) the influence of the media, particularly television: by broadcasting images of extreme poverty and disasters around the globe, the media has contributed to creating a biased picture of the reality faced by developing countries, which Western societies then choose to focus, on, without questioning whether or not these are truly representative of life in those places – for instance, children living on the streets or in institutions are not necessarily abandoned, and therefore are not eligible for adoption;[265] and

(e) a humanitarian consciousness: since the 1970s, a humanitarian spirit has emerged, developing a new means of solidarity and fostering the idea of a global responsibility, in light of which, adoption may be perceived as a way to help the most vulnerable.[266]

Considering permanency as a factor of specific importance when making a decision to place a child in care, the Guidelines recommend that the "application of the planning for care provision and permanency should be carried out from the earliest possible time, ideally before the child enters care, taking into account the immediate and longer-

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265 Note the date of publication of this particular research referred to, namely 2006, and the impact that HIV has had on the statistics of children left orphaned and abandoned in South Africa in 2019. See ch 3 for a detailed discussion on the position of currently available appropriate alternative care in South Africa in particular. Children in CYCCs who are not adoptable are excluded for the purpose of this research.

266 Vité and Boechat in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 2.

term advantages and disadvantages of each option considered, and should comprise short- and long-term propositions".[267]

2 3 1 3 (I) THE CRC'S PROVISIONS ON THE "BEST INTERESTS" OF THE CHILD

The best-interests principle is recognised as one of the fundamental principles of the CRC and is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the CRC and the holistic development of the child. It is a principle that is found in law, nationally and internationally, concerning the rights of children. The principle has been incorporated into the CRC[268] but has been the subject of much academic analysis. It is a significant feature of the CRC that the best-interests principle is re-stated in several of its articles, thus emphasising its importance to the drafters of the CRC.[269] There was consensus in the drafting of the CRC that the best-interests principle should remain undefined to allow for flexibility in determining what was and is in the best interests of the child in a given instance. The Committee is clear in recognising that the concept is dynamic and evolving. The Committee of the CRC accepts a broad application of the principle by the professionals involved in decision making.

Zermatten, a member of the Committee, was responsible for drafting General Comment No. 14, which sets out how the best interests of the child should be

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267 The Guidelines 11.

268 See the following Articles: Art 18(1) obliges the parents or legal guardians to have the best interests of the child as their basic concern; Art 9(1) prohibits the separation of the child from his or her parents against his or her will unless "such separation is necessary for the best interests of the child"; Art 9(3) provides that States Parties shall respect the right of a child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests; Art 20(1) states that where a child is temporarily or permanently deprived of his or her family environment, or in whose own best interests, cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state; Art 21 provides that the best interests of the child should be the paramount consideration in the adoption process; and Art 37(c) stipulates that a child in the criminal justice system should be held in custody separately from adults unless the separation is against the best interests of the child.

269 UN CRC *General Comment No. 16* (2013) *on State Obligations Regarding the Impact of the Business Section on Children's Rights*, 17th April 2013, CRC/C/GC/16 par 11.

considered in implementing the CRC. Zermatten suggests that: "[t]he criterion of the best interests of the child is relative in space and time."[270] The Committee maintains that the general objective of Comment No. 14 is to promote a real change in attitudes leading to the full respect of children as rights holders.[271] An obligation is placed on States Parties to ensure to all children within their jurisdictions the rights guaranteed in the CRC.[272] This not only implies that states must prevent discrimination, but also that they must ensure the positive enjoyment of the rights that enable all children to be recognised as equally valuable members of society. As such, every child within the state's jurisdiction holds all the rights guaranteed under the CRC, without regard to his or her sex or status. Where a child is to be placed abroad, the decision must always respect the paramountcy of the best-interests principle.

With respect to the best-interests principle as provided for in the CRC, Zermatten opines:

> In unpacking the concept of the interests of the child, we know that "the best interests" phrase was only recently introduced into Western legal systems. The earlier conception of "the well-being of the child" evolved into the "best interests" principle which is now found in Article 3(1) of the CRC. It is therefore a thoroughly modern legal concept which has not yet been the subject of comprehensive study. As its contents remain rather vague and its potential functions are multiple, the application of this concept is more appropriately suited to precise issues or systematic elaboration in jurisprudence. It must be "allow[ed] the right to adapt to the concrete demands of life".[273]

Mezmur points out that the legal meaning of "best interests" means different things to different people.[274] Notwithstanding all the consideration given to the principle, its exact meaning remains elusive. Referring to Van Bueren,[275] Kaime recommends that

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270 Zermatten 2010 *Int'l J. Child. Rts.* 16.

271 UN CRC *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art.3, par. 1)* CRC/C/GC/14 par 12.

272 Van Bueren *The International Law on the Rights of the Child* 40.

273 Zermatten 2010 *Int'l J. Child. Rts.* 5.

274 Mezmur "The United Nations Convention on the Rights of the Child" in Boezaart (ed) *Child Law in South Africa* (2017) 413.

275 Van Bueren *The International Law on the* Rights *of the Child* 303.

a decision to determine a child's best interests should entail a balancing of the values and interests "competing for the core of best interests".[276]

All determinations are therefore made on a case-by-case basis. Vité and Boechat note that article 21 of the CRC is inspired by the provision in article 5 of the 1986 Declaration. The 1986 Declaration provides that "in all matters relating to the placement of the child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and rights to security and continuing care, should be the paramount consideration".[277]

The CRC declared that the best-interests principle should be one of the "over-arching implementation issues" and it explicitly aims to advance this principle.[278] Family and parental care are undoubtedly recognised by the CRC as serving the child's best interests. The CRC emphasises the right of the child not to be separated from his or her parents except when it is necessary and as a measure of last resort.[279] It is uniformly accepted that, as long as a child lives in a functioning family, his or her paramount interest lies in the preservation of this family unit.[280] The CRC obliges States Parties first to respect the responsibilities, rights and duties of parents, the extended family or the community, and secondly to assist them wherever possible in their child-rearing responsibilities.[281] It is also clear that some elements of a child's

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276 Kaime 2005 *AHRLJ* 232.

277 Vité and Boechat in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 24.

278 Cantwell *The Principle of Best Interests of the Child in Intercountry Adoption* UNICEF 32.

279 Art 9(1) of the CRC.

280 See Art 13 of the 1986 Declaration.

281 Art 18 of the CRC provides:

"1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children."

best interests include “his or her need for affection and the right to security and continuing care”.[282]

However, the exact content and meaning of the principle remains vague and indeterminate. What is best for a specific child cannot be determined with any degree of certainty. Elster opines:

> For a determinate answer to the question of what would be in the child’s best interests,
> (1) all the options must be known,
> (2) all the possible outcomes of each option must be known,
> (3) the probabilities of each outcome occurring must be known, and
> (4) the value attached to each outcome must be known.[283]

Given the difficulty in predicting the factors referred to above, Elster continues by stating:

> The best interest principle may, however, yield decisions that are better for the child than are automatic decisions, in the abstract sense that disregards the harm done to the child by the decision-making process itself. At least I shall proceed on this assumption, setting aside for the time being the objection from indeterminacy. The question, then, is whether children are on the whole better off by fine-tuning than under cruder principles such as automatic rules or strong presumptions.[284]

Save The Children[285] opines that when determining the best interests of a child, the child’s “wellbeing, safety (both physically and emotionally), wishes, individual circumstances including the community and cultural context with which the child is familiar, and the living situation, including the presence or absence of parents or other family members” must be taken into account.[286] The Committee has stated expressly

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282 Art 5 of the 1986 Declaration.

283 Elster “Solomonic Judgments: Against the Best Interest of the Child” 1987 *The University of Chicago Law Review* 12.

284 *Ibid.*

285 Save the Children South Africa was established in 2013. This organisation aims to fight for local children’s rights.

286 Save the Children *Intercountry Adoption: Policy Brief* (June 2012) https://resourcecentre.savethechildren.net/sites/default/files/documents/6250.pdf (accessed 2017-10-29). All states parties are obliged to submit regular reports to the Committee on the Rights of the Child

that the best-interests right is not a "super right".[287] The fact that a child's best interests is "a" primary concern is indicative of the fact that it is not seen as an overriding principle, but rather that other competing and conflicting interests must also be granted consideration in a matter concerning a child. The CRC recognises and considers the child's culture important in determining the best interests of the child, and consequently in identifying the best possible parents for the child. UNICEF has confirmed this approach where it provides that it is important to "promote the physical, psychological, spiritual, social, emotional, cognitive and cultural development of children as a matter of national and global priority." Zermatten states that the best-interests principle must take cognisance of the following when making a determination in relation to a child:

a) The importance of every child as an individual with opinions;
b) The short-, medium- and long-term perspectives of the life of the child, bearing in mind that the child is a human being in development;
c) The global spirit of the CRC; and
d) An interpretation that is not "culturally relativist" or denies other rights of the CRC, for example, the right to protection against harmful traditional practices and corporal punishment.[288]

Kaime is also of the view that where cultural practices restrict a child's growth and development, this cannot be in the child's best interests since article 2 of the CRC guarantees every child the enjoyment of the rights set forth in the CRC without discrimination.[289]

The CRC does not provide a list of factors to be considered when a decision is made in the best interests of the child. The principle itself is nevertheless an integral part of

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pertaining to how the state concerned has implemented the rights as provided for in the CRC. States Parties to the CRC are obliged to submit an initial report two years after acceding to the CRC. Thereafter States Parties submit periodic reports to the Committee every five years. The Committee is tasked to examine each report and address its concerns and recommendations to the State Party concerned in the form of "concluding observations".

287 Visser "Some Ideas on the 'Bests Interests of a Child' Principle in the Context of Public Schooling" 2007 70 *THRHR* 460.

288 Zermatten 2010 *Int'l J. Child. Rts.* 8.

289 Kaime 2005 *AHRLJ* 221–238.

the CRC, as highlighted above. Zermatten further suggests that the meaning of "best interests" as referred to in the CRC is as follows:

> Taken together, "best" and "interests" simply mean that the ultimate goal should be the "well-being" of the child, as defined throughout the Convention, particularly in the Preamble and in Article 3 of the CRC.[290]

Notwithstanding the complexities of the principle, the CRC has taken the best-interests principle beyond its previous scope. The principle is recognised as one of the fundamental principles of the CRC and is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the CRC and the holistic development of the child.

Article 21 of the CRC provides criteria for determining the eligibility of prospective adoptive parents and stresses the paramountcy of the best interests of the child. Accordingly, any decision taken must use the best-interests standard as the guiding and absolute basis for any potential adoption placement. The concept of the best interests of the child is found throughout the CRC.[291] The best-interests principle requires the development of a rights-based approach that engages all parties in order "to secure the holistic, physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity".[292] Strengthening the understanding and application of the right of children to have their best interests assessed and taken into account as "a" primary consideration or, the "paramount" consideration, is the main objective of the General Comment No. 14.[293] However, the lack of clarity in how to

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290 Zermatten 2010 *Int'l J. Child. Rts.* 37. Zermatten opines that the use of the plural when referring to a child's best *interests* does not mean the interests of a child precede all interests of other persons. The child cannot be viewed as an "individualised person to the extreme".

291 See Art 9: separation from parents; Art 18: parental responsibilities for their children; Art 20: deprivation of family environment; Art 21: adoption; Art 37*(c)*: separation from adults in detention; Art 40(2)(b)(iii): presence of parents at court hearings for penal matters involving a juvenile.

292 UN CRC *General Comment No. 11 (2009) Indigenous children and their rights under the Convention* CRC/C/GC/11.

293 UN CRC *General Comment No. 14* par 12 5.

determine a child's "best interests" has presented a major challenge for the practical implementation of the principle. The Committee emphasises that the child's best interests is a threefold concept in that it is:

> 1. A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.
>
> 2. A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.
>
> 3. A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States Parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.[294]

In response to the problems created by the lack of guidelines and lack of consensus on factors to be considered in determining a child's best interests, the Committee drafted certain proposals for consideration.[295] These proposals are contained in General Comment No. 14,[296] which sets out recommendations on how the best

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294 UN Committee on the Rights of the Child (CRC) *General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interest taken as Primary Consideration (Art 3 par 1)* CRC/C/GC/14 4.

295 It took 23 years after the inception of the CRC for such guidelines to be finalised.

296 See fn 293 above.

interests of the child should be considered when implementing the CRC. It provides guidance for due consideration, especially in judicial and administrative decisions, as well as in other actions concerning the child as an individual, and at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines and in all implementation measures concerning children in general or as a specific group.[297]

Article 3(1) of the CRC emphasises that in all instances where a decision is made concerning a child, the best interests of such child must be considered. The fact that a child's best interests is "a" primary concern is indicative of the fact that it is not seen as an overriding principle, but rather that other competing and conflicting interests must also be granted consideration in a matter concerning a child. Mezmur notes in this regard that "the implication being that other considerations, in addition to the best interests of the child, can assume primacy".[298] The best interests of the child is a primary determining factor when considering a solution for a child in need of care.[299] Unlike the ACRWC, where the Convention provides that the best interests of the child is *the* primary consideration, there is something of a downgrading of the principle in the CRC to one of *a* primary consideration. The Working Group of the CRC considered, and rejected, making the best interests of the child "the" primary consideration.

However, the wording used by the drafters, namely that the "best interests of a child *shall be* a primary consideration", indicates the importance of the duty placed on states to comply with the application of the principle.[300] The right of the child to have her or his best interests taken as a primary consideration means that the child's interests

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297 Moreover, UN CRC *General Comment No. 5* states that legislative, administrative and judicial bodies or institutions are required to apply the "best interests" principle by systematically considering how children's rights are or will be affected by their decisions or actions.

298 Mezmur *Intercountry Adoption in an African Context* 16.

299 Zermatten 2010 *Int'l J. Child. Rts.* 13.

300 UN CRC *General Comment No. 14* par 36.

have a high priority and are not simply just one of several considerations. As such, a greater weight is attached to what serves the child best.

It is important to consider the best-interests principle of the child in light of the meaning and impact of the principle of subsidiarity. Article 21 of the CRC makes provision for two important principles – namely, the child's best interests and the principle of subsidiarity as follows:

> States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
>
> (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.

The general standard underpinning the CRC is the principle of a child's best interests. The principle is a foundation stone of the CRC and is deemed to be a primary consideration in all actions concerning children. However, where adoption is concerned, the best interests of the child are deemed to be *the* primary consideration. In article 21, the best-interests principle automatically and explicitly becomes the decisive factor for assessing any course of action anticipated under the CRC with respect to adoption.[301] Its status is raised to "the *paramount* consideration" in decisions about the proposed adoption of a child.[302] When considering intercountry adoption and needing to embrace the "paramountcy" of the best interests of a child, and the fact that this principle must be considered "in any matter relating to the child", it is clear that the same child-centred approach is adopted. In this respect, Zermatten states:

> When cutting these relationships is at stake (adoption for example), or suspending them (placements, loss of freedom); the decision of the child's removal must

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301 Hodgkin and Newell *Implementation Handbook* 295 refer to Art 21 as providing that "no other interests, whether economic, political, state security or those of the adopters, should take precedence over, or be considered equal to the child".

302 Moyo 2012 *AHRLJ* 146.

> always respect this principle. This means that in these cases, the individual interest of the child precedes the interest of the family (to have a relationship with his/her child) or the State (to ensure the stability of families).[303]

Article 21 provides that a decision to place a child in residential care should be limited to cases where "such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests". Vité and Boechat suggest that article 21 must be interpreted and understood in relation to all the provisions of the CRC.[304] Article 21 is directly related to the provision of article 20.

In their General Comments, the Committee stressed that an interpretation of the child's best interests must be compatible with the CRC. Reference to the best-interests criterion can be found throughout the CRC, and the Committee has published its developing interpretation in its General Comments.[305] The criterion must be considered in the light of the entire convention and in conformity with the other general principles identified by the Committee itself.

Assim further points out that the best-interests principle is considered when regard is had to the basic conditions and needs of the child (such as food and shelter), but that "the principle is equally based on the principle of 'individualised treatment".[306] The best-interests approach is thus dependent on the value systems of the decision maker.[307] Approaches to the principle have varied with some referring to the best-interests principle as "one of the most significant accomplishments of the CRC", while

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303 Zermatten 2010 *Int'l J. Child. Rts.* 10.

304 Vité and Boechat in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 8.

305 UN CRC *General Comment No. 14*; Grover *Children Defending their Human Rights Under the CRC Communications Procedure: On Strengthening the Convention on the Rights of the Child Complaints Mechanism* (2015) 139.

306 Assim *Understanding Kinship Care of Children in Africa* 16.

307 Funderburk "Best Interest of the Child Should Not Be an Ambiguous Term" 2013 33(2) *Children's Legal Rights Journal* 229.

others have described it as “a formula for unleashing State power, without any meaningful reassurance of advancing children’s interests”.[308]

Notably the CRC provides that the best-interests principle is deemed “a primary consideration” in article 3, while the standard is elevated to one of “paramount consideration” in article 21 with respect to adoption of a child. The use of the determiner “a” in the CRC is evidence of the intention of the drafters of the CRC: in determining the child’s best interests, the authorities must attach a particular importance to the best interests of the child, but this interest does not mean all other interests are systematically overshadowed In other words, all divergent interests are weighed up against each other. In referring to the paramountcy of a child’s interests when adoption is under consideration, Zermatten notes that the paramountcy must be interpreted to mean that the best interests of the child must be granted a value of supreme consideration.[309] The primary importance of article 21 is to establish legal obligations on the States Parties involved to ensure the protection of vulnerable children against practices that include the sale and trafficking of children, and, the total disregard of vital factors in respect of the child’s best interests.[310] The CRC places the best interests of the child as the highest possible priority in matters of adoption.

A decision to place a child in adoption, including intercountry adoption, represents one of the most drastic and definitive decisions that could possibly be made in the life of a child.[311] There is also no agreed assumption on whether intercountry adoption is likely to serve a child’s best interests. Mosikatsana, for example, states that intercountry adoption is seldom in a child’s best interests given the inherent disruption in the child’s culture, upbringing, religion, language, family and domestic ties.[312] Bartholet on the

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308 Zug “Should I Stay or Should I Go: Why Immigrant Reunification Decisions Should Be Based on the Best Interest of the Child” 2011 *BYU Law Review* 1139.

309 Zermatten Working Group 2010 *Int’l J. Child. Rts.* 3.

310 See ch 2, par 2 4 1 3(i) of this thesis for a detailed discussion.

311 For a more detailed discussion in this regard, see ch 4 of this thesis, par 4 5 2, 4 5 4 and 4 5 6.

312 Mosikatsana 2000 *SAJHR* 69.

other hand opines that "[t]hroughout the poorer countries of the world, millions of children live out their young lives in substandard institutions or in the streets. In times of war or political and economic upheaval, added numbers of children become homeless".[313] She adds that despite the controversy surrounding the practice of intercountry adoption, "the benefits of international adoption far outweigh any negatives and … international adoption should be encouraged with appropriate protections against abuses".[314]

Both those in favour of and those opposed to intercountry adoption, approach the debate having a child's best interests at heart. There are different elements to be considered when assessing and determining what the best interests of a child are, and therefore, on occasion, certain competing or contradicting factors may be considered. However, all potential conflicts are solved on a case-by-case basis.

2 3 1 3 (II) THE CRC'S PROVISIONS ON SUBSIDIARITY

The CRC specifies that intercountry adoption may be considered as an option of placement where no suitable alternative care can be found in the child's country of origin. These provisions are discussed in detail in chapter 5 of the thesis.

2 3 2 THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (ACRWC)

Africa has become the new frontier for intercountry adoption and, according to Mugawe,[315] between 2003 and 2010 the number of children adopted from Africa increased threefold. However, Africa seems to be ill-equipped in law, policy and practice, to provide its children with sufficient safeguards when they are adopted internationally. The ACRWC was drafted to give the CRC specific application in the

313 Bartholet 1993 *JSTOR* 89.
314 Bartholet 1993 *JSTOR* 91.
315 ACPF *Africa: The New Frontier for Intercountry Adoption* (2012) iv.

African context since the representation by African countries at the time of the drafting of the CRC was deemed inadequate.[316] The ACRWC is an important international human rights law instrument for the African continent. The ACRWC was drafted by the member states of the OAU. As such, the ACRWC is more specific to issues relevant to the African continent. Only countries on the African continent, including South Africa and Kenya, have ratified this African-specific convention. One of its greatest strengths is that it reflects the realities of the lives of the African child. The ACRWC makes Africa the only continent to date with a region-specific child-rights instrument, and the ACRWC is thus the only regional convention that considers the adoption of a child.

As with the CRC, the ACRWC is premised more on the rights of the child than the powers the parent has over the child. The emphasis of the ACRWC is on continent-specific issues, focussing specifically, and uniquely, on the issues (including intercountry adoption) that are relevant to the African child.[317] The list of issues around which there is typically a lack of consensus internationally in the context of intercountry adoption in Africa is expansive. It includes the cultural disconnection that children are subject to in the adoption process, as well as the fact that the definition of a family environment differs in the ACRWC and the CRC respectively. Questions regarding the adoptability of the child, and who can adopt, are critical to the African context owing to varying interpretations. For example, considering intercountry adoption as a measure of last resort continues to pose difficult legal and ethical challenges for African countries. In practice, intercountry adoption suffers from poor regulation in many African countries, and where regulation exists, implementation is inadequate. The same holds true for South Africa.

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316 Only Algeria, Morocco, Senegal and Egypt participated in a meaningful manner in the drafting process of the CRC.

317 Skelton "The Development of a Fledgling Child Rights Jurisprudence in Eastern and Southern Africa Based on International and Regional Instruments" 2009 9(2) *AHRLJ* 483.

2 3 2 1 THE ORIGINS OF THE ACRWC

The OAU Assembly of Heads of State and Government adopted the ACRWC in 1990.[318] It became the second global and first regional treaty on the human rights of the child. In formulating and adopting the ACRWC, a major impetus was the recognition that the rights of African children needed to be viewed realistically with reference to the prevailing specific conditions within the African continent.[319] Africa's history of gross violation of human rights, abject poverty, HIV/AIDS, warfare, famine and the existence and practice of harmful cultural practices required special recognition.[320] The ACRWC took almost 10 years to come into force and effect, the Children's Charter having been adopted by the heads of state of the then-OAU on 11 July 1990. It entered into force on 29 November 1999 after receiving the required 15 state ratifications. By November 2018, 48 states had ratified the ACRWC.[321]

The ACRWC prides itself on its "African" perspective on human rights and takes into consideration the virtues of the African cultural heritage, and the values of African civilisation that are expected to inspire and characterise the African concept of the rights and welfare of the child. South Africa became a signatory in October 1997.

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318 The OAU decided that its member states would benefit by adopting the ACRWC, as it represents the "African" perspective and concept of human rights. This makes the ACRWC unique in its approach.

319 Viljoen "Supra-national Human Rights Instruments for the Protection of Children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" 1998 *CILSA* 199, refers to the fact that the failures of the CRC were threefold, leading to the drafting of the ACRWC. These failures included the under-representation of Africans during the drafting process of the CRC; the omission of potentially divisive and emotive issues when attempting to reach a consensus between states that have diverse backgrounds; and lastly, to reach a compromise, certain specific provisions peculiar to Africa were omitted from the CRC.

320 Mubangizi "Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and the Gains" 2006 *AHRLJ* 146–165.

321 Global Initiative to End All Corporal Punishment of Children "African Charter on the Rights and Welfare of the Child (ACRWC)" (undated) https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/acrwc/ (accessed 2018-21-12).

2 3 2 2 OVERVIEW OF THE ACRWC'S PROVISIONS

The ACRWC is regarded as a better reflection of African cultural concerns than the CRC.[322] This is particularly so due to the collective rather than individualistic approach of the instrument. The African tradition places a high value on the role and welfare of the extended family. The question raised here is whether aims to preserve the cultural and/or ethnic identity and rights of the child could in fact conflict with other rights to which a child is entitled – for example, the right to grow up in a family environment. The answer needs to be based on the recognised principle of the importance of agreements that promote and protect human rights on a *regional* level. That a regional treatise is best placed to consider and resolve human rights issues in the relevant region has also been acknowledged by the UN. African governments are therefore called upon to take up their responsibility to provide for all children in the continent.[323]

Children, rather than adults, are most likely to be the victims of human rights violations, and furthermore, children on the African continent are more likely to be victims than children on other continents. Poverty, HIV/AIDS, warfare, hunger and harmful cultural practices have all played a significant role. However, the ACRWC provides for the protection of both "children" and "peoples", leading to the conclusion that children are protected both as "children" and as "peoples" as they qualify as members of a group. A regional monitoring body of the ACRWC, the African Committee of Experts, makes it possible to monitor member states closely as it is a dominant and focused body.[324] This close monitoring provides little room for member states to evade their responsibilities under this regional mechanism.

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322 Isanga 2012 *Journal of Public Law* 269.

323 Keetharuth "Major African Legal Instruments" in Bösl and Diescho (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 163–232.

324 Mezmur "The Africa Committee of Experts on the Rights and Welfare of the Child: An Update" 2006 6(2) *AHRLJ* 549 571.

In terms of section 4(1) of the ACRWC, the best interests of the child are "the" primary consideration when considering a matter affecting a child. It is apparent that a higher standard is required in the ACRWC than in the CRC, where the best interests of a child are to be given "a" primary consideration.[325]

Article 2 is probably the most important of the articles of the ACRWC as it defines those who fall within the ambit of the Charter. The fact that a "child" is defined in one sentence only is important and has cultural implications. The ACRWC defines "child" as "all those persons below 18 years".[326] Furthermore, article 23 provides protection not only to refugee children, but also to internally displaced children, in recognition of the realities of this problem in Africa. According to Lloyd,[327] it is a misconception to regard the regional human-rights system of Africa as being the least developed or effective. She suggests on the contrary as follows:

> The African regional system despite being the newest can be considered as the most forward thinking of all the regional systems and has the capacity extensively to add to the development of international human rights law and to scholarly debate on the subject.[328]

The ACRWC does not replace existing standards, but rather adds to them by providing for the basic minimum standard that will be tolerated, and further providing that any municipal law or international agreement that does not conform to such standard will only prevail if it is more conducive to the realisation of children's rights.[329] As such, the ACRWC is considered as the overriding *lex spesialis*[330] in that the ACRWC sets the

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325 Art 3(1) of the CRC.

326 Art 2 of the ACRWC.

327 Lloyd "Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet" 2002 10 *The International Journal of Children's Rights* 179.

328 *Ibid*.

329 Lloyd "Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet" 2002 10 *The International Journal of Children's Rights* 185.

330 Lloyd "A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child" 2002 2(1) *AHRLJ* 21.

bar in this area of children's rights regarding both setting a standard and enforcing conduct to meet such standard. The ACRWC improves the status of children in Africa, but also furthers their rights by not merely *stating* their rights. The ACRWC makes provision for the fact that any cultural practices performed must *all* be in the child's best interests. Article 1(3) states as follows:

> Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall be discouraged to the extent of such inconsistency.

2 3 2 3 THE ACRWC'S PROVISIONS ON INTERCOUNTRY ADOPTION

Adoption and specifically intercountry adoption is dealt with in article 24 of the ACRWC. Article 24 provides as follows:

> State Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:
>
> (a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;
>
> (b) recognize that inter-country adoption in those States that have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
>
> (c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
>
> (d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;
>
> (e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs; (f) establish a machinery to monitor the well-being of the adopted child".

From the ACRWC it appears *intra*-African adoptions are viewed as preferable to *inter*country adoptions on the basis that, although there may be cultural differences in the population where an adoption of a child takes place on the African continent, these differences are not as radical compared to an adoption taking place abroad. Supporting this interpretation is the Preamble of the ACRWC, which recognises that "the child occupies a unique and privileged position in the African society" and further takes into consideration "the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child". However, it must be noted that the ACRWC does not contain a provision like article 30 of the CRC that is aimed at protecting the cultural identity of the child. Like the CRC, the ACRWC prescribes that the best interests of a child should be "the paramount consideration" in assessing intercountry adoption, not merely a "primary" consideration.[331] No competing factors can be of greater importance than that of the child's best interests, as the latter are not merely a "primary" consideration.

While article 18(1) recognises that the family is the natural unit and basis of society, the drafters of the ACRWC recognised the need, where adoption of a child is under consideration, to elevate the interests of the child to one of "paramount consideration".[332] In line with the standard of the CRC, the ACRWC provides that no competing rights can be of greater importance than those of the child.[333]

By contrast, in relation to other actions concerning the child generally, article 4 provides that the best interests of a child shall be "the primary consideration". Article 20 further provides that the primary responsibility for the upbringing and development of a child rests on the parents of such child. The parents are required to ensure that

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331 Art 24. This principle in the ACRWC is discussed in detail in ch 7 of this thesis.

332 Pretorius *Intercountry Adoption and the Best Interests of the Child* (LLM dissertation, North-West University) 2012 47.

333 Mezmur 2009 *Sur. Revista Internacional* 89.

the best interests of the child are their "basic concern at all times".[334] However, article 24 raises the best-interests standard to "the paramount consideration" in instances of adoption.

2 3 2 3 (I) THE ACRWC'S PROVISIONS ON THE BEST INTERESTS OF THE CHILD

The CRC was the inspiration for the ACRWC. There is a subtle difference in the wording used by the CRC and the ACRWC respectively in the best-interests requirement.[335] Skelton suggests that while the difference in wording amounts to one small word, it nonetheless creates a significant difference in the weight accorded to the best-interests principle in the CRC and the ACRWC respectively.[336] The principle of a child's best interests in the ACRWC suggests that a child's best interests must be given a heavier weighting where there are competing rights.[337]

Lloyd points out that the ACRWC discourages those traditional or cultural views that may be inconsistent with the spirit and the provisions of the ACRWC.[338] The well-being and safety of a child is considered to be of overriding importance, and group rights to culture are regarded as being relatively weaker and subordinate to other human rights, in particular in relation to the best interests of the child.[339] Note, however, that the principle itself has a far-reaching effect in the African continent, where the concern remains that the implementation of the principle may be compromised by domestic legislation.[340]

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334 Art 20(1)(a).
335 Pretorius *Intercountry Adoption and the Best Interests of the Child* 37.
336 Skelton 2009 *AHRLJ* 486.
337 *Ibid*.
338 Lloyd 2002 *AHRLJ* 16.
339 Art 21.
340 Lloyd 2002 *AHRLJ* 18.

2 3 2 3 (II) THE ACRWC'S PROVISIONS ON SUBSIDIARITY

The principle of subsidiarity is enshrined in the ACRWC.[341] Article 24(b) of the ACRWC expressly provides that intercountry adoption must be a measure of "last resort" – in that intercountry adoption should only be considered as an option of placement when no other suitable care is available in the child's country of origin. Article 24(*d*) places an obligation on States Parties to guard against "improper financial gain" in the process of intercountry adoption and to fight against "trafficking" of children. The principle of subsidiarity is discussed in detail in chapter 5 below.

2 3 3 THE HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION[342]

The rapid increase in intercountry adoptions following World War II, and the complex and serious legal and human problems caused by the absence of domestic or international regulation, led the Permanent Bureau of the Hague Conference on Private International Law to consider how the practice of intercountry adoption could best be regulated.[343] The Hague Convention was developed as a consequence and was seen as a great step forward in regulating intercountry adoption. This convention sought not to establish new substantive rules, but rather a framework through which inter-state co-operation could be established. In its Preamble, special reference is made to the provisions of the CRC and the 1986 Declaration.[344] The objective of the directives within the Preamble of the Hague Convention is to pre-empt conflict with

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341 Art 24(b).

342 Hague Conference on Private International Law (HCCH) *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (29 May 1993) 33. The Convention was approved at the 17th session of the Hague Conference on Private International Law.

343 HCCH *1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: 25 Years of Protecting Children in Intercountry Adoption* (2018) https://assets.hcch.net/docs/ccbf557d-d5d2-436d-88d6-90cddbe78262.pdf4. See also Schäfer *Child Law in South Africa: Domestic and International Perspectives* (2011) 515.

344 UN General Assembly *Declaration on the Right to Development* (4 December 1986) A/RES/41/128.

other instruments, and to ensure that the paramountcy of the best interests of the child is protected and complemented at all times.[345]

The Hague Convention regulates intercountry adoption, child laundering and child trafficking to protect the parties involved against the dangers of corruption, abuses and exploitation sometimes linked to intercountry adoption. The Hague Convention established safeguards to ensure that intercountry adoptions take place in a manner that takes into consideration the best interests of the child. This marked a development in international law by ensuring that the rights of children would be protected and that children themselves would be protected against potential abusive practices through the strict regulation of intercountry adoption. It is submitted that this is a positive development.

The Hague Convention recognises that it is of primary importance that a child grow up in a family environment, and that this is essential for the happiness and healthy development of the child. At the same time, the Hague Convention states that intercountry adoption may offer a child the advantage of a permanent family in the instance where a suitable family cannot be found in the country of origin.[346] This may be seen as an acknowledgement that an intercountry adoption, properly done, may be preferable to institutionalisation.

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345 UN General Assembly *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally* (6 February 1987) A/RES/41/85.

346 Vité and Boechat, in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 16, note that a distinction must be drawn in national law between simple adoption (filial ties not broken with the family of origin, and adoption is revocable) and full adoption (full integration of the child into the adoptive family and all legal ties with the family of origin are severed). In terms of Art 27 of the Hague Convention 'where an adoption granted in the state of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving state which recognises the adoption under the Convention, be converted into an adoption having such an effect if in law of the receiving state so permits and if the consents have been given or are given for the purpose of the adoption'.

One of the reasons that the Hague Convention is so important is that it provides formal international and intergovernmental recognition and regulation of intercountry adoption, and will as a general rule be recognised and given effect to in other party states. Bartholet[347] noted:

> This agreement signifies the *beginning* of the global community approach to international adoption concerns and co-operation, and recognises that private, partisan competition, and unregulated adoption work cannot continue without establishing proper international childcare principles and guidelines.

In its Preamble, the Hague Convention refers to the institution of intercountry adoption as finding a *permanent* family for a child for whom *no suitable family* could be found in the child's country of origin.[348] Martin points out that intercountry adoption, so defined, involves the placement of a child who is habitually resident in one state, in the permanent care of another person or of spouses who are not the biological parents or guardian of such child, and who reside in a different state to that of the child.[349] Rushwaya states that intercountry adoption is in effect:

> [the l]egal process by which an adoption is made by an authoritative body placing a child who is a national of a different state in the permanent care of another family residing in another state, which order transfers all powers and responsibilities to the adoptive parents.[350]

The Hague Convention is the treaty that is most directly applicable in the sphere of intercountry adoption.[351] This convention thus symbolises the recognition by the international community of the need to encourage global societal protection of the rights of children in the sphere of intercountry adoption.[352] The Hague Convention

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347 Bartholet 1993 *JSTOR* 93. See also Martin "The Good, The Bad & The Ugly? A New Way to Look at the Intercountry Adoption Debate" 2006–2007 13 *University of California Davis Journal of International Law and Policy* 173 191.

348 Preamble of the Hague Convention par 3.

349 Martin 2006–2007 *UC Davis J. Int'l L. & Pol'y* 176.

350 Rushwaya *A Critical Analysis of the Legislative Framework Regulating Intercountry Adoption in South Africa and Ghana* 13.

351 Mezmur 2009 *Sur. Revista Internacional* 85.

352 Isanga 2012 *Journal on Public Law* 260; Preamble of the Hague Convention.

serves as an international source of standards in the promotion and facilitation of international co-operation between member states where intercountry adoptions occur.[353] These standards operate as a progressive realisation of the protection of children's rights.

2 3 3 1 THE ORIGINS OF THE HAGUE CONVENTION

The Hague Convention was developed following investigations by the Permanent Bureau of the Hague Conference on Private International Law.[354] The Hague Convention was adopted on 29 May 1993 and entered into force two years later on 1 May 1995.[355] The Hague Convention is recognised as the most important and comprehensive legal instrument governing intercountry adoption. One hundred and one contracting states had acceded to the Hague Convention as of April 2019.[356] South Africa acceded to the Hague Convention on 1 December 2003 with the aim of regulating intercountry adoption according to internationally accepted standards.

2 3 3 2 OVERVIEW OF THE HAGUE CONVENTION'S PROVISIONS

Besides providing a legal framework for the practice of intercountry adoption, the Hague Convention aims to promote and facilitate international co-operation between countries practising intercountry adoption. From the outset, it was accepted that the Hague Convention would go beyond codifying rules of private international law. The negotiating parties agreed that the Hague Convention should be treated as one of the broader body of rules in existence concerned with children.[357] The Hague Convention

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353 Zhang "Intercountry Adoption: Clashing Colours of a Family Portrait" 2010 16 *UCLA Asian Pacific American Law Journal* 166; Skelton and Carnelley *Family Law in South Africa* (2010) 308.

354 Kennard "Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions" 1994 *U. Pa. J. Int'l Bus. L* 631.

355 The texts were in the English and French languages and each is treated as equally authentic.

356 HCCH "Status Table" https://www.hcch.net/en/instruments/conventions/status-table/?cid=69 (accessed 2019-03-10).

357 Schäfer *Child Law in South Africa: Domestic and International Perspectives* 515.

examines the state's obligations towards an individual in the context of its obligation or duty towards the child.

Not everyone considers the ambit of the Hague Convention in the same light, however. Smolin opines that the Hague Convention was not designed to be comprehensive.[358] For example, even with the goal of combatting child-trafficking where intercountry adoption takes place, the Convention is not designed to address criminal law responses to the practices mentioned within its provisions.[359] Smolin also noted the following:

> The Convention's agenda is modest, as the Convention leaves unaddressed significant principles of child welfare and child rights at stake in intercountry adoption, while providing only partial coverage even to issues such as abusive child laundering practices, which it does seek to address.[360]

Referring to comments made by Von Loon,[361] who was responsible for the 1990 *Report on Intercountry Adoption*, Smolin highlights the following:

> [A]t about the time work on the new Convention started, intercountry adoption itself was at risk, with an increasing number of children's countries of origin closing borders or otherwise rendering adoption impossible. The convention has created a global framework that provides stability by giving countries the control they need to trust their partners.[362]

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358 Smolin *Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption*: *Information Document No. 1 HCCH* (2010) 6.

359 HCCH *Implementation and Operation of the Hague Convention Good Practice Guide No. 1* par 632.

360 Smolin *Abduction, Sale and Traffic in Children* 8.

361 Van Loon *Report on Intercountry Adoption (Preliminary Doc. No. 1 of April 1990)* Preliminary Work, Proceedings of the Seventh Session (10 to 29 May 1993); see also Pfund "Intercountry Adoption: The Hague Convention: Its Purpose, Implementation and Promise" 1994 28 *Family Law Quarterly* 53 and 54, which lists the "very comprehensive report on intercountry adoption prepared by Hans van Loon of the Permanent Bureau" as one of the significant preparatory documents in the creation of the Convention.

362 Smolin *Abduction, Sale and Traffic in Children* 6.

No reservations of any provisions of the Hague Convention are permitted. Article 40 dictates that the Hague Convention must be adopted *in toto*. The Preamble of the Hague Convention reads as follows:

> [T]he preamble explicitly recognises the child's right to grow up in a family environment and that intercountry 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.

The objectives of the Hague Convention are the following:

a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children; and
c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

The Preamble to the Hague Convention sets out the following rationale for the conclusion of the Convention by the signatories in these terms:

a) Recognition must be given to the acceptance that for the full and harmonious development of the child's personality, the child should be granted the opportunity to grow up in a family environment, in an atmosphere where love, happiness and understanding are experienced.
b) Each state must as a matter of priority take all steps to place the child in his or her family of origin.
c) Recognition must be taken of the fact that where a child cannot be permanently placed in a suitable family in the country of origin of the child, intercountry adoption may offer a suitable alternative for permanent placement in a family.
d) Each State must acknowledge the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child concerned, respecting the fundamental rights of the child, and preventing the abduction, sale of, or traffic in children.[363]

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363 Art 1.

Clear procedures and measures are established in the Hague Convention to curtail and prohibit improper financial gain and, as such, the Convention succeeds in providing greater security, predictability and transparency for the parties involved in the adoption process.[364] To ensure best adoption practices and the elimination of abuses, a system of co-operation between sending and receiving countries was developed.

2 3 3 3 THE HAGUE CONVENTION'S PROVISIONS ON INTERCOUNTRY ADOPTION

The Hague Convention is a practical document that provides for the safe and harmonious adoption of children and is founded on the principle that placement with a permanent family is in the best interests of a parentless child. The primary aim of the Hague Convention is the creation of a regulatory framework for intercountry adoption. In terms of article 2, the Hague Convention applies:

> where a child habitually resident in one Contracting State ("the State of Origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

The aims of the Hague Convention are to promote the best interests of the child, to eradicate any form of child abduction or trafficking, to address the serious problem of geographical as well as social relocation,[365] and to "establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law".[366]

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364 HCCH "The 1993 Hague Convention of Protection of Children and Co-operation in Respect of Intercountry Adoption" (2012) https://assets.hcch.net/docs/994654cc-a296-4299-bd3c-f70d63a5862a.pdf (accessed 2019-02-20).

365 Preamble of the Hague Convention; Pretorius *Intercountry Adoption and the Best Interests of the Child* 2.

366 Preamble of the Hague Convention.

The Hague Convention highlights the importance of the best-interests principle when considering intercountry adoption[367] by making provision for specific procedural requirements.[368] Provision is made to ensure that contracting states work together to protect and safeguard the rights of children. The Hague Convention does not purport to standardise adoption laws but instead it seeks to establish minimum requirements to be followed by receiving and sending countries. In interpreting the provisions of the Hague Convention, the publications of the Permanent Bureau of the Hague Conference on Private International Law provide assistance to the authorities involved in the process. The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice No. 1 (the Guide) was published in 2008. The Guide contends that the best interests of the child should be served each time an adoptive child is matched to potentially adoptive parent/s by professional authorities. These professionals are required to be skilled in areas that include psycho-social expertise.[369]

One of the key principles of the Hague Convention is the principle of "subsidiarity",[370] which means that intercountry adoption can be considered only when all suitable options within the child's country of origin have failed. As a rule, institutionalisation of the child in his or her country of origin should be considered as a measure of last resort. However, based on the approach that it wished to make the document desirable to both member and non-member states, the Hague Convention made allowance for the substantive law of adoption to be drawn up by individual states.

Ironically then, the Hague Convention is viewed by some as the reason for the reducing number of intercountry adoptions.[371] However, it is submitted that criticism of

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367 Bojorge "Intercountry Adoptions: In the Best Interests of the Child?" 2002 2(2) *QUTLJJ* 269.

368 Pretorius *Intercountry Adoption and the Best Interests of the Child* 7–8.

369 HCCH *Implementation and Operation of the Hague Convention Good Practice Guide No. 1* 357.

370 "Subsidiarity" was first provided for in Art 17 of the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children.

371 Nehrbass "Why are International Adoptions on the Decline?" (2017) https://www.nightlight.org/2017/10/international-adoptions-decline/ (accessed 2018-07-24).

the Hague Convention is often founded on the critic's philosophical approach to alternative care, and to intercountry adoption in particular. Critics argue that changes are necessary to bring the Hague Convention in line with their own philosophical approach.

The basic principles of the Hague Convention are in essence drawn from the CRC. This is particularly evident when considering the provisions in article 21 of the CRC. The Hague Convention reiterates this CRC article's approach in article 1, which likewise seeks to ensure that, in all instances of intercountry adoption, the best interests of the child are to be considered, and that all intercountry adoptions should be conducted in a responsible and protective manner. The aim of this section is the elimination of the potential of abusive practices that have occurred in the past.

Although the Hague Convention accepts that the natural family remains the most appropriate unit of care for a child, the Hague Convention gives recognition to the fact that intercountry adoption can provide a permanent "family" for a child in need thereof. However, what constitutes "family" is not defined in the Hague Convention and no reference is made to culture as a defining aspect of what constitutes a family. Article 16 of the Convention refers to the fact that, when determining whether a child is adoptable or not, "due consideration" should be given to the child's ethnic, religious and cultural background. The Hague Convention also requires all member states to establish a central authority that will take the responsibility domestically to deal with intercountry adoptions.[372] Where an adoption has failed, meaning where the adoption has proved not to be in the best interests of the child, returning the child to the country of origin is to be considered as a measure of last resort.

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372 In terms of s 258(1) of the CA, the Director-General of Social Development was appointed as the Central Authority in South Africa.

The Explanatory Report to the 1993 Hague Convention[373] refers to the phrase that the best interests of the child shall be "a paramount consideration" as an indication that the drafters of the Hague Convention intended that the interests of other parties must also be taken into consideration.[374] This includes the interests of the biological and the prospective adoptive parents. It is evident from earlier discussions on the provisions of the CRC that the approach of the Explanatory Report accords with that of the CRC. A discussion of the provisions of the Hague Convention concerning the best interests of the child follows.

2 3 3 3 (I) THE HAGUE CONVENTION'S PROVISIONS ON THE BEST INTERESTS OF THE CHILD

The Hague Convention embraces the principle of the best interests of a child in several its articles. Articles 1*(a)*, 4*(b)*, 16*(d)*, 21(1) and 24 all refer to this principle. As with the CRC and the ACRWC, the Hague Convention does not define the best-interests principle. One of the objectives of the Convention is "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law".

The Permanent Bureau opined in the Guide to Good Practice[375] that the definition of the principle was left open because the requirements necessary to meet the best interests of the child may differ in each individual case, and that the factors to be considered should not, in principle, be limited and restricted. However, certain essential factors are referred to in the Hague Convention, and it is mandatory for those involved in the process to include these in any consideration of what is in the best interests of a child who is the subject of an intercountry adoption.

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373 Parra-Arranguren "Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption" (1994) https://assets.hcch.net/upload/expl33e.pdf (accessed 2019-04-19).

374 *Ibid*.

375 HCCH *Implementation and Operation of the Hague Convention Good Practice Guide* No. 1 22.

With a view to advancing the best interests of the child in intercountry adoption, the Hague Convention recognises that: children should grow up in a family environment; a permanent solution is preferable to a temporary measure and intercountry 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.

The Permanent Bureau provides guidelines on how the best interests of the child can be safeguarded in the context of intercountry adoption. In the first place, the Guide to Good Practice indicates that the state of origin must establish that the child is "genuinely adoptable". Article 4(a) of the Convention provides as follows:

> An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –
>
> (a) Have established that the child is adoptable.

No definition of "adoptable" appears in the Convention and it is thus left to the discretion of the child's state of origin to determine and provide therefor in its domestic legislation and policies. To assist States Parties in this regard, the Guide provides as follows:

> As a matter of good practice, the State of origin should declare in its implementing measures which authority is competent under Article 4*(a)* to establish that a child is adoptable, as well as the criteria for making that decision. The child's psycho-social adoptability is determined by the conclusion that it is impossible for the birth family to care for the child, and by the assessment that the child will benefit from a family environment. This is supplemented by his/her legal adoptability, which forms the basis for severance of the filiation links with birth parents, in the ways specified by the law of the State. [376]

Where the child is abandoned or orphaned, the Guide states that an investigation should be undertaken into the child's background and circumstances and that the authorities concerned should make all attempts to reunite the child with his or her

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376 HCCH *Implementation and Operation of the Hague Convention Good Practice Guide* No. 1 81 82.

biological family and relatives.[377] Where the child has voluntarily been given up for adoption by his or her family, it is important that the authorities undertake an investigation to ensure that the family's decision was not induced by financial considerations.[378] The Guide furthermore encourages states to keep a list of adoptable children in a central registry and to monitor carefully the length of time that a child is on such a list.[379]

Finally, the best interests of a child can be protected by ensuring that the child's needs are carefully matched to the qualities of the prospective adoptive family or parents.[380] The professional authorities (not the adoptive parents) must do the matching after a thorough and professional investigation. This is of utmost importance specifically with reference to a child with special needs. Article 16 of the Hague Convention makes provision for the steps to be taken after a decision of adoptability has been taken as follows:

> (1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall -
>
> (a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;
>
> (b) give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;
>
> (c) ensure that consents have been obtained in accordance with Article 4; and
>
> (d) determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement *is in the best interests of the child*.[381]

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377 HCCH *Implementation and Operation of the Hague Convention Good Practice Guide No. 1* 81 82 par 326.

378 Par 327.

379 Par 330.

380 HCCH *Implementation and Operation of the Hague Convention Good Practice Guide No. 1* 81 par 64.

381 Art 5 of the Hague Convention.

It is clear therefore that a placement will be made where the needs of the child are best met by an identified prospective adoptive parent or parents – that is, where the placement envisaged is in the best interests of the child.

2 3 3 3 (II) THE HAGUE CONVENTION'S PROVISIONS ON SUBSIDIARITY

The Hague Convention provides that a child should be raised by the child's biological family, or alternatively the extended family, wherever possible.[382] Where this is not possible, permanent placement options for the child in the country of origin should be considered. The principle of subsidiarity as enshrined in the Hague Convention is discussed in greater detail in chapter 5.

2 4 DISPARITIES IN THE CONVENTIONS WITH REGARD TO THE PRINCIPLE OF SUBSIDIARITY

The conventions that are currently relevant to intercountry adoptions evidently have somewhat different approaches to the principle of subsidiarity. This affects whether intercountry adoptions are only seen as a solution of last resort, or whether there are circumstances when such adoptions could climb up the hierarchy of available options. In brief, the CRC and ACRWC apparently provide for intercountry adoption only as a last possible option, whereas the Hague Convention takes a more approving approach and could foresee an international adoption being deemed a better option than, for example, foster care or institutionalisation within a child's country of origin.

Although the Hague Convention prioritises permanent family relationships over intercountry foster care or institutional care, intercountry adoption remains subsidiary to both adoption and foster care within a child's country of origin.[383] The disparities

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382 Preamble of the Hague Convention.

383 Kaufmann "Memorandum Presented by the Center for Adoption Policy Studies: Resolving Conflicts between the UN Convention on the Rights of the Child and the Hague Convention on Intercountry Adoption" (undated) http://www.adoptionpolicy.org/pdf/hague.pdf 2 (accessed 2018-07-25).

between the relevant conventions in the hierarchy of placement of a vulnerable child have left countries that have ratified the CRC, ACRWC and Hague Convention with a dilemma in reaching a determination.

Van Loon proposes a determination on the following basis:[384]

1. Ensure that no child is adopted abroad unless it has been established that the original family cannot take care of him or her and that no other viable alternative in the country of origin is available.

2. Define criteria and improve practice and procedures for intercountry adoption once it has been established that is the only viable alternative to the child.

3. Finally, help eliminate abuses of intercountry adoption, in particular, abduction and/or sale of children.

Van Loon notes the uncertainty regarding the role of the principle of subsidiarity in the three above-mentioned international conventions dealing with intercountry adoption. While adoption provides a form of certainty and security in its permanence, cognisance must be taken of the benefits of a child experiencing his or her native society and culture.

The Preamble to the Hague Convention neither denies nor ignores placement alternatives to intercountry adoption. However, the Hague Convention deliberately refrains from granting specific priority to *intra*-country foster care over intercountry adoption.[385] While the CRC explicitly states a preference for *intra*-country foster care over intercountry adoption, and the CRC, ACRWC and the Hague Convention all give priority to maintaining a child in his or her country of origin, ratification of these

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384 Van Loon "Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption" 1995 3 *Int'l J. Child. Rts* 464.

385 Preamble.

conventions does not preclude intercountry adoption as an alternative for children who lack a family.

None of the relevant conventions call for the creation of *intra*-country alternatives to intercountry adoption if they do not currently exist. The UN has encouraged its members to join the Hague Convention and this serves as support for the notion that the CRC and Hague Convention are fundamentally compatible. Finally, it is important to remember that the CRC was written in the absence of any regulation of intercountry adoption, a problem that the Hague Convention directly addresses through the stringent regulation of intercountry adoption. It is submitted that many of the obstacles that have plagued intercountry adoption and that have reduced its priority are in fact ameliorated by ratification of the Hague Convention.

2 5 THE RELATIONSHIP BETWEEN THE CONSTITUTION AND INTERNATIONAL CONVENTIONS

It is relevant to determine the question as to whether international conventions are binding, especially in light of the provisions of the Constitution. Should the Constitution be interpreted in the light of the treaties, or is it the other way around: do the treaties only bind South Africans insofar as they are in conformity with the Constitution? Translating international human rights norms into domestic law and practice and bringing the promise of international treaties home has been noted as one of the central challenges to international human rights law and to its universality.[386] South Africa has traditionally adopted a mixed approach to the incorporation of international law into domestic law by adopting a dualist approach in respect of relevant treaties.[387] The Constitution makes provision for the determination of the role of international law domestically. Section 39 of the Constitution states that the courts, and other legal

386 Staberock "Domestic Implementation" in Wolfrum (ed) *Max Planck Encyclopedia in Public International Law* (2013) par 5.

387 Strydom and Hopkins "International Law" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2005) 30-2.

bodies, when interpreting the Bill of Rights, *must* consider international law and *may* consider foreign law. Section 39(1) invokes public international law primarily for "the purpose of interpretation of rights and for determining their scope, not for proving their existence".[388]

Furthermore, section 231 of the Constitution provides that a treaty binds South Africa after approval by the National Assembly and the National Council of Provinces, unless it is self-executing, or of a technical, administrative or executive nature. Section 231(2) of the Constitution provides that an international agreement binds the Republic of South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. Only those treaties specifically incorporated by an Act of Parliament, however, become part of South African domestic law. Where South Africa ratifies a treaty, it is bound by international law to honour the provisions of that treaty.[389] Where a treaty has been ratified but has not been incorporated in municipal law by Parliament (meaning that domestic courts cannot enforce South Africa's international obligations), the state may be found to be in breach of international law.[390]

As Strydom and Hopkins indicate in this regard:

> Under the Vienna Convention on the Law of Treaties, Article 26 places an obligation upon a state that has become a party to a treaty to execute the treaty in good faith, while Article 27 prevents the state party from invoking the provisions of its domestic law as justification for its failure to perform in terms of the treaty.[391]

In *Government of the RSA v Grootboom*, the Constitutional Court held: "the relevant international law can be a guide to interpretation but the weight to be attached to any

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388 Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 147.

389 Strydom and Hopkins in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2005) 10-30; *Azapo v President of the RSA* 1996 (4) SA 671 (CC) par 28.

390 Strydom and Hopkins in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 10 30.

391 *Ibid*.

particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable."[392] It has been suggested that a binding international law norm can be inferred from a treaty that has been ratified by government, but not yet enacted into domestic law.[393] Nevertheless, South African courts have appeared to be reluctant to venture beyond the wording of the Constitution in interpreting fundamental rights. This, it has been noted, has serious implications for the role of international law as an aid to interpretation:

> While directly applicable convention law still has a chance of receiving some consideration, non-binding norms of whatever kind are likely to be met with indifference.[394]

Section 233 provides that, when interpreting legislation, South African courts *"*must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*"*. While section 233 gives greater weight to international law*,* the *court concerned will consider whether* the relevant international law is binding on South Africa. However, where international law is in direct conflict with the Bill of Rights, the courts will not uphold it domestically.[395]

In S *v Makwanyane*, Chaskalson CJ described the role of international law as follows:

> (P)ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals delaying with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on

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392 *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1160 (CC) par 26.

393 Strydom and Hopkins in Woolman and Bishop (eds) *Constitutional Law of South Africa* 2ed (2008) 13 30.

394 *Ibid*.

395 Haywood, Hassim and Berger "The Role of International Law in South African Health Law and Policy-making" 2010 *Health & Democracy – A Guide to Human Rights, Health Law and Policy in Post-Apartheid South Africa* 129.

> Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].[396]

The issue was also raised in *Government of the Republic of South Africa v Grootboom*, where the court held*:*

> The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.[397]

Referring to the impact of international law in interpreting section 28 of the Constitution, the Constitutional Court in *S v M* held:

> Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction, the [CRC] has become the international standard against which to measure standards and policies.[398]

The decision in *C v Minister of Health and Welfare*[399] provides a glimpse of the Constitutional Court's interpretation of section 28 and, in the minority judgment, an explanation of the relationship between international provisions that are in conflict with constitutional provisions. The first and second applicants were, respectively, Mr C (father of a girl aged three) and Ms M (mother of two girls aged one and four). On Friday, 13 August 2010, Mr C was conducting his trade repairing shoes at an intersection in Pretoria. He did so daily, but on that day, he was accompanied by his daughter. His partner, who usually looked after his daughter during the day, was in hospital giving birth. Ms M begged for her living. She was present at the same intersection, accompanied by an assistant and her two daughters, as she is blind.

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396 *S v Makwanyane* 1995 (3) SA 391 (CC).
397 *Government of the Republic of South Africa v Grootboom* (CCT11/00) [2000] ZACC 19 par 26.
398 (CCT 53/06) [2007] ZACC 18 par 16.
399 (CCT 55/11) [2012] ZACC 1.

Social workers employed by the Department, together with officials from the city had planned the removal of children from people found to be begging while accompanied by children. No court order had been sought for the removal of the children. In execution of the operation, social workers removed Mr C's and Mr M's children from their care and placed them in the Department's care facilities without notifying the parents of their whereabouts. Mr C and Mr M, together with the Centre of Child Law approached the High Court with a two-part application. In the first part, they applied on an urgent basis for an order restoring the children to their care.[400] The High Court ordered that Mr C's daughter be returned to his care immediately and that Ms M's children remain at the place of safety for five weeks, pending an investigation into whether they needed alternative care. They were later returned to Ms M's care by order of the Children's Court and under the supervision of a social worker. In the second part, the appellants sought a declaration of constitutional invalidity of sections 151 and 152 of the CA to the extent that the sections fail to provide for judicial review of removal and placement decisions made by the social workers or police.[401]

The present case concerned the confirmation of constitutional invalidity in sections 151 (removal of a child by an order of the Children's Court) and section 152 (removal of a child without a court order in certain circumstances of the CA in terms of section 172(2) of the Constitution). Section 172(2)*(a)* of the Constitution provides that an order of constitutional invalidity by a High Court must be referred to the Constitutional Court for confirmation, failing which the High Court order will have no force or effect.

The Constitutional Court handed down three separate judgments. In both the majority judgment (handed down by Yacoob J with Moseneke DCJ, Khampepe J, Nkabinde J and Van der Westhuizen J concurring) and the first minority judgment (by Skweyiya J with Froneman J concurring),[402] the court confirmed the judgment of the High Court

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400 Par 11.
401 Par 12.
402 Par 15.

declaring sections 151 and 152 unconstitutional because the sections do not provide for an automatic review of the removals permitted in sections 151 and 152 of the CA.[403] In the second minority judgment, Jafta J with Mogoeng CJ concurring disagreed with the other two judgments and held that the provisions of section 151 and 152 of the CA were not unconstitutional.[404]

In the majority judgment, Yacoob (with Moseneke DCJ, Khampepe J, Nkabinde J and Van der Westhuizen J concurring) held that sections 151 and 152 had been enacted to give effect to section 28 of the Constitution. The removal provisions are aimed at protecting the safety and well-being of children while the best interests of the children are positively considered. Despite the tightly defined circumstances in which children can be removed, the possibility always remains that a removal can be wrongly made. The court held that it is in the interests of the children that an incorrect decision made in terms of section 151 or 152 be susceptible for automatic review by the court in the presence of the child and parents. Sections 151 and 152 limit the rights contained in section 28(2) of the Constitution since the provisions are not in the best interests of the child.[405] Such limitation is not justifiable. Moreover, section 34 of the Constitution, which grants everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or other tribunal is also unjustifiably limited. The court accordingly concluded that sections 151 and 152 of the CA are unconstitutional because no automatic judicial review is provided for in the sections.

In his judgment, Skweyiya J (with Froneman J concurring) held that the removal of a child provided for in sections 151 and 152 of the CA constitutes a limitation of the child's rights to family or parental care[406] in terms of section 28(1)*(b)* of the Constitution. Although section 28(1)(b) also contemplates appropriate alternative care

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403 Par 41.
404 Par 98.
405 Par 24.
406 Par 52.

when removed from a family environment, this is a secondary right and not an equivalent alternative right. It does not necessarily render a removal constitutionally compatible with the primary right of family or parental care.[407] Although section 28(1)(b) itself also contemplates "appropriate alternative care when removed from a family environment", this is a secondary right, not an equivalent alternative right. The court pointed out that the interpretation is fortified by the formulation of the right in international law, which the court was bound by section 39(1)*(b)* of the Constitution to consider.[408] Both the CRC and ACRWC provide for an automatic judicial review of decisions to remove children from family or parental care.[409]

Skweyiya J pointed out that the provisions impose a limitation on the "expansive guarantee" given in section 28(2) of the Constitution that a child's best interests are of paramount importance in every matter concerning the child. The court held that there was no justification to the limitation of the constitutional rights in section 28(1)*(b)* and section 28(2) of the child since sections 151 and 152 do not contain the automatic right to judicial review. Moreover, in addition to the limitation of the right to family or parental care removal without automatic judicial review also infringes the right of access to courts in terms of section 34 of the Constitution. These limitations were neither reasonable or justifiable. As a result, the court confirmed the declaration by the High Court that sections 151 and 152 were unconstitutional.

In the other minority judgment, Japhta J pointed out that section 28 of the Constitution does not refer to automatic review at all.[410] Therefore the requirement for judicial review in the CRC and ACRWC does not form part of the section.[411] It can also not be incorporated into the section. Consequently, it cannot be used as a constitutional standard for determining validity of the particular sections even though the CRC and

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407 Par 24.
408 Par 20.
409 Par 25.
410 Par 109.
411 *Ibid*.

ACRWC were ratified and are binding on South Africa.[412] Japhta J came to this conclusion on the basis that international law may form part of South African law if it is not inconsistent with the Constitution or an Act of Parliament.[413] Where there is such an inconsistency between international law and an Act of Parliament, the latter prevails. Japhta J held further that since section 28 if the Constitution does not require automatic review, sections 151 and 152 of the CA cannot be declared invalid for failing to provide for an automatic review, because there is no constitutional benchmark requiring automatic review. Japhta J furthermore held that the sections do not limit the right to parental care entrenched in section 28(1)(*b*), because they do not apply to family and parental care envisaged in section 28(1)(*b*). This is so because the right to family and parental care in section 28(1)(*b*) refers to "beneficial" family and parental care whilst sections 151 and 152 of the CA constitute legislative measures consistent with section 28(1)(*d*) and s28(1) and (2). As measure designed to protect children from harmful parental care, the provisions do not limit the right to parental and family care. On the contrary, the provisions advance the children's interests which are paramount to any decision involving a child.

Concerning section 34 of the Constitution Japhta J held that this section could not be invoked to test sections 151 and 152 of the CA, because the applicants did not rely on this section in the High Court, and the Constitutional Court was concerned with the confirmation of the order of the High Court.

The important conclusion in the Japhta judgment is that where provisions of international instruments conflict with the constitutional provisions and other national legislation, the Constitution and the national legislation of South Africa prevail.

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412 *Ibid*.
413 *Ibid*.

2 6 CONCLUSION

South Africa is a signatory to numerous international treaties and agreements. The rights of children are legally defined in international human rights treaties. The extent to which international instruments and laws can improve the lives of children worldwide is dependent on the extent to which States Parties implement them and adopt domestic measures to comply with the relevant obligations. While India and Kenya have also ratified the CRC and Hague Convention, the extent to which the provisions have been put into practice in these countries will be considered in chapter 6.

The discussion in this chapter has provided an outline of the development of international law regarding global recognition of a child as a bearer of rights. A child's right to family and parental care or, when necessary, appropriate alternative care was considered regarding relevant conventions. The chapter has highlighted the recognition of the child as a bearer of rights, and the movement internationally from acceptance of mere moral obligations ultimately towards a state's obligation to ensure the protection and recognition of children's rights as legally recognised rights. This chapter has traced the progressive development of the recognition of a child as a bearer of rights.

In the most recent conventions, namely the CRC, Hague Convention and ACRWC, the development of intercountry adoption as a potential form of alternative care is seen. National adoption as a placement option is prioritised in all conventions concerned with the alternative care of OACs. The CRC clearly states that children who are deprived of a family environment are entitled to special protection and that states that recognise adoption must ensure that the best interests of the child shall be a paramount consideration. The ACRWC also recognises adoption but expressly states that intercountry adoption shall be a last resort if the child cannot be cared for suitably in his or her country of origin. Although largely unregulated in the CRC, the drafters of the Hague Convention recognised that intercountry adoption is practiced worldwide and that regulation of intercountry adoption was essential to protect children from potential exploitative practices. The strict regulation of placements abroad was a

much-needed innovation of the Hague Convention. The following chapter considers alternative care in South Africa and the suitability of the status of such care for an OAC is evaluated.

The process of intercountry adoption is complex. As discussed in the current chapter, international law provides a framework to assist states in promoting co-operation and communication between states involved in intercountry adoption. The role of the relevant international treaties and their monitoring bodies in regulating intercountry adoptions is clearly vital to the successful implementation of this placement option. Most of the provisions of the international treaties are not contested, but several issues remain contentious as is evident in the discussion above. The approach in international law is that the most suitable form of alternative care, even if this be intercountry adoption, must be sought. Mezmur states that

> [i]ntercountry adoption as a measure of last resort" should be read to mean "intercountry adoption as being generally subsidiary to other alternative means of care," but subject to exceptions. In addition, "last resort" should not mean when all other possibilities are exhausted.[414]

Where intercountry adoption is regarded as an appropriate solution, the question arises as to what policy, procedure, decision or practice qualifies a decision regarding the placement of a child in intercountry adoption to be in the best interests of the child concerned. Although perhaps contentious, this has led to the suggestion by certain commentators that an adoption that is compliant with the norms and procedures of the Hague Convention (which must by definition be in the best interests of the child) could potentially rank ahead of foster care and institutional care in the country of the child's origin.[415] Mezmur states in this regard:

> Assessed against the general preference towards family-based, permanent and national (domestic) solutions, foster placement (along with intercountry adoption) is invariably to be considered subsidiary to any envisaged solution that

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414 Mezmur 2009 *Sur. Revista Internacional* 98.

415 Wechsler "Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption" 2010 22(1) *Pace International Law Review* 4.

> corresponds to all three International principles – for instance, domestic adoption. Preference towards foster care over institutionalisation is often expressed by the CRC Committee.[416]

An argument favouring the view that the CRC was not intended to preclude intercountry adoption is to be found in the recommendations of the Committee that the provisions of the Hague Convention be adhered to. That the UN has encouraged its members to join the Hague Convention further supports the notion that the two conventions are fundamentally compatible.

The best interests of the child should be protected in every decision concerning a child's placement. It is submitted that the principle itself, albeit not the sole concern, should moderate any mechanical application of conflicting legal rules. Ultimately, the standard of the best interests of the child forms the basis of the CRC, ACRWC and Hague Convention, and as such, may serve as a predictor for the expected treatment of conflicts in international law. International law clearly prioritises domestic adoption where placement for an OAC is sought. All relevant international convention supports the best interest principle where a decision is made to place an OAC in care. An approach However, the determination of best interest is indeterminant. An approach to the interpretation of the principles is considered in the chapters that follow. Chapter 3 will consider various forms of alternative care available to a child in need of care in South Africa.

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416 Mezmur *Intercountry Adoption in an African Context* 329.

CHAPTER 3

ALTERNATIVE CARE IN SOUTH AFRICA

3 1 INTRODUCTION

In the previous chapter, the evolution of a child's right to alternative care was traced through the relevant international covenants and declarations. Alternative care, whether permanent in nature or a temporary solution, is defined as the care that is provided where the child's biological family is unable to provide adequate for the child concerned.[417] Alternative care in this sense includes both formal and informal care of children but excludes parental care by the biological parent or parents.[418] It is submitted that "alternative care" has both a wider and narrower meaning. In the wider sense, "alternative care" refers to care that is not provided by the biological core family, and accordingly includes all forms of adoption, both domestic and intercountry.

This chapter seeks to define the various forms of alternative care (in the narrow sense – that is, excluding adoption and intercountry adoption) that are available in South Africa. A focus on adoption and intercountry adoption as a form of alternative care follows in chapters 4 and 5, and a consideration of intercountry adoption as a placement that potentially meets the best-interests principle of a child in a particular case, is considered in subsequent chapters. The status of alternative care in India and

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417 Assim *Understanding Kinship Care of Children in Africa* 118. Assim defines "alternative care" as that care that "indicates the provision of care other than parental care to children deprived of their family environment, temporarily or permanently, but with such alternatives possessing the elements of care".

418 See UNDP "Beyond the Midpoint: Achieving the Millennium Developmental Goals" (2010) http://www.undp.org/content/undp/en/home/librarypage/mdg/beyond_the_mid-pointachievingthemillenniumdevelopment goals.html (accessed 2018-04-02).

Kenya is considered in chapter 6. The role that adoption and intercountry adoption can play in alleviating the challenges facing the many OACs in both countries is considered with the view to ascertain if any lessons or practices can be noted which would be beneficial to the South African position.

In the narrower sense, alternative care includes all forms of care options that are temporary in nature, and includes foster care, supported independent living, and residential care.[419] Kinship care is extraordinary because, while it is recognised as a means of alternative care, it is generally not temporary in nature. In South Africa, care of an OAC by a relative, or relatives, is common and well established. Besides a few exceptional instances, this form of care is generally not court-ordered. Kinship care is, as a rule, permanent in nature and an important form of care in South Africa. However, given the many similarities between kinship care and foster care, extended family care is considered under foster care in this chapter. Alternative care in the wider sense, that is, alternative care that includes a permanent solution for the child concerned, forms the basis of this research. To have a full understanding of care that caters for the best interests of the South African child, all forms of care, temporary and permanent, must be considered. While alternative care is also considered in instances following a decision of the criminal justice system,[420] this research is restricted to alternative care for those children who are orphaned and/or abandoned, and who are declared to be in "need of care and protection".[421]

Generally, alternative care options in the CA are by their nature characterised as temporary or impermanent. Potential temporary forms of alternative care provided for in the CA include foster care (as well as cluster foster care),[422] temporary safety

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419 S 167 of 38 of 2005.

420 This includes *inter alia* legal provisions and interventions sanctioned by the state, which are designed to deal with situations in which specific children are being harmed, or are at immediate risk of harm, through abuse or neglect.

421 S 150.

422 S 180.

shelters,[423] and care in CYCCs.[424] Care for children in a CHH is also a reality in South Africa.[425] For the purposes of this research, consideration of care in temporary safe care shelters is excluded. The viability and efficacy of alternative care options are considered in light of the numbers of children in such care, how the rights of such children are catered for, the quality of care received and concerns with respect to the care provided. Where available, reference will be made to the latest available statistics for each form of alternative care. All means have been attempted to acquire the most recent statistics. The positive and negative effects of the particular form of care are considered, in light of the constitutional right that every child has the right that have his or her best interests considered of paramount importance when such a determination of placement is made.[426]

According to the most recent available statistics, South Africa was home to an estimated 2.8 million orphaned children in 2017.[427] These statistics include double-, maternal- and paternal-orphans. Hall states that the number of children in South Africa who are double-orphans more than doubled between 2002 and 2011.[428] However, since 2012, there has been a gradual decrease in these statistics largely because of improved access to antiretroviral medication. Hall notes that as of 2017, 505 000 South African children had lost both their parents.[429] She states further

> [o]rphaning rates are particularly high in provinces that contain the former homelands, as these areas bear a large burden of care for orphaned children. Fifty-four percent of double orphans live in either the Eastern Cape, KwaZulu-Natal or Limpopo provinces.[430]

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423 S 46(1)(a)(iii).
424 S 46(1)(a)(ii).
425 S 46(1)(b).
426 S 28(2).
427 Hall "Orphaning Children Count Statistics on Children in South Africa" (2018) not paginated http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=4 (accessed 2018-12-11).
428 *Ibid.*
429 *Ibid.*
430 *Ibid.*

Furthermore, it is estimated that 58 000 children are living in CHHs in 2017 and that approximately 12 577 children were cared for in state-funded CYCCs.[431] While precise statistics are difficult to obtain, approximately 10 000 children were estimated to be living on the streets in South Africa in 2014.[432] There are no current statistics available concerning children abandoned in South Africa annually, but the National Adoption Coalition (NACSA) [433] reports that the number of abandoned children has increased significantly over the past few years.[434]

These statistics and reports paint a bleak picture of the overall state of OACs[435] in South Africa. However, since the advent of democracy, the discourse on a child's rights has focused on the realisation of the child as a bearer of rights.[436] The state bears the obligation to protect and promote the well-being of its children. South Africa's commitment to this goal is evident firstly within the provisions of the Constitution, international law and relevant national legislation.

While it is generally accepted that every effort is required to support and maintain the family as a unit[437] and that only compelling reasons should lead to the removal of any

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431 Hall "Child-only Households Children Count Statistics on Children in South Africa" (2018) not paginated http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=17 (accessed 2018-12-11).

432 Mokomane, Rochat and the Directorate 2012 17 *Child & Family Social Work* 347.

433 The National Adoption Coalition of South Africa was established in 2011 with the aim of unifying and empowering the adoption community.

434 News24 "Decline in Child Adoption Rate – Report" https://www.news24.com/SouthAfrica/News/Decline-in-child-adoption-rate-report-20140520 (accessed 2019-03-21).

435 Clause 1 of the Children's Third Amendment Bill seeks to amend s1 of the CA, by substituting the definition for the words: "abandoned" to include a child in respect of whom the whereabouts of the parents are unknown.

436 South African Human Rights Commission "Twenty-five Years of Children's Rights" 2014 https://www.sahrc.org.za/index.php/sahrc-media/news/item/58-twenty-five-years-of-children-s-rights (accessed 2017-12-07). Refer to chapter 2 in this respect.

437 Perumal and Kasiram "Children's Homes and Foster Care: Challenging Dominant Discourses in South African Social Work Practice" 2008 44(2) *Social Work/Maatskaplike Werk* 159. The authors opine that considering the decline in the traditional family environment in South Africa due to several factors, including HIV/AIDS, poverty and unemployment, whether traditional family care should always be prioritised as a placement of first option, is questionable. The authors refer to Clough in support of this view: "There is a widely held belief that families are the ideal places in which to bring up children or indeed in which any of us, but particularly the

child from his or her biological family,[438] the ideal is difficult to attain in a developing country such as South Africa.[439] Children are vulnerable members of society, and the state and its relevant authorities are required to recognise and protect their rights at all times. Following South Africa's ratification of the relevant international instruments on alternative care as discussed in chapter 2, obligations were incurred by South Africa to enact domestic legislation compliant with international principles. When placing a child in alternative care, both international and national law recognises that placement of a child in alternative care is viewed as less desirable than maintaining or reunifying a family.[440] The responsible authorities involved in making a determination, face the challenge of attaining the best match for a child "in the face of deprived families and inadequate infrastructural support".[441] With this in mind, the various forms of alternative care that are provided for in the CA are discussed.

3 2 LEGISLATIVE PROVISIONS CONCERNING ALTERNATIVE CARE

A brief consideration of the legislation relevant to the recognition and protection of a child in need of care in South Africa follows. Constitutional provisions are considered first, followed by reference to other national legislative protection.

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dependent, should live. The myth that life is best in families persists in spite of the fact that families are not perfect."

438 Schäfer *Child Law in South Africa: Domestic and International Perspectives* 453. In *Kleynhans v Kleynhans* (EC) (unreported) 30/07/2009 Case no 2256/2008 15, the Eastern Cape High Court refused an application to have minor children removed from their maternal care, pending a "family re-integration" process.

439 Perumal and Kasiram 2008 44(2) *Social Work/Maatskaplike Werk* 161.

440 Couzens 2009 *PER/PELJ* 63.

441 Perumal and Kasiram 2008 44(2) *Social Work/Maatskaplike Werk* 164.

3 2 1 CONSTITUTIONAL PROVISIONS PROTECTING CHILDREN IN NEED OF ALTERNATIVE CARE

The Constitution, as the supreme law of South Africa, places emphasis on the following three children's rights:

- the right to family care, parental care or appropriate alternative care; [442]
- the right to social services;[443] and
- the right to protection from abuse, neglect, maltreatment and degradation.[444]

Section 28(1) is clear in imposing an obligation on the state to care for its OACs. The state is obliged to cater for such rights in the context of the principle that a child's best interests[445] are of paramount importance when making any determination regarding a child.[446] In light of section 27(1)*(c)*[447] read with section 28(1)*(c)*,[448] the Constitution sets certain minimum mandatory standards pertaining to socio-economic rights in an attempt to protect the rights of a child.[449] These standards relate to the provision of social security, social assistance and social services. As such, the state has a constitutional obligation to provide social assistance to those who are "unable to

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442 S 28(1)*(b)*. Residential care includes a number of arrangements, including small-group homes, children's villages and institutional care, where children are cared for collectively in large groups.

443 S 28(1)*(c)*.

444 S 28(1)*(d)*.

445 A flexible standard that takes into account the relevant factors for the individual child as well as all other rights of the child.

446 S 28(2).

447 S 27(1)(c) provides that" Everyone has the right to have access to-(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance".

448 S 28(1)(c) provides that "Every child has the right-(c) to basic nutrition, shelter, basic health care services and social services".

449 In their article, Mbazira and Sloth-Nielsen "Incy Wincy Spider went Climbing up again Prospects for Constitutional (Re) interpretation of Section 28(1)(*c*) of the South African Constitution in the Next Decade of Democracy" 2007 2 *Speculum Juris* 147, opine that s 28(1)*(c)* of the Constitution should be classified socio-economic rights clause, but rather as a constitutional provision for child protection.

support themselves and their dependants".[450] In light hereof, the state and government has established three categories of social grants, aimed at alleviating some of the financial burdens of the raising of children. These grants include the Child Support Grant (CSG); the Foster Care Grant (FCG); and the Care Dependency Grant (South Africa) (CDG).

3 2 2 NATIONAL LEGISLATION

A consideration of additional national legislation that provides for the care of *inter alia* OACs follows.

3 2 2 1 THE CHILDREN'S ACT

Chapter 11 of the CA provides for general regulation of alternative care of OACs. In terms of the CA, the court must first consider a report on the circumstances of a child, drawn up by the relevant social worker.[451] The court concerned may make various orders if it finds a child to be "in need of care and protection".[452]

One of the advances of the CA is that it introduces a range of options for the courts that were not available under the CCA. To be considered for alternative care, provisions in the CA set the requirement that such child must be found to be in "need of care and protection". If a court confirms the social worker's finding that a child is in need of care, it may make an appropriate order based on what is deemed to be in the best interests of the child under consideration.[453] A model to assist in making a determination that meets the child's best interest is submitted in chapter 7.

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450 S 27(1)*(c)*.
451 S 155(2).
452 S 156.
453 A detailed discussion on the principle of the best interests of the child is found in chapters 2 and 7 of this thesis.

3 2 2 2 A CHILD IN "NEED OF CARE"

Regulations published in terms of the CA set out all the factors that a presiding officer should consider before concluding that a child is in need of care and protection. The CA has expanded the list of factors that could be considered under the CCA. In terms of section 150 of the CA, a child is deemed to be "in need of care and protection" where the child:

(a) has been abandoned or orphaned and is without any visible means of support;

(b) displays behaviour which cannot be controlled by the parent or care-giver;

(c) lives or works on the streets or begs for a living;

(d) is addicted to dependence-producing substances and is without any support to obtain treatment for such dependency;

(e) has been exploited or lives in circumstances that expose the child to exploitation;

(f) lives in or exposed to circumstances which may seriously harm that child's physical, mental or social well-being;

(g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;

(h) is in a state of physical or mental neglect; or

(i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

In terms of the provisions of the CA, the fact that a child is abandoned or orphaned does not necessarily mean that the child is deemed to be "in need of care and protection". The problem lies in the wording of section 150(1)*(a)*, which states that a child is "in need of care and protection" if the child "has been abandoned or orphaned

and is without any visible means of support" (own emphasis). The question at the centre of the wording of section 150(1)*(a)* is one of support from the state where such child has been identified to be in need of care.

3 2 2 3 THE SOCIAL ASSISTANCE ACT 13 OF 2004

To address the needs of children, especially in the context of the HIV/AIDS pandemic in South Africa, the DSD identified the benefit of providing social security grants to alleviate suffering and provide for the needs of children who were orphaned. In terms of section 8 of the Social Assistance Act (SAA), a foster parent is eligible for an FCG and such foster parent is the primary care-giver of the child concerned. The foster parent is entitled to receive the FCG for as long as such child (subject to the provisions of section 5) is in need of care.[454] The child concerned must also be "placed in his or her custody".[455] It is a requirement that the "foster parent is a South African citizen, a permanent resident or a refugee."[456]

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454 S 8*(a)*. S 5 of the SAA provides as follows:
"(1) A person is entitled to the appropriate social assistance if he or she –
(a) is eligible in terms of section 6, 7, 8, 9, 10, 11, 12 or 13;
(b) subject to section 17, is resident in the Republic;
(c) is a South African citizen or is a member of a group or category of persons prescribed by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette;
(d) complies with any additional requirements or conditions prescribed in terms of subsection (2) and
(e) applies for social assistance in accordance with section 14(1).
(2) The Minister may prescribe additional requirements or conditions in respect of-
(a) income thresholds;
(b) means testing;
(c) age limits, disabilities and care dependency;
(d) proof of and measures to establish or verify identity, gender, age, citizenship, family relationships, care dependency, disabilities, foster child and war veterans' status
(e) forms, procedures and processes for applications and payments;
(f) measures to prevent fraud and abuse".

455 S 8 of the SAA.

456 Western Cape Government "A Useful Guide for Refugees, Migrants and Asylum Seekers" https://www.westerncape.gov.za/text/2013/June/local-government-refugee-guide-june.pdf (accessed 2018-04-19).

The common thread for the provision of social assistance in the SAA is the focus on provision of grants to alleviate poverty and increase the likelihood of "family care" for children who have been orphaned, on the basis that children without parents are "in need of care". Media reports as of July 2018 have emphasised the plight of those reliant on the grant system. The effective payment of social grants in South Africa has proved difficult in the recent past. The implementation of a policy that has been formulated, such as the grant system in South Africa, is seldom straight forward, and consequences can result that are not intended by the policy makers. In attempt to correct existing problems within the system to successfully effect payment to grant receivers, the Department of Social Welfare effected changes to its mode of payment.[457] The South African National Civic Organisation (SANCO) released a statement averring that the migration crisis that resulted in an estimated 700,000 social grant beneficiaries not receiving their pay-outs from the South African Social Security Agency (SASSA) on time could have been avoided with better planning.[458]

Mthethwa opines that the FCG system is not effective in South Africa because of the challenges faced by applicants in the application process.[459] In addition, while the growth in the monetary value of the grants and the number of beneficiaries of social assistance is welcomed, the discrepancy between the amounts awarded under a FCG *versus* that of a CSG could result in the misuse of the grant. Mthethwa lists challenges facing the social assistance programme in South Africa as follows: corruption, shortage of staff, inadequate resources, low personnel morale and lack of proper

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457 In terms of the regulations, a beneficiary can choose to either have their grants paid into their personal bank account or the new SASSA card.

458 ENCA "Social Grants Crisis Could Have Been Avoided" https://www.enca.com/south-africa/social-grants-crisis-could-have-been-avoided-sanco (accessed 2019-02-03).

459 Mthethwa *Evaluating the implementation of the Child Support Grant in South Africa: the case of KwaZulu-Natal Province* (doctoral thesis, University of Pretoria) 2017 13.

documentation.[460] He further maintains that the long-term sustainability of the system is questionable.[461]

The Social Assistance Amendment Bill[462] was tabled in Parliament in April 2018 and provides that the Minister of Social Development has the authority to increase the amounts for certain categories of grants. The intention of the legislature is to add a top-up payment to the CSG for relatives caring for orphans. In effect the normal CSG amount of R400 00 would be topped up with an amount of R200 00. This CSG Top-Up is part of the solution to the foster care crisis and if designed and administered effectively, those who qualify as caregivers will be able to access the grant directly from SASSA without the need to go through social workers and the courts. The effect hereof is that those caring for orphans will be able to access the grant faster than the existing FCG. Once Parliament has passed the bill, the DSD will be obliged to draft regulations clarifying the proof required to prove orphan hood (and/or abandonment) of the child concerned and family relationship of the child to the caregiver. Considering South Africa's high rates of child poverty, the UN Committee on Economic, Social and Cultural Rights recently flagged this issue for priority attention in its Concluding Observations to the South African Government.[463]

3 3 IMPERMANENT ALTERNATIVE CARE SOLUTIONS

Various temporary or impermanent alternative care solutions are available in South Africa to a South African OAC. As indicated above the CA recognises foster care, cluster foster care, CHHs and CYCCs as alternative care. These are discussed in more detail below. However, all these care options share significant challenges. Several factors influence the effectiveness of the alternative care system in South Africa at

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460 See fn 181 above.

461 Mthethwa *Evaluating the implementation of the Child Support Grant in South Africa: the case of KwaZulu-Natal Province* (doctoral thesis, University of Pretoria) 2017 172 173.

462 Social Assistance Amendment Bill B8-2018.

463 United Nations Economic and Social Council *Concluding Observations on the Initial Report of South Africa* (2018) *E/C.12/ZAF/CO/1* par [57(c)] and par [83].

present. An example hereof is the fact that the CA defines a child as "a person under the age of 18" and not 21 as provided in the CCA.[464] To achieve its goal it is submitted that the welfare services in South Africa are currently under-capacitated and as such to a large extent hindered in fulfilling its aim in ensuring that placements are indeed appropriate for OACs.[465] The DSD finds itself under great pressure to fulfil its commitments effectively as a result of staff and budgetary constraints.

3 3 1 FOSTER CARE

Foster care is an integral component of the South African alternative care system. For the purposes of this research, foster care is considered to be the placement of a child needing to be removed from the parental home into the custody of a suitable family or persons willing to be foster parents. Section 181 (*a*) and (*b*) of the CA views foster care as the main source of alternative care in South Africa which, among its purposes, intends

> to protect and nurture children by providing a safe, healthy environment with positive support; promoting the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime and respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity.[466]

In South Africa, a child is legally considered to be in foster care if the child concerned has been placed in the care of a person who is not the parent or guardian of such child,[467] and the placement is made as a result of: an order of a Children's Court;[468] or a transfer in terms of section 171 of the CA.[469] Foster care placement may be with

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464 S 1 of 38 of 2005.

465 Dhludhlu and Lombard "Challenges of Statutory Social Workers in Linking Foster Care Services with Socio-Economic Development" *Social Work/Maatskaplike Werk* 2017:53(2) 165.

466 *Ibid.*

467 Certain parental rights and obligations remain with the biological parents of the child. An example hereof is found by the fact that guardianship is not automatically transferred to the foster parents through the granting of an order of foster care.

468 S 180(1)*(a)*.

469 S 180(1)*(b)*.

non-family, extended family, cluster residential care or even in a CHH. According to the CA as amended, foster care placement is defined as a mechanism through which the government provides for children who are the responsibility of the state and not chiefly intended as a poverty alleviation mechanism like other social grants such as the CSG in South Africa. Foster care can be further divided into kinship foster care as well non-kinship foster care. Kinship foster care is one of the most popular forms of foster care in South Africa, this kind of foster care happens when an orphaned child has been legally placed in foster care with his or her relatives whilst non-kinship foster care is when an OAC is placed with adults who have been screened and found suitable to foster the child who are not related to the child. The position of kinship care is due to change as a result of proposed amendments to the CA tabled in Parliament in 2019. A brief discussion of these amendments follows in paragraph 3.3.2. When these amendments are effected, kinship care will, correctly, it is submitted, be regarded as a separate and significant form of alternative care in South Africa. The importance of foster care is well-established in international instruments as well as in domestic legislation.[470] It is the most frequently used form of formal alternative care for OACs in South Africa.[471] Within the formal child-care system, foster care is ordinarily considered to be the preferred form of substitute care for a child who cannot remain with his or her biological family and who is also not available for domestic adoption. In South Africa a well-established customary practice, referred to as kinship care or extended family care, takes places where kin care for the child concerned. It is not uncommon to find children in South Africa being raised at different stages by grandparents, parents and other relatives.

Foster care has also greatly expanded in part due to a policy in 2000 that legalised the placement of children with extended family members. Historically, the care of children

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470 Furthermore, the same documents state that children requiring out-of-home care have the right to appropriate alternative care – see Arts 24–25 of the ACRWC; s 28(1)*(b)* of the Constitution; Arts 20(1), (2), (3) and 25 of the CRC.

471 *Ibid*.

in South Africa was a moral duty or obligation that was binding on all family members. Extended family care is traceable to the African tradition where a child is seen as belonging not just to their nuclear family, but rather that such a child is deemed to fall under the responsibility of the entire community within which they are born.[472] Placement of the child within the extended family can be beneficial for the child concerned in several respects. Within the system of alternative care, care by the extended family is generally seen as the first option of placement in South Africa for vulnerable children. Most children are in "informal kinship care", with a smaller proportion formally placed by the courts into statutory foster care with relatives.[473] Assim refers to the fact that kinship care is not necessarily restricted to biological or genetic ties.[474] Ezewu defines kinship care as follows:

> From actual practices in the various societies in Africa, the following characteristics can be observed: 1. The extended family system is a combination of several nuclear, polygamous, or polyandrous types of family, and the relationships between the members are biological and social. 2. The members through biological relationships usually trace their origin to a common ancestor, lineage and a common genealogical line. 3. The members usually occupy a specific geographical location in a village or city as a home place for all members even if they live in other parts of the world, returning to it from time to time. 4. The members have a common identity and group feelings, looking up to one another for help at times of disaster or misfortune and sharing one another's happiness.[475]

Kinship care is valuable in a number of ways *inter alia* in that it gives effect to the child's constitutional right to either parental or family care and it contributes significantly to their well-being, development and protection.[476] However, it is submitted that all placements must be considered in light of the circumstances of each case, and certain

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472 Assim *In the Best Interest of Children Deprived of a Family Environment: a Focus on Islamic Kafalah as an Alternative Care Option* (LLM dissertation, University of Pretoria 2009) 22–23.

473 Khomba *Redisigning the Balanced Scorecard Model: An African Perspective* (PHD thesis, University of Pretoria 2011) 130.

474 Assim *Understanding Kinship Care of Children in Africa* 17.

475 Ezewu "The Relative Contribution of the Extended Family System to Schooling in Nigeria" 1986 55 *The Journal of Negro Education* 222.

476 Department of Social Development "South Africa's Child Care and Protection Policy" (2017) https:// www.sacssp.co.za/NDSD_CCPP_19_DECEMBER.docx (accessed 2018-04-17).

concerns are raised where placement in the extended family is accepted as an option of first resort in all instances for an OAC. Like all alternative care placements, the factors must be considered having regard to the rights and the best interests of the child concerned at the time the determination is made.

Characteristically, within the extended family system, significant reliance is placed on women, particularly on the grandmother/s of the children to provide the care needed. As can be expected, the situation inevitably leads to additional costs for the caregiver. Considering the *de facto* financial position of elderly women in particular, it is evident that they will often need access to financial support. The recent court judgment allowing grandparents who provide such care to access an FCG has provided some relief in this regard and the case is discussed in this chapter.[477] Generally, only where it is impossible for the extended family to care for an OAC do children become the responsibility of unrelated caretakers. However, the extent of HIV/AIDS[478] in South Africa has resulted in a large-scale breakdown in this well-established traditional structure of care, leading to a decrease in the capacity of extended family members to provide such care.[479] Furthermore, there has been a noticeable decline in the number of prime-age caregivers, such as aunts and uncles.[480] Mathebula opines that the decline of caregivers in their prime age "implies that relatives, who took over the responsibility for taking care of orphan children, are also ill and dying due to the HIV/AIDS pandemic".[481]

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477 *SS v Presiding Officer, Children's Court, Krugersdorp* 2012 (6) SA 45 (GSJ*).*

478 UNAIDS reported that there were 270 000 new HIV infections in 2017 and that were 110 000 AIDS deaths that were reported in the same year https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/south-africa (accessed 2019-02-26).

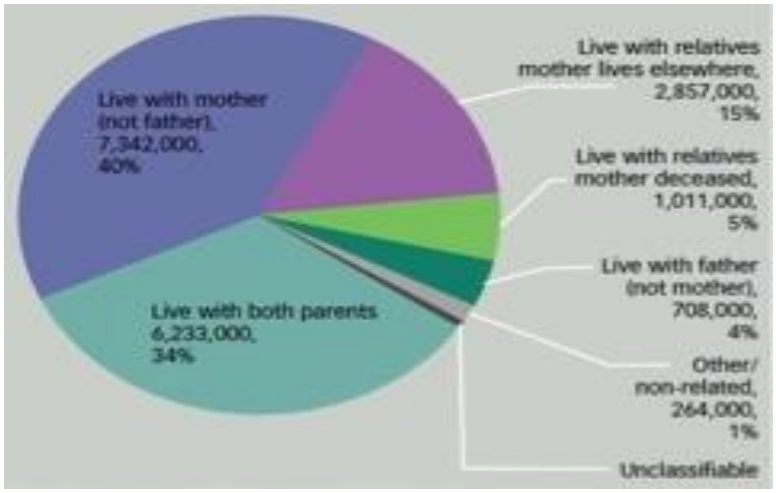
479 Gallinetti and Sloth-Nielsen 2010 46(4) *Social Work/Maatskaplike Werk* 486.

480 Mathebula *From being in Charge of a Child-Headed Household to being Placed in Kinship Foster Care: The Experiences and Expectations of Orphans Previously in Charge of Child-Headed Households* (2012) Master of Arts In Social Science (Mental Health) UNISA 6.

481 Mathebula *From being in Charge of a Child-Headed Household to being Placed in Kinship Foster Care: The Experiences and Expectations of Orphans Previously in Charge of Child-Headed Households* 6.

From the figure below, one can deduce that in 2014 some 3 868 000 children lived with relatives other than their biological mother and/or father.[482] This provides an approximation of the number of children living in extended care in 2014. There has been a significant increase in the number of children living in extended family care.

Figure 1: Children in co-residence arrangements 2014[483]



In *SS v Presiding Officer, Children's Court, Krugersdorp*, the court considered the instance where the maternal aunt and uncle took care of their nephew.[484] The question before the court was whether the nephew could be a child in need of care as envisaged in terms of the CA? The lower court's refusal to find such child to be in need of care was overturned on appeal. In making its judgment, the Appeal Court held that since the aunt and uncle owed their nephew no common law duty of support in South African law, as carers for the children they were entitled to receive a social grant to assist financially in caring for the children concerned. An unfortunate consequence of this judgment lay in the fact that grandparents, who do at common law owe their

482 Statistics South Africa "General Household Survey" http://www.statssa.gov.za/publications/P0318/P03182014.pdf (accessed 2017-05-20).

483 Delany, Jehoma and Lake *South African Child Gauge* 35.

484 *SS v Presiding Officer of the Children's Court: District of Krugersdorp* 2012 (6) SA 45 (GSJ).

grandchildren a duty of support, were excluded from receiving any form of social assistance when caring for their grandchildren.

The judgment and order of the South Gauteng High Court in *NM v Presiding Officer of Children's Court, Krugersdorp.*[485] It has clarified the meaning of section 150(1)*(a)* of the CA and the court concluded that a caregiver who bears a common law legal duty of support (like a grandparent) *may* qualify to be a foster parent, and as such may be entitled to receive an FCG.[486] Legal Aid SA welcomed the court ruling, stating that the spirit of the CA had been realised, in that orphaned children would no longer have to be separated from their families to qualify for an FCG.

The court furthermore provided guidelines for Children's Courts to follow when interpreting section 150(1)*(a)*. These include how to determine whether a child is in need of care, and thereafter whether the child has a visible means of support. It was emphasised that the focus needed to be on whether the *child* had a visible means of support and not on whether the caregiver had a visible means of support. The Children's Court had for some time misinterpreted "visible means of support"[487] in the determination of whether a child was "in need of care and protection" as provided for in section 150(1)*(a)* of the CA. As a result, some relatives were held not to qualify for an FCG and foster care order in respect of a child related to them as they were considered to owe such a child a common law duty of support. Since the court now found that the means to be considered was that of the child, a prospective foster parent who owes a child a common law duty of support is no longer precluded from receiving an FCG in respect of such a child.

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485 2013 (4) SA 379 (GSJ).

486 Par 26.

487 For an overview of the problems faced when interpreting s 150(1)*(a)* of the CA see Parliamentary Monitoring Group "Children's Act: Implementation Challenges & Proposed Amendments: by Departments of Social Development & Justice and Constitutional Development" (2013) https://pmg.org.za/committee-meeting/16173/ (accessed 2019-04-28).

The difference in the amount received by a caregiver who receives an FCG and one who is entitled only to a CSG is substantial. The South African Child Gauge reports that in October 2016, 11 972 900 children were recipients of CSG.[488] In the same year, 470 000 children were in receipt of an FCG.[489] In 2017, over 12 million children received social grants.[490] The amount of the FCG is restricted to a maximum of six children *per* household.[491] Following the Budget speech delivered by ex-Finance Minister Pravin Gordhan in February 2017, FCGs increased to R920 a month and the CSG to R410 a month.[492] This amount was payable to foster parents as from 2018. The awarding of an FCG forms part of the statutory obligation of the state to provide care and protection for those in need. Although a potential difficulty lies in the sustainability of grants, Hall says the outcomes to date have been positive:

> The effects of the grant have been shown in multiple studies, and are widely known: children who receive grants, or even those who live in households where others receive grants, have better health and nutritional outcomes when controlling for other variables, and they do better at school. Grants are also associated with less risky behaviour among teenagers.[493]

However, the protection of these rights and principles has unfortunately often been abused. Driven by factors that include *inter alia* poverty, health, and social and

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488 Department of Social Welfare "SASSA Annual Report 2015/16 26" http://pmg-assets.s3-website-eu-west-1.amazonaws.com/SASSA_Annual_report_2015_2016_Low_res.pdf (accessed 2019-04-21).

489 Frye "Social Grants Falling as Share of State Expenditure" https://www.groundup.org.za/article/ shrinking-share-social-grants/ (accessed 2019-05-05).

490 Children Count "Current Statistics on Grants for Children" http://www.childrencount.org.za/ (accessed 2017-04-04). See also Children Count "Statistics on Children in South Africa" http:// www.childrencount.org.za/ (accessed on 2017-05-06).

491 Kelly and GroundUpStaff "Everything you Need to Know about Social Grants: For People who Receive a Grant or Need to Receive One (2017) (not paginated) https://www.groundup.org.za/ article/everything-you-need-know-about-social-grants_820/ (accessed 2018-07-29); Madsaparent 24 "How to get Child Support Grants in South Africa" 2018 (not paginated).

492 Merten "In Numbers: Budget" (10 July 2017) https://www.dailymaverick.co.za/article/2017-02-22-in-numbers-budget-2017/#.WtnO2IhuZPY (accessed 2017-04-04).

493 Office of the United Nations High Commissioner for Human Rights "Country Fact Sheet for the CRC"http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/INT_CRC_NGO_ZAF _22832_E.pdf (accessed 2017-07-23).

economic factors, it is not surprising that poverty-stricken families resort to reliance on FCGs to alleviate such poverty.[494] The difference between the amounts granted in terms of a CSG *versus* that of a FCG, has created an incentive for the communities to opt for the FCG.[495] A "means test" is required to determine who qualifies for a CSG, and the grant is awarded to the primary caregiver of a child in need of financial assistance. For example, a parent, grandparent or a child over 16 years of age heading a CHH can apply and be granted a CSG.[496] This extension has the positive effect of establishing a family member to keep the child within the family environment. This is not without its problems, and these are discussed later in this chapter. No such grant is awarded when a child is adopted.

The proposed amendment of the CA in order to provide clarity on the test used to determine a child's eligibility to be placed in foster care has not yet been effected. The proposed amendment of section 150(1)*(a)* of the CA would replace the words "is without any visible means of support" with the words "does not have the ability to support him - or herself and such inability is readily evident, obvious or apparent". Such an amendment will bring the section in line with the South Gauteng High Court judgment in *NM v Presiding Officer of the Children's Court, District of Krugersdorp*[497] and also clarify the provision of this section.

The confusion surrounding the eligibility of grandparents to receive FCGs has accordingly been clarified. In April 2013, the South Gauteng High Court in *Manana v the Minister of Social Development*[498] decided that in determining "visible means of

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494 A social grant, such as a foster care or a child support grant refers to a grant paid by SASSA.

495 SASSA "You and Your Grants 2016/2017" http://www.sassa.gov.za/index.php/knowledge-centre/grant-booklets?download=523:you-and-your-grants-2016-2017&start=6 (accessed on 2017-03-04).

496 Only people whose income is below a certain level qualify for the grant. In order to qualify, the Social Assistance Act 13 of 2004 provides that a person may not earn more than R42 000 *per* year if single. If married, the caregivers combined income should not be more than R84 000 *per* year.

497 2013 (4) SA 379 (GSJ).

498 Case Number A3075/2011 (unreported).

support", account should not be taken of the means of a prospective foster parent even if the foster parent is related to the child; the "means" to be considered is that of the child. The ruling clarifies the fact that orphaned children under the care of grandparents do qualify for FCGs, subject to a financial inquiry being conducted on the caregivers having a common law duty of support.[499]

While the judgment is a step in the right direction, it does not provide a solution to the backlogs in the foster care system caused by a lack of capacity of social workers and courts to keep up with the numbers in need. Proudlock stated:

> Unfortunately the judgment does not solve the systemic problems that still exist, and may in all likelihood add to the pressure on the foster care system, as it opens the doors for more people to be placed on an already stretched system.[500]

The number of children who are placed with extended family far exceeds the estimate of orphans who have lost both parents in South Africa. This can be accounted for because child placement in relatives' homes may be driven by factors such as migratory work, the location of a secondary or better schooling, the inability of parents to provide for their children, and illness.[501] Determining the number of children who stay within the extended family is very difficult, and no reliable statistics are available. However, it does not mean that extended family care is always considered by the children concerned to be the best option for them. Mathebula states that following a survey of children living in CHHs, some of the children indicated that the extended families did not play a vital role in their lives while the parents were still alive, and as such, these children regarded the extended family with suspicion about wanting to use

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499 Legal Aid South Africa "South Gauteng High Court Ruling on Foster Care Grants makes the Children's Act 38 of 2005 a Reality for Orphaned Children" (16 April 2013) 2 http://www.legal-aid.co.za/wp-content/uploads/2012/03/2013-16-April-_Ruling-on-foster-care-grants-helps-orphaned-children.pdf (accessed 2017-04-04).

500 Children's Institute University of Cape Town "UCT Institute Supports Foster Child Grant" (2013) https://www.news.uct.ac.za/article/-2013-04-29-uct-institute-supports-foster-child-grant-campaign (accessed on 2017-06-24).

501 UNICEF "Alternative Care for Children in Southern Africa: Progress, Challenges and Future Directions" (2008) 3 4.

them for financial gain such as receiving the FCG.[502] What is significant is the way in which different cultures give social meaning to ties that may be understood as biological, and are thus deemed to be kinship ties.[503] While neither the CRC nor the ACRWC makes any direct reference to kinship care as an accepted form of alternative care, the UN Guidelines for the Alternative Care of Children does make direct reference to kinship care.[504] The UN Guidelines are significant because, not only is provision made for the express recognition of kinship care as a form of alternative care but it was also because of the widespread practice of kinship care that the UN was motivated to draft the Guidelines.[505] Extended families often provide the first and, debatably, the most important form of informal care in South Africa and such care should not be overlooked.

Although foster care is well known in South Africa, it was not until the CA was enacted that this type of alternative care was defined legally. Chapter 12 of the CA contains the provisions relating to foster care. For the purposes of this research, the study is limited to foster care for a child deemed to be in need of "care and protection" as defined in section 150 of the CA.

The CA determines the aims of foster care as follows:

- to protect and nurture OACs by providing a safe, healthy environment that gives the positive support every child needs;
- to promote the goals of permanency planning, the priority at all times being to attempt to reunify the family;[506] and

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502 Mathebula *From being in Charge of a Child-Headed Household to being Placed in Kinship Foster Care: The Experiences and Expectations of Orphans Previously in Charge of Child-Headed Households* (Master of Arts in Social Science dissertation, UNISA 2012) 6.

503 McCarthy and Edwards *Key Concepts in Family Studies* (2011) 128. Refer to the acceptance that ties with unrelated individuals may be described as "fictive kinship" or "*quasi* kinship".

504 UN General Assembly *Guidelines for the Alternative Care of Children: Resolution / Adopted by General Assembly* A/RES/64/142.

505 *The Guidelines* par 29*(b)*(i) and *(c)*(i).

506 S 181*(b)* of 38 of 2005.

- where family reunification is not a viable option, to connect OACs to other safe and nurturing family relationships.[507]

A child is placed in foster care through a valid court order, and the intention of such placement is to provide care and protection in a nurturing, safe and healthy environment with positive support. Currently, the suitability and viability of foster care of an abandoned South African child must be considered in light of the principle of the placement being in the best interests of the child concerned. Large numbers of children are placed in foster care as it is generally considered to be the "next-best option" where a child is not able to remain in the care of his or her own family.[508]

However, the high numbers of children needing such care has proved challenging; and the system has become overburdened.[509] In 2014 the then Minister of Social Development announced the establishment of a ministerial committee to address problems facing the foster care system.[510] According to a briefing from the DSD in July 2010, SASSA had submitted a list of 299 076 foster children with lapsed foster care orders when the children were retained and receiving child grants. Owing to the backlog, the DSD was petitioned before court. In 2011, the North Gauteng High Court issued a court order in terms of which the DSD could extend the foster care orders administratively until 31 December 2014.[511] As at 4 September 2017, the backlog in all the nine provinces was still standing at 39 102.[512] This number had to be eliminated by 30 November 2017 and be reported to the North Gauteng High Court on 31

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507 *Ibid*.

508 Breen "Policy Brief: Foster Care in South Africa: Where to from here?" (2015) 15 http://children.pan.org.za/sites/default/files/publicationdocuments/Child%20Welfare%20Policy%20Brief-%20Foster%20Care%20March%202015.pdf (accessed 28-02-2017); Van der Riet *Foster Care: The Experiences of Birth Children* (Master of Social Work dissertation, UNISA 2009) 3.

509 *Ibid*.

510 ENCA "Committee Established to Probe Foster Care System Issues" (2014) not paginated https://www.enca.com/south-africa/committee-established-probe-foster-care-system-issues (accessed 2019-02-24).

511 Parliamentary Monitoring Group "Foster Care System: Progress Report by Department of Social Development, with Minister" (2017) https://pmg.org.za/committee-meeting/25566/ (accessed 2019-05-05).

512 *Ibid.*

December 2017. However, the eradication of the backlog proved difficult as new order extensions lapsed every month because the orders cycle for each child was two years.[513] All provinces in South Africa had been required to submit sustainability plans to revert to the provisions of the CA by 7 December at the latest, because the extension would lapse on 31 December of that year. Apart from the backlog, there were 49 534 foster care orders that had to be extended before 31 December 2017. On 20 October 2017, the Centre for Child Law had filed an application and Clause Two of the Nomination of Motion had declared that the failure of the Minister to provide amending legislation towards comprehensive legal solutions to the overburdened foster care system was “illegal, unconstitutional and invalid”.[514] The Centre for Child Law further averted that failure of the state to put in place the necessary support mechanisms, structures and resources for foster care in a sustainable manner was illegal, unconstitutional and invalid.[515] It was submitted that comprehensive legal solutions required amendments to the provisions of the CA and the SAA. Section 150 of the CA needed to be amended by removing the phrase 'has been abandoned or orphaned and was without visible means of support and had no family member caring for him or her' and replaced with 'does not have the ability to support self and inability was readily apparent'. Section 150(2) provides for a list of children who may be in need of care and protection. The amendment would be to add to the list, ‘a child who was orphaned and abandoned living with family members,’ as this would alleviate the pressure on foster care. Such children living with relatives would therefore not need to go through court processes except if there was a reason to believe that they needed care and protection, if the child was abused or neglected. The DSD decided not to extend the

513 PMG “Foster Care System: Progress Report by Department of Social Development, with Minister” https://pmg.org.za/committee-meeting/25566/ (accessed 2019-02-24).

514 See fn 511 above.

515 *Ibid.*

court order and consequently the provinces had to eradicate and put systems in place to address the cyclical nature of the expiry of court orders.[516]

A further 30 232 orders would lapse between January and March 2018. Extensions for children who would be turning 18 years old also had to be done in accordance to section 176 of the CA. The DSD listed some of the interventions designed to deal with the backlog including *inter alia* the monitoring and oversight of the system through annual provincial meetings and the development of an integrated monitoring and evaluation framework for foster care by April 2018.[517] The DSD addressed these challenges by requesting additional resources to enable the DSD to appoint more social workers and use social services professionals to monitor foster placements and provide prevention services. The appointment of more professionals would provide the ability to resolve cases faster. However the financial implications of employing enough social workers and having enough tools for the efficient operation of the DSD were high.[518] The DSD had also strengthened co-operation with the Judiciary, the Departments of Justice and Constitutional Development (DJCD), Home Affairs (DHA), Basic Education (DBE) and Higher Education (DHE) to fast track the resolution of foster care cases, and the Department of Health and was working on finalising the childcare protection policy by March 2018.

Whilst the number of recipients receiving a FCG has decreased in number from 2014, the statistics indicate a significant number of children in South Africa are in need of care and receive social assistance. Table 1 provides statistics on children who were recipients of FCGs from 2010 to 2016. These are indicated with reference to the province in which the child lives and the FCG amount received.[519]

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516 *Ibid*.

517 *Ibid.*

518 *Ibid.*

519 Hall and Meintjies "Children Count: Statistics on Children in South Africa Children's Institute" (2011) https://www.childrencount.org.za/indicator.php?id=1&indicator=17 (accessed 2017-08-30) as recorded in the SOCPEN administrative data system of the SASSA.

Table 1: The number of children receiving the FCG, 2010–2016[520]

	Number of child beneficiaries at end March						
Province	2010	2011	2012	2013	2014	2015	2016
Eastern Cape	100 810	108 389	116 826	117 231	116 172	115849	110 007
Free State	44 478	43 764	43 311	41 317	39 178	37 985	35 426
Gauteng	62 023	59 477	56 451	58 722	55 027	53 411	51 568
KwaZulu-Natal	141 404	134 181	142 114	135 442	125 702	118 505	106 755
Limpopo	54 314	54 701	56 066	58 953	58 571	57 694	52 272
Mpumalan-ga	26 164	27 366	32 886	35 359	33 877	34 260	33735
North West	38 656	41 405	45 634	42 215	40 726	37 984	36 001
Northern Cape	14 716	14 999	14 456	14 342	14 307	14 513	14 075
Western Cape	28 195	28 592	29 003	28 578	28 495	29 573	30 176
South Africa	510 760	512 874	536 747	532 159	512 055	499 774	470 015
FCG amount	R 710	R 740	R 770	R 800	R 830	R 860	R890

520 *Ibid*.

Vorster submits that of foster care placements, 41 per cent are with the grandmother, 30 per cent with aunts, 12 per cent with other relatives and 9 per cent with non-relatives.[521] 478 158 children were receiving FCGs as at the end of October 2017.

Prospective foster parents are screened by welfare organisations to ensure they are suitable to take on the responsibility of caring for a child. Dickerson and Allen maintain that it important that foster parents are screened to ensure the safety of the foster child, success of the placement and the continuation of family life.[522] It is also critical that these families are prepared and trained for fostering their foster children. A Children's Court summonses prospective foster parents to appear before it pending a foster care order. In this way, the state is involved in the determination of whether or not placement through foster care is appropriate. Two essential elements distinguish foster care from other care. Firstly, foster care consists of care that is provided by the foster care parent or parents – that is, the care is not provided by a state institution. Secondly, the act of placement of an OAC in foster care is achieved through a formal process.[523]

Three primary factors require special attention when placing a child in a foster care environment, namely: effective assessment of prospective foster parents by authorities; adequate training of prospective foster parents;[524] and effective and consistent foster placement support.[525] Unique to foster care is the characteristic that placement in foster care does not confer "full parental responsibilities" upon the foster parents. In effect, parental responsibilities for the child concerned is shared between

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521 Vorster "South Africa: The First Profile of Social Security Grant Beneficiaries" (2007) http://www.africafiles.org/article.asp?ID=16090&ThisURL=./index.asp&URLName=HOME (accessed 2017-03-01).

522 Dickerson and Allen *Adoptive and Foster Parent Screening. A Professional Guide for Evaluations* (2007) 22.

523 Schäfer *Child Law in South Africa: Domestic and International Perspectives* 467.

524 Durand *The Support and Training of Foster Parents* (Masters of Arts dissertation, University of Stellenbosch 2007) 39; Van der Riet *Foster Care: The Experiences of Birth Children* 7–8 and 27.

525 Booysen *Exploring the Causal Factors of Foster Placement Breakdowns* (*Magister Diaconiologiae* dissertation, UNISA) 2006 36 and 37; Department of Social Development; Durand *The Support and Training of Foster Parents* 27; Thiele *Exploring the Feasibility of Foster Care as a Primary Permanency Option for Orphans* (Masters dissertation, UNISA 2005) 30.

the state and the foster parents.[526] Although it should be noted that foster care is essentially temporary care for the child in his or her community of origin, many foster care placements seem to be developing into long-term placements[527] as children are rendered orphans, mostly because of the HIV pandemic.[528] South Africa has the highest rate of AIDS-related deaths in the world, leaving thousands of orphaned and vulnerable children. While South Africa aims to reduce the annual number of new infections to under 100,000 by 2022, the statistics of AIDS deaths and children rendered orphaned as a result are high and cannot be ignored. The reality is that many children placed in foster care do not have the option of returning to the care of their parents. This creates its own set of problems, not least of which are severe financial constraints on the foster care givers.

Section 186 of the CA makes provision for the relevant court to extend a foster care placement until the child reaches the age of 18 years. This provision effectively removes the requirements of two-yearly social work reports and court reviews. The effect of this provision is an attempt to make foster care a more permanent placement option for a child who cannot live with his or her biological parent or parents. Having described foster care, the next section discusses cluster foster care.

3 3 2 CLUSTER FOSTER CARE

Where no related or unrelated foster care parent is available to care for an OAC, the CA provides that a Children's Court may order that the child be placed in a cluster

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526 Assim *Understanding Kinship Care of Children in Africa* 26.

527 Carter *A Contextually Appropriate Protocol in Social Work for the Assessment of Prospective Foster Parents in South Africa* (MA dissertation, University of Johannesburg 2013) 208.

528 Desmond and Kvalsvig *Child, Youth & Family Development Evaluating Replacement Childcare Arrangements: Methods for Combining Economic and Child Development Outcome Analyses* (2005) 27; Mkhize *The Role of Social Worker in Handling of Child-headed Household* (Masters dissertation, UNISA 2006) 82; Thiele *Exploring the Feasibility of Foster Care as a Primary Permanency Option for Orphans* 55.

foster care home.[529] Cluster foster care schemes (CFCSs) are legally acknowledged as a form of alternative care for children in need of care and protection in South Africa. They are discussed in chapter 12 of the Children's Amendment Act 41 of 2007. These schemes provide social workers with an alternative care option through which the high demand for care can be managed. Section 1 defines a cluster foster scheme as follows: "a cluster foster care scheme is a scheme managed by a non-profit organisation and registered with the provincial department of social development for this purpose." Alternative care of a child in a cluster foster care system was the recommended by the White Paper for Social Welfare[530] recommendations for care of children in need of care and protection, as described in, which reads as follows: "[t]raditional and indigenous systems of foster care will be recognised provided that the needs and rights of children are protected".[531] CFCSs originated as an option to care for children in need of care and protection within the communities by community members.[532] Provision for cluster foster care is made in chapter 12 of the Children's Amendment Act 41 of 2007.

This definition has been criticised in that it fails to provide the parameters, contents or contours of what a cluster foster care scheme might be.[533] One can at least determine that children who are cared for in CFCS are cared for by someone who is not a parent or guardian, and who is placed in such care in terms of a court order. Up to six children may be placed in a cluster foster care scheme, but a scheme may provide care for

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529 S 156(1)(ii) of 38 of 2005. Likewise, in terms of s 183, provision is made for groups of children to be placed in the care of a non-profit organisation rather than in foster care.

530 1997a.

531 Department of Social Development of Social Development Comprehensive Report on the Review of the White Paper for Social Welfare 1997 (2016) https://www.gov.za/sites/default/files/Comprehensive%20Report% 20White%20Paper_.pdf (accessed 2018-12-03).

532 Du Toit, Van der Westhuizen and Alpaslan "Operationalising Cluster Foster Care Schemes as an Alternative Form of Care" *Social Work/Maatskaplike Werk* 2016:52(3)392.

533 Gallinetti and Sloth-Nielsen "Cluster Foster Care: A Panacea for the Care of Children in an Era of HIV/AIDS or a MCQ?" 2010 46(4) *Social Work/Maatskaplike Werk* 486–496. The authors point out that s1 of 38 of 2005 sheds no further light on what a cluster foster care scheme comprises.

multiple clusters.[534] In terms of this form of care, a group of caregivers (duly registered to provide cluster foster care) will, under the supervision of a social worker, care for the children. In light of the HIV/AIDS pandemic, cluster foster care schemes can be viewed as a response from the state to its obligation in terms of section 28(1)*(b)* of the Constitution.[535]

Where institutional and other recognised forms of alternative care are not viable, then appropriate alternative care must be sought for the child concerned. In this respect, section 28(1)*(b)* is applicable to cluster foster care. The child's care is awarded to the scheme, not the foster parents. The care order does not change if the caregivers change. Section 28(1)*(c)* also comes under consideration as far as the right to socio-economic rights of the child are concerned. Where there is no family to provide for the child, the obligation falls on the state to provide for the children's rights to shelter, basic nutrition, basic health care services and social services.[536] UNICEF drafted a report in 2014 highlighting the demand in South Africa to find care options for children in need thereof, noting that many families in South Africa are struggling to care for their children due to "high levels of poverty, domestic violence, substance abuse, sexual abuse and neglect".[537]

Since 2002, the number of orphans in South Africa has risen drastically, and the demand for placement in cluster foster care, has increased dramatically. The concerns raised in relation to the management of foster care are equally applicable to cluster foster care. Gallinetti and Sloth-Nielsen noted their concern at the process by which a caregiver in a cluster foster care scheme is appointed. Du Toit, Van der Westhuizen and Alpaslan confirm these concerns.[538] In particular, the commentators refer to the

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534 S 185(1).

535 Cluster foster care schemes must be distinguished from unregistered children's homes.

536 *Government of the Republic of South Africa v Grootboom* (2001) par 19.

537 Gallinetti and Sloth-Nielsen "Cluster Foster Care: A Panacea for the Care of Children in the Era of HIV/AIDS or an MCQ?" 2010 46(4) *Social work/Maatskaplike Werk* 487.

538 Du Toit, Van der Westhuizen and Alpaslan Operationalising "Cluster Foster Care Schemes as an Alternative Form of Care" 2016 52(3) *Social Work/Maatskaplike Werk* 391.

basis on which a foster parent is considered qualified, the manner of selection and prior approval of the foster parents.

The two key pieces of legislation, namely the Children's Amendment Act 41 of 2007 and the Non-profit Organisation Act 71 of 1997 both require that management practices of the CFCSs be clearly defined and monitored.

3 3 3 CHILD-HEADED HOUSEHOLDS

Because of the large numbers of OACs and the difficulties families face in caring for their relatives who are in need of care, CHHs have emerged as a form of legally recognised alternative care.[539] The purpose of the definition of a CHH in the CA is formally to recognise CHHs as a family form and give them legal status. It refers to a household in which a child over the age of 16 has assumed the role of primary caregiver for other children in the household, even if there is an adult living in the household who, for example, is too old or ill to take on that role**.** The Children's Court has jurisdiction to grant an order to establish a CHH, which consists only of children, with the child-head being 16 years or older.[540] For the purposes of this research, a CHH[541] is recognised as a household where a child has taken charge of a household in terms of decision-making and responsibility to provide for the physical, social and emotional needs of others living with him or her in that household, regardless of relationship.[542] Bequele refers to the fact that one of the children in such CHH heads the household and that this child is recognised within the household as being

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539 Couzens and Zaal "Legal Recognition for Child-headed Households: An Evaluation of the Emerging South African Framework" 2009 17(2) *International Journal of Children's Rights* 17.

540 It is accepted that in certain circumstances a terminally ill adult may live with, and be cared for, by the members of the CHH. These instances are excluded for the purpose of this research.

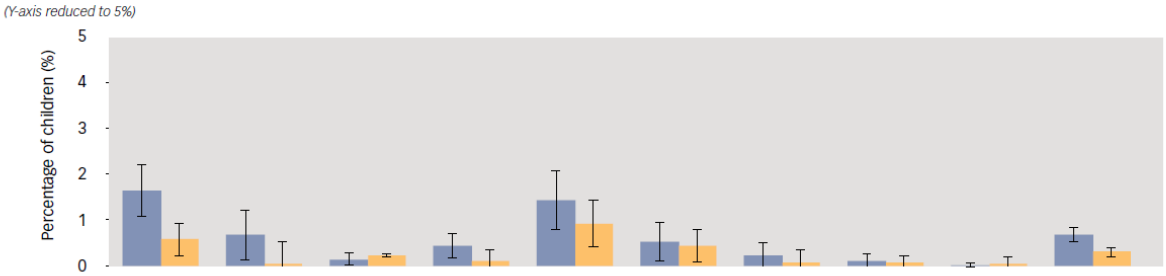
541 Also referred to as a "Child-Only Household" or a "Sibling-Headed Household"; Bequele "Legally Recognising Child-Headed Households" through a Child's Rights Approach Human Development Report 2007/2008 25.

542 S 137(1)(a) of 38 of 2005.

independent and responsible for providing leadership and sustenance for the household concerned.[543]

An estimated 58,000 children were living in 35,000 CHHs in 2015. This equates to 0.3% of all children.[544]

Table 2: Children living in child-headed households, 2002 and 2015[545]



	EC	FS	GT	KZN	LP	MP	NW	NC	WC	SA
2002	1.6%	0.7%	0.1%	0.4%	1.4%	0.5%	0.2%	0.1%	0.0%	0.7%
	50,000	7,000	4,000	19,000	35,000	8,000	3,000	0	0	127,000
2015	0.6%	0.1%	0.2%	0.1%	0.9%	0.4%	0.1%	0.1%	0.0%	0.3%
	15,000	0	8,000	4,000	20,000	7,000	1,000	0	1,000	58,000

Source: Statistics South Africa (2003; 2016) *General Household Survey 2002; General Household Survey 2015.* Pretoria: Stats SA.
Analysis by Katharine Hall & Winnie Sambu, Children's Institute, UCT.

Considering the figures reflected in Table 2, it is clear that the number of children living in CHHs has in fact declined since the figures recorded in 2002. However, 58 000 children in CHHs remains a substantial number of children in such care.

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543 Bequele "The Emerging Challenges of Children Heading Households: Some Reflections" Speech delivered at the Opening Session of the 5th African Conference on Child Abuse and Neglect on HIV/AIDS and Children: The Challenges of Care for and Protection of Children in Africa (2007)2 http://www.africanchildinfo.net/documents/CHH_ASPCAN_ (accessed 2019-02-24).

544 Jamieson, Berry and Lake (eds) *South African Child Gauge 2017* (2017) 131.

545 Children's Institute "Child-only Households" http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=17 (accessed 04-02-2019).

3 3 4 CHILD AND YOUTH CARE CENTRES

A CYCC is defined in the CA as a facility that provides residential care for more than six children who are not living with their biological families.[546] CYCCs include children's homes, places of safety, secure care centres, schools of industry, reformatories, and shelters for street children.[547] There are no definite statistics available on the number of CYCCs in South Africa.[548] Research results published in *Public Perceptions, Beliefs and Experiences of Fostering and Adoption: A National Qualitative Study in South Africa*[549] provides some data on children in who are cared for in CYCCs. However, the report confirms that any data on children in such care is difficult to come by, particularly as a result of the number of unregistered children's homes that are opening their doors in South Africa. The report indicates that an estimated 15 590 children were cared for in CYCCs from 2007. This total is most likely to be an underestimation of the true figures.

A Children's Court has the jurisdiction to order that a child be placed in a CYCC. In terms of section 159 of the CA, the court may grant such an order for a period of two years, after which time the order lapses.[550] According to the CA, the placement order cannot extend beyond the child's coming of age. Various circumstances affecting the best interests of the child need to be considered when a court makes an order to place a child in any form of care. Among factors to be considered before placing a child in a

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546 Since 1 April 2010, and in terms of s 195 of the CA, all existing government children's homes, places of safety, secure care facilities, schools of industry or reform schools were classified as CYCCs providing residential care programmes in terms of s 191(2)*(a)* of the CA.

547 Jamieson *Children's Act Guide for Child and Youth Care Workers* 9.

548 Meintjies *et al Introduction to South African Law: Fresh Perspectives* 2ed (2011) 16.

549 Rochat, Mokomane, Mitchell and The Directorate "Public Perceptions, Beliefs and Experiences of Fostering and Adoption: A National Qualitative Study in South Africa" 2016 30(2) *Children & Society* 120 131.

550 This is so unless the court order indicates that the placement will be for less than two years. The court must review the order every two years and decide to extend the order or release the child.

CYCC are the child's age and possibilities to place the child within the family.[551] Residential care is considered as an option only if no other option is deemed to be appropriate for the child concerned. This is especially so for those children who are vulnerable to harm because of their circumstances.

If a court decides to place a child in a CYCC, it must take into consideration what specific residential care programme the child concerned needs. Each child should have an individual development plan that describes what programmes and services he or she needs.[552] A court order should then determine that the child be placed at a centre that offers a particular programme that will be of therapeutic value to the child concerned.

3 4 CHALLENGES AND CONCERNS IN IMPLEMENTING ALTERNATIVE CARE IN SOUTH AFRICA

It is important to have regard to the efficacy of the alternative care option in South Africa at present. The quality of the system of alternative care ultimately has an impact on the determination as to the appropriateness or not of placing a child in a particular form of alternative care. A consideration of the concerns with the existing impermanent alternative care options in present day South Africa follows.

3 4 1 CONCERNS WITH FOSTER CARE PLACEMENT

Placing children in foster care in South Africa gives rise to several concerns. The most serious concerns stem from the strain that the welfare system is under because of the numbers of children placed in foster care, fuelled especially by the HIV/AIDS

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551 Department of Social Development "South Africa's Child Care and Protection Policy" (2017) https://www.sacssp.co.za/NDSD_CCPP_19_DECEMBER.docx (accessed 2018-04-17).

552 The legal definition of "assessment of a child" to the CA was inserted by s 3 of 41 of 2007. This section provides as follows: "[a]ssessment of a child means a process of investigating the developmental needs of a child, including his or her family environment or any other circumstances that may have a bearing on the child's need for protection and therapeutic services".

pandemic.[553] Freeman and Nkomo are among commentators[554] who have noted with concern that, as the HIV/AIDS pandemic increases, so the services and structures in place to ensure the care of vulnerable children become increasingly strained and overwhelmed.[555] Concerns with the extended family care system are considered first followed by a consideration of the concerns with the foster care system as envisaged as a formal placement in alternative care by the CA.

In 2002 the former Minister of Social Development, Zola Skweyiya, stated publicly that the DSD was "encouraging relatives to take care of orphaned children under the foster care package".[556] The Minister's sentiments were supported by other politicians and policy-makers, and the foster care system and FCG for orphans included kinship care as an important option for alternative care for OACs.

In 2002 the South African Law Reform Commission proposed the legal recognition of court-ordered kinship care, distinguishing between kinship care ordered by a court and informal kinship care.[557] The Law Reform Commission proposed that relatives caring for children who have been abandoned or orphaned or are for some other reason in need of their assistance, but who are not *per se* in need of formal protection services, should have access to a simple procedure whereby the necessary parental responsibilities can be conferred on them. This proposal was not included in the CA.

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553 The Actuary Society of South Africa 2008 report concurs with the report from UNAIDS and WHO (2002) and reports 282 348 deaths due to AIDS related infections in 2002, and 374 655 deaths in 2007. This signifies an increase of 92 307 cases despite the availability of free antiretroviral (ARVs) in public/government institutions over this period.

554 Freeman and Komo "Guardian of Orphans and Vulnerable Children: A Survey of Current and Prospective Care Givers" 2006 18(4) *Journal of AIDS Care* 302 310. See also Roux, Bungane and Strydom "Circumstances of Foster Children and their Foster Parents Affected by HIV/AIDS" 2010 46(1) *Social Work/Maatskaplike Werk* 45. National Academy of Sciences *Preparing for the Future of HIV/AIDS in Africa: A Shared Responsibility: The Burden of HIV/AIDS: Implications for African States and Societies* (2011) 25**.**

555 See fn 554 above.

556 Skweyiya *Keynote address at the national Department of Education HIV/AIDS* conference in May 2002.

557 South African Law Reform Commission "Project 110 Report: Review of the Child Care Act. Pretoria: SALRC.216" (2002) http://www.ci.org.za/ depts/ci/plr/pdf/salrc_rprt_02/pr110chapter16.pd (accessed 209-02-28).

Notwithstanding the acceptance and importance of extended family care, it is evident that the extended family care system has become overburdened and is not always able to cope with the numbers of children in need of care. While care by the extended family is lauded for the role it plays in providing a child with a sense of belonging within his or her family or community of origin, concerns with have been noted particularly with respect to the large numbers of children in need of care in South Africa. As such, these concerns cannot be ignored when considering what placement best meets the needs of the child concerned. Despite the obligation on the state to provide alternative care for children deprived of parental care, the extended family system still bears the greatest burden in caring for affected children. However, the responsibility for caring for orphaned children often overextends the capacity of families to cope, and consequently, many extended family systems have been completely overwhelmed.[558] Table 3 below was drafted by Hall, Children's Institute, University of Cape Town.

[558] Thiele *Exploring the Feasibility of Foster Care as a Primary Permanency Option for Orphans* 1.

Table: 3a Orphan-FCG Analysis[559]

PERCENTAGE DISTRIBUTIONS (weighted)

Care arrangement (proxy: relationship to household head)

ORPHAN STATUS	UNRELATED	EXTENDED FAMILY	FOSTER/STEP PARENT	TOTAL
non-orphan	0.54%	7.89%	0.98%	9.41%
maternal only	0.14%	14.87%	1.19%	16.21%
paternal only	0.14%	2.48%	0.35%	2.97%
double orphan	0.27%	64.77%	6.38%	71.42%
Total	1.10%	90.01%	8.89%	100.00

ILLUSTRATIVE NUMBERS (applying percentage distributions to actual FCGs in payment)

Table 3b: Care arrangement (proxy: relationship to household head)

ORPHAN STATUS	UNRELATED	EXTENDED	FOSTER/STEP PARENT	TOTAL
non-orphan	2 085	30 457	3 783	36 324
maternal only	540	57 401	4 594	62 574
paternal only	540	9 573	1 351	11 465
double orphan	1 042	250 025	24 628	275 695
Total	4 246	347 456	34 317	386 019

559 Hall Orphan-FCG Analysis requested by G van der Walt 2019.

Poverty plays a major role in the struggle for the extended family to meet the needs of the OAC/s in their care. This crisis has been noted by local and international non-governmental organisations (NGOs).[560] Research carried out by the Children's Institute in Cape Town revealed that South African kinship foster parents continue to live a life of poverty despite the provision of FCGs.[561] The continued capacity of the extended family to serve as a support system to the number of children in need of care in South Africa is uncertain. Generally, primary caregivers within the family are entitled to claim only a CSG, and not the substantially larger FCG. Kinship caregivers today tend to be impoverished and often older, and less educated, and may themselves be subject to deteriorating health conditions.[562]

Assim notes that children in kinship care tend to be unnoticed by the state, and consequently that their situations cannot be properly monitored, and their best interests cannot be safeguarded as contemplated under the CRC and the ACRWC.[563] Children in kinship care face the risk of violation of their rights, violations that impact negatively on their proper growth and development. Blackie expresses her concern that many OACs are not benefitting from the formal child protection system, as many of the children abandoned are absorbed into the communities concerned. She opines that while the communities assist in many ways, it cannot be guaranteed that such children do not then become victims of child trafficking.[564]

Poverty is undoubtedly one of the biggest threats to human security. While social security is as Nkosi notes, "designed for the purposes of poverty prevention, poverty

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560 Motepe *A Life Skills Programme For Early Adolescent Aids Orphans* 145.

561 Meintjes, Budlender, Giese and Johnson *Children 'In Need of Care' or in Need of Cash? Questioning Social Security Provisions for Orphans in the Context of the South African AIDS Pandemic* (2003) 27.

562 Roby "Children in Informal Alternative Care" 2011 *UNICEF* 41.

563 Assim *Understanding Kinship Care of Children in Africa* 154.

564 Blackie "Fact Sheet on Child Abandonment Research in South Africa" (2014) https://bettercarenetwork.org/sites/default/files/Fact%20Sheet%20Research%20on%20Child%20Abandonment%20in%20South%20Africa.pdf (accessed 2017-05-15).

alleviation, social compensation and income distribution",[565] children and caregivers in kinship care (who form the majority of those in alternative care situations) receive little or no support from the state in the form of access to social protection interventions. Although a right to financial and material relief is now legally recognised following the judgment in *SS v Presiding Officer, Children's Court, Krugersdorp,*[566] other concerns must be noted. For instance, it is debatable whether the placement of a young child in the care of an elderly grandparent does in fact serve the best interests of a child.[567] While the support of the extended family is desirable in caring for abandoned and orphaned family members (particularly because these children are afforded the opportunity to remain within their home environment), it is not surprising that essential services such as education and health care for such children are often not within reach of an impoverished family's budget.[568] This situation for the child is not compatible with South Africa's constitutional provisions and its international obligations in respect of the fundamental rights of the child.

Although many social workers do not feel it is necessary to subject biological relatives of a child in need of fostering to the same rigorous screening procedure imposed on prospective non-related foster parents, literature suggests that foster placements with relatives are not always in the child's best interests.[569] Sinclair and Wilson state:

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565 Nkosi "An Analysis of the South African Social Assistance System as it Applies to Children in Rural Communities: A Perspective from the *Grootboom* case" 2011 26(1) *South African Public Law* 15.

566 *Ibid.*

567 Norward and Williams "No Grandchildren Left Behind: Educational Issues Faced by Grandparents OshKosh University of Wisconsin" (2013) http://www.uwosh.edu/hst/?p=446 (accessed 2017-06-06).

568 Hall, Sambu, Berry, Giese, Almeleh and Rosa "South African Early Childhood Review" (2016) 6 Better Care Network "South African Early Childhood Review" https://www.bettercarenetwork.org/sites/default/files/South%20African%20Early%20Childhood%20Review%202016.pdf, reports that "Poor households have a disproportionately large burden of care for young children. This includes situations where grandparents and other family members care for the children of parents who must migrate to find work. Four million children under 6 years live in the poorest 40% of households. This is a relative poverty line, and there has been no significant change in the number of young children living in the poorest 40% of households since 2003".

569 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 210.

> [G]ood foster carers are not produced by good organisation or strategic plans [but] through accurate selection appropriate training, appropriate support, and, in the hopefully rare cases where this is necessary, counselling out.[570]

Williamson, however, is of the view that the extended African family still has an important role to play in caring for OAC.[571] Although he recognises that the extended family is weaker now than it has ever been,[572] "the revival of the old African tenets of extended family hood are not to be ignored".[573] He asserts that the community's resilience and spirit of community life should not be overlooked. The practice of *ubuntu* is recognised and practised in South Africa among African communities.[574] However, it is submitted that the high incidence and devastating effects of HIV/AIDS in South Africa should not be underestimated.

Organisational challenges have been identified as the cause for ineffectiveness among social workers. Included in these causes are *inter alia* insufficient training, lack of role clarity, inadequate leadership, unrealistic expectations by the DSD, lack of resources or funding and low salaries.[575] In addition, some of the identified challenges relate to lack of leadership in providing direction to social workers on how to effectively respond simultaneously to the demands of statutory work, including foster care.[576] Pistorius, Feinauer, Harper, Stahmann and Miller stated that social workers often experience burn-out as a consequence of the nature of their work involving traumatised families and children.[577] Similarly, Van Heugten established that when social workers spend a lot of time with traumatised clients they experience vicarious trauma and compassion

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570 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 211.

571 Williamson "Caring for Orphans: A Child's Place is in a Family. Children First" 2002 6(44) *Social Work/Maatskaplike Werk* 24–25. See also Foster and Williamson "A Review of Current Literature on the Impact of HIV/AIDS on Children in Sub-Saharan Africa 200014(3) *AIDS* S275–S284.

572 This is because of the devastation resulting from the HIV/AIDS epidemic.

573 Williamson 2002 6(44) *Social Work/Maatskaplike Werk* 24–25.

574 The term "*ubuntu*" can be translated as "we are who we are because of others".

575 Nhedzi and Makofane "The Experiences of Social Workers in the Provision of Family Preservation Services" 2015 51(1) *Social Work/Maatskaplike Werk* 357.

576 *Ibid.*

577 Pistorius, Feinauer, Harper, Stahmann and Miller "Working with Sexually Abused Children" 2008 36 *The American Journal of Family Therapy* 181 195.

fatigue.[578] These effects cannot be ignored when considering the quality of service that can be rendered by these social workers. The foster care system is also human-resource intensive. It requires investigations and reports by social workers,[579] formal placement by the courts and regular reviews.[580] The system is meant to be a temporary arrangement for children who are removed from their families because of abuse or neglect. While the law of South Africa provides that children have a right to family care and grandparents have a duty of care, some of the state policies undermine this. The state places OACs who already live with family members (mostly grandparents) in foster care with their family. Hall opines that this practise formalises an existing arrangement and at the same time introduces an significant amount of paperwork and red tape.[581] Hall refers to the Draft Care and Protection Policy of the DSD, published for comment in 2018,that proposes that where children live with kin whilst their parents live elsewhere, the kinship carer and parent must formalise the arrangement by concluding a "parenting rights and responsibilities" agreement.[582] In 2016 Fortune questioned whether the overburdened foster care system could be said to fulfil the legal obligation to ensure that the best interests of the child was met.[583] During a meeting held with the DSD in 2017, Masango stated that the DSD was not performing well. The DSD was still paying social grants five years after foster care orders had lapsed and required extensions to continue.[584] It appeared that the DSD had used

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578 Van Heugten *Social Workers Under Pressure: How to Overcome Stress, Fatigue and Burnout in the Work Place* (2011) 11.

579 Hall "Policies in South Africa Must Stop Ignoring Families' Daily Realities" (2018) http://www.ci.uct.ac.za/news/policies-south-africa-must-stop-ignoring-families%E2%80%99-daily-realities (accessed 2019-02-26).

580 *Ibid*.

581 *Ibid.*

582 *Ibid*.

583 Fortune *An Overview of the Foster Care Crisis in South Africa and its Effect on the Best Interests of the Child Principle: A Socio Economic Perspective* (Magister Philosophies in Structured Law, University of the Western Cape 2016) 20.

584 Parliamentary Monitoring Group "Foster Care System: Progress Report by Department of Social Development, with Minister" (2017) not paginated https://pmg.org.za/committee-meeting/25566/ (accessed 2018-12-12).

reactive measures to deal with the backlogs. Included here is the strain placed on the extended family to take care of OAC relatives.

In 2017, the Committee invited the DSD and the SASSA to give progress reports on the status of the foster care system in South Africa. In its report, the DSD highlighted the total number of children receiving FCGs; the use of court orders to place children in foster care; challenges with pay-outs by SASSA due to lapsed court orders; backlogs of court orders that needed to be extended by 30 November 2017; the legal, systemic and implementation challenges of the DSD of court orders; and interventions designed to deal with the backlogs. Referring to Clause Two of the Nomination of Motion application of the Centre for Child Law filed, declaring that the failure of the Minister to provide amending legislation towards comprehensive legal solutions to the overburdened foster care system was illegal, unconstitutional and invalid, the DSD indicated that comprehensive legal solutions requiring amendments to the CA and the SAA were required. The key interventions included policy changes on the childcare protection policy, which provided for the fast tracking of the amendments to the CA and the SAA. The Committee expressed concern that the DSD had been continuously been reactive and not proactive in solving problems instead of preventing them. It observed that the backlog was an ongoing problem and was caused by the large difference between the FCGs and CSGs. Members asked questions about foster care court orders; the implications of not being able to trace beneficiaries; alternative care units; the retention of social work graduates; alternative plans to address court orders before the expiry date; the cost analysis of project plans; and legal reforms and amendments in legislation to provide comprehensive legal solutions.

The DSD is under pressure as it struggles to keep up with the demand for foster care placement applications. The Centre for Child Law, Legal Aid SA, the Black Sash and the Children’s Institute are concerned that the foster care system is failing to assist

family members caring for OACs.[585] The foster care system was designed to accommodate 50 000 children; yet it presently has over 500 000 children to care for.[586]

The duties of social workers increased with the enactment of the CA whilst they were already struggling to keep up with their workload. Although the CA aims to ensure the protection of children's rights and ensure that informed decisions are made in their best interests, the number of social workers employed by the DSD is inadequate to keep abreast with the constant demands they face.

Section 158 of the CA requires that the Children's Court reviews a foster care order every two years (unless the Court has specified a shorter period). The predecessor of the CA, the CCA,[587] concluded no such provision.[588] The review requirement has further burdened already overburdened social workers[589] and has had considerable budgetary implications. By 2010, thousands of foster care orders had begun to lapse. Social workers were unable to keep up with their administrative duties that include initial investigations and reports by social workers, court-ordered placements, and additional two-yearly social worker reviews and court-ordered extensions. Consequently, the children concerned were no longer legally placed in foster care, and nor were they eligible for the FCG. Owing to the backlogs, over 110 000 foster care orders had lapsed, and children had lost their income support, creating hardship and tragedy.

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585 See IOL "Huge Relief for Orphans and Grandparents" https://www.iol.co.za/pretoria-news/opinion/huge-relief-for-orphans-and-grandparents-1505114 (accessed 2017-09-25).

586 *Ibid*.

587 74 of 1983.

588 In terms of the CCA, foster care orders were reviewed administratively by the DSD.

589 Breen "Policy Brief Foster care in South Africa: Where to from here? Johannesburg Child Welfare" (2015) 5 http://children.pan.org.za/sites/default/files/publicationdocuments/Child%20Welfare%20 Policy%20Brief-%20 Foster%20Care%20March%202015.pdf (accessed 28-02-2017).

In 2011, after Child Line and Child Welfare had sought its assistance, the Centre for Child Law[590] brought an urgent court application[591] for interim relief to avoid a collapse of the system. The court ordered that all lapsed FCGs were deemed not to have lapsed, and that these foster-care orders, together with the FCGs, could be extended administratively until the DSD could provide a solution to the problem.[592] The court order provided temporary alleviation of the pressure on the foster care system. The backlogs stem from a lack of resources to deal with the high numbers of foster care orders, including overcrowded court rolls and overburdened social workers. An inter-ministerial task team was established and tasked to address the challenges experienced in the foster care system. Despite these efforts, the court order expired in December 2014 before the team could find a solution.

At this time, and in the wake of another potential crisis, the DSD approached the court requesting an extension to 2017 or until the CA could be amended.[593] The order was granted, stipulating that lapsed orders were deemed not to have lapsed and remained valid for a further period of two years.[594] The Centre for Child Law recommended that the DSD be compelled to report to the court every six months on the progress it had made in solving the current, and potentially future, backlog of cases. This recommendation was accepted and made part of the court order. Skelton stated that "the purpose of granting the Department of Social Development breathing space was to allow the department to develop a solution to solve the systemic problems in the foster care system".[595] The order was extended subsequently to November 2019 and

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590 *Ibid.*

591 *S v J* 2011 (3) SA 126 (SCA).

592 *Ibid*.

593 *Centre for Child Law v Minister of Social Development and Others*, North Gauteng High Court, Case no. 21726/11.

594 Fortune *An Overview of the Foster Care Crisis in South Africa and its Effect on the Best Interests of the Child Principle: A Socio Economic Perspective* 9; Davis Festering Indifference: Foster Care Grant Mess has Echoes of SASSA Crisis Daily Maverick (2017) (not paginated) https://www.dailymaverick.co.za/article/2017-03-21-festering-indifference-foster-care-grant-mess-has-echoes-of-sassa-crisis/ (accessed 2018-07-27).

595 Skelton states in Health24 "1 Million Orphans Need the Foster Child Grant: Over One Million Orphans Desperately Need the Foster Child Grant – Can the Department of Social

the High Court required the DSD to design a comprehensive legal solution to the foster care issue.

Furthermore, a report undertaken by the Children's Institute in 2018 shows that the FCG is not reaching the majority of orphans in need thereof.[596] It had taken the DSD many years to reach those orphans who are fortunate enough to receive such grant.[597] Xi reported in 2014 "[O]ver a million orphans and abused, neglected, and abandoned children in South Africa are falling through the cracks of an overburdened foster care system".[598] It is clear that the existing system is not capable to accommodate or afford the payment of the FCG for more children: grants are lapsing because the system is not able keep up with the vast numbers of fostered children.[599]

The FCG was originally mainly used as child protection support for children who were placed in foster care in terms of a court order because of the abuse, neglect or abandonment they had experienced. For social workers, the process involves home visits and interviews with the child's family, writing a court report, obtaining approval by a supervisor, and obtaining a court date. This requires that the social workers

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Development deliver?" (2013) (not paginated) https://www.health24.com/Parenting/Child/News/1-million-orphans-need-the-foster-child-grant-20130417 (accessed 2018-07-27).

596 Röhrs, Proudlock and Maistry "Legislative and Policy Developments 2016/2017" *Children and Law Reform SA* http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2017/Child_Gauge_2017-Legislative_developments_in_2016-2017 (accessed 2018-08-30); Hall, Skelton and Sibanda *Social Assistance for orphaned children living with family South African Child Gauge* (2016) 69–70.

597 Health24 "1 million Orphans need the Foster Child Grant" (2013) (not paginated) https://www.health24.com/Parenting/Child/News/1-million-orphans-need-the-foster-child-grant-20130417 (accessed 2018-07-27). In this Article, regard is had to the struggle that orphans seeking a grant have faced since 2002. At the time, the number of orphans was steadily increasing because of the HIV pandemic.

598 Children's Institute "Child's Rights in Focus University of Cape Town The Foster Care System is failing a Million Orphans: Child rights NGOs call for a Kinship Grant" (2015) http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Projects/Current_Projects/Civil%20Society%20Briefing%20on%20Foster%20Care%20May%202015.pdf (accessed 2018-07-27).

599 Hall "Children Count Statistics on Children in South Africa" (2017) (not paginated) http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=1#6/-28.692/24.698 (accessed 2018-08-08), indicates that 12 273 900 CSGs were paid out by SASSA at the end of March 2018, and that 416 016 FCGs were disbursed.

concerned must conduct new investigations and submit new reports. Failing this, the FCG lapses.

Owing to their workload, social workers seldom have time to adequately assess the foster parents, leading to the potential that such placement might well breakdown which is detrimental to the well-being and sense of security for the child concerned. Carter opines that social workers further lack the experience to assess the foster parents adding as follows:

> Most universities in South Africa address foster care in a section of a semester module on the continuum of care (according to verbal reports from discussions with heads of seven social work departments at South African universities, or lecturers there, from 2008 to 2014). Given the scope of the continuum of care, foster care is touched on only briefly. Given the complexities of foster care, it appears that current social work students are not adequately prepared by universities to deal with foster care in the field.[600]

It is understandable that social workers struggle to find the time to see a foster child, and for the same reason, the foster parent. The average visit to a foster care home is at present only once a year.[601] This is not satisfactory given the impact that placement in alternative care has on a child. Both foster children and foster parents indicate that they do not receive individual or group therapy that could be of assistance to both child and foster parent in building and strengthening personal relations between foster child and foster parent. Despite a shortage of social workers to fulfil these duties, social workers nonetheless have a responsibility to their clients (the foster child and foster parent) and to the community. The situation is clearly untenable.

Carter refers to three primary factors that appear to have a positive impact on foster placement namely the stability of the child achieved through the effective screening and assessment of prospective foster parents; the provision of adequate training of prospective foster parents; and finally, foster placement support.[602] As indicated, this

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600 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 211.
601 Roux, Bungane and Strydom 2010 46(1) *Social Work/Maatskaplike Werk* 51.
602 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 211.

is not taking place in South Africa. The table below provides some insight into the contact, or lack thereof that social workers have on average with children placed in foster care.

Table 4: Contact with social worker[603]

Frequency of contact with foster children	**F**	**%**	**Frequency of contact with foster parents**	**F**	**%**
Once a week	1	4,76	Twice a month	1	4,76
Once a year	14	66,67	Once a year	12	57,14
Once in two years	3	14,29	Once in two years	7	33,33
Do not know	2	9,53	Never	1	4,76
Never	1	4,76		0	0
N	21	100	N	21	100

Foster parents should be carefully screened to determine their ability to provide good care to children.[604] Too few of the parties involved in foster placement, including the foster parents, have sufficient, or any, training regarding the actual fostering of a child. This renders them inadequate to deal effectively with potential crises or problems that may arise. Social workers often find it difficult to place children given the absence of

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603 Bungane *Guidelines for Social Workers to Improve Foster Care Placements for Children affected by HIV/AIDS* (*Magister Artium* (Social Work) dissertation, Potchefstroom Campus of the North West University 2007) 19.

604 When a foster placement is inadequately assessed (whether for family-related foster care or unrelated foster care), there is an increased likelihood that that placement itself could be unsuccessful and culminate in the breakdown of care. These instances are detrimental to the child's well-being. There are various reasons cited for such breakdowns, including the movement of the foster child into adolescence; the complexity of the child's social problems; a lack of foster parent support; the incorrect matching of a child to the foster parent; interference from the biological family and the over-burdening of social service systems.

an appropriate protocol for assessing prospective foster parents and they need additional support and resources to assess prospective foster parents.

Carter and Van Breda note their concern at the screening processes for foster care placements, and especially with the fact that there is no set of objectives and contextually relevant criteria to guide the assessment of prospective foster parents.[605] Without standardised data for use by the social workers involved, there is no potential for the development of national standards that would be of great assistance in best monitoring the well-being of foster children. While the CA makes provision for broad assessment criteria, the CA leaves interpretation of these criteria up to the social workers involved..

The DSD has developed new foster care guidelines – namely, *Guidelines for the Effective Management of Foster Care in South Africa*.[606] However, these guidelines fail to explain how to assess a prospective foster parent and instead provide a detailed explanation of the statutory process of foster care in South Africa. Social workers in South Africa screen potential foster parents without any clear guidelines from the DSD, which is further compounded by their lack of adequate training at a tertiary level. The assessment of prospective foster parents should be essentially an extensive information-gathering exercise and evaluation of the ability and suitability of the prospective foster parent with the aim to ensure a safe, stable, loving and nurturing environment for foster children.[607] For several reasons, the evaluation should take place against a set of objective criteria. These include the fact that foster care orders may be extended for more than two years,[608] and an effective assessment enhances placement stability.

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605 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 226.
606 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 210.
607 Give a Child a Family is an organisation which was established in 1992.
608 S 186.

Many children placed in foster care have a greater potential to manifest behavioural and emotional problems.[609] Many come from broken and dysfunctional families, and it is of the utmost importance that supportive training be offered to foster parents to empower and capacitate them to best look after the child concerned.[610] The intention of the legislature was to design a social technology innovation that social workers would be able to use for the assessment of prospective foster parents. Without this in place, Perumel and Kasiram express the view that placement of a child in a CYCC that has a therapeutic programme in place may in fact be more suitable for serving the best interests of the child than foster care.[611] The greatest advantage of institutional care is its ability to ensure that children have access to vital services identified as essential by the authorities concerned. However, serious concerns remain about the placement of a child in a CYCC.

While foster care provides a child with "substitute" parents, it is care that is temporary in nature and as Assim opines, can have a negative impact on a child's psychological well-being and mental development.[612] This is all the more prominent in cases of so-called "foster drift", in which children experience placement in several foster families without securing permanence. Children's developmental needs change as they grow. Where a social worker has contact on average once a year with a child placed in foster care, and equally on average once a year with the foster parent (who is not receiving any form of appropriate training), it is submitted that the changing needs of the child and his or her best interests are unlikely to be well served.

Once an OAC reaches the age of majority and leaves formal care, no support is provided to assist such child. This represents a further negative for a foster child who

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609 Waid, Kathari, Bank and MacBeath "Foster Care Placement Change: The Role of Family Dynamics and Household Composition" September 2016 *Child Youth Serv Rev* 68.

610 Perumal and Kasiram 2008 44(2) *Social Work/Maatskaplike Werk* 165.

611 *Ibid*.

612 Assim *Understanding Kinship Care of Children in Africa* 121.

at the age of majority finds him- or herself out of the network of security that a family environment naturally provides.

Given the stresses of the work environment, there is also an unsurprisingly high turnover in the employment of social workers. One can easily predict the negative impact this may have on a child in foster care who has built up a relationship of trust with the social worker concerned with the placement. Despite severe failings in the current foster care system in South Africa, the state DSD has failed to address the problems, and no sustainable solution has been suggested. Social workers themselves raise disconcerting concerns about the efficacy of the foster care service they render.[613] Many criticise the current system saying that it creates an incentive for impoverished families to place their children in the foster care of others in order to achieve financial relief. The criticism is founded on the approach that the state fails to provide adequate support for all vulnerable families. OACs have been rendered more vulnerable than ever despite a constitutional imperative that these children deserve the best service and commitment that the social welfare services have to offer.

It is submitted that the DSD needs to re-think its way of operating. The CA has created further obligations for social workers and the judiciary, and social workers are not able to give the attention required to individual foster placements. In September 2012, the DSD announced its intention to introduce reform aimed at providing a grant that relatives could access directly *via* an application to the SASSA.[614] This would cut out

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613 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 210.

614 Black Sash Media Statements "Over One Million Orphans Desperately Need the Foster Child Grant – Can the Department of Social Development Deliver?" (2013) (not paginated) https://www.blacksash.org.za/index.php/media-and-publications/media-statements/282-black-sash-media-statement-over-one-million-orphans-desperately-need-the-foster-child-grant-can-the-department-of-social-development-deliver-18-april-2013 (accessed 2018-08-08).

the need for a social worker report and a court inquiry, thereby ensuring that all entitled orphans would have a quicker response and access to a grant.[615]

The Social Assistance Amendment Bill includes a new CSG top up. This top up to the CSG is designed to lessen the impact on families following their removal from the foster care system so that they no longer receive the FCG. This proposed R210.00 top-up to the CSG to compensate families for orphan care, has been before Parliament since 2018.[616] It is submitted that this development may lead to kinship care being regarded as an independent alternative care option in South Africa. A CSG top up will be available in kinship care instances without court orders, investigations by social workers and consequent delays of applying for an FCG.[617]

3 4 2 CONCERNS ABOUT CLUSTER FOSTER CARE

Registration as a child protection organisation in terms of section 107 of the CA of 2008 is not a requirement for a child foster care scheme. A foster care scheme is required to register as a Non-profit Organisation (NPO) and is defined in the Non-Profit Organisation Act as "a trust, company or other association of persons that are (a) established for public purpose and (b) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered". A Public Benefit Organisation is an organisation established in South Africa that must be constituted in one of the following ways: incorporated under section 21 of the Companies Act 71 of 2008; a trust; a voluntary association; or a branch of a foreign charitable organisation.[618] The management boards of the

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615 Simula *Developing An Evidence-Based Foster Mother Screening Tool For Cluster Foster Care In The Western Cape, South Africa* (MSocSc in Clinical Social Work dissertation, University of Cape Town 2016) 57.

616 Reynolds "New Social Grant for Families" (2018) ww.groundup.org.za/article/new-social-grant-families (accessed 2019-08-11).

617 Hall, Skelton and Sibanda "Social Assistance for Orphaned Children Living with Family" *South Africa Child Gauge* (2016) 73.

618 South African Revenue Services "Annual Report 2006/2007" available at https://www.gov.za/sites/default/files/gcis_document/201409/sars06070.pdf.

participating child and foster care schemes were constituted as a community committee or a trust. Du Toit, Van der Westhuizen and Alpaslan state that the cluster foster schemes had guidelines regarding the definition, registration and minimum standards for this type of alternative care, but lacked any standardised guidelines to assist service providers to operationalise such schemes.[619] They opine that the "operationalisation of this care option is still a grey area" Although there are certain guidelines regarding the definition, registration and minimum standards for this type of alternative care, there are no standardised guidelines to assist service providers to operationalise a cluster foster care schemes. Foster parents in such a scheme may not serve as a member on the management board. Du Toit undertook a data collection survey of cluster foster schemes in 2016.[620] Participants of the survey described the nature of child and foster care schemes as the management of and support for a group of foster care parents, the development of a management system for existing foster care parents, and management of homes within the community instead of the traditional children's home model. The management boards of the schemes participating in the data collection survey were constituted as a community committee or a trust. It was noted that the changing environment in which an NPO operates makes it difficult to be specific about the skills and knowledge needed on the management board of an organisation at a specific time. Therefore, skills and knowledge need to be recruited as the need arises.[621] Section 8 of the SAA provides that a foster parent is eligible for a FCG. The participating managers, however, reported that applications for grants are challenging.

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619 Du Toit, Van der Westhuizen and Alpaslan "Operationalising Cluster Foster Care Schemes as an Alternative Form of Care" 2016 52(3) *Social Work/Maatskaplike Werk* 391.

620 *Ibid.*

621 *Du Toit, Van der Westhuizen and Alpaslan Operationalising Cluster Foster Care Schemes as an Alternative Form of Care* 399.

Concerns about cluster foster care are acknowledged. Simula opines that following interviews done with the cluster foster care "mothers" the following concerns were raised:

> Foster care mothers require training as they as a general rule care for children who come from traumatic backgrounds. Such training would equip the care givers with behaviour management skills so that they are able to deal with the varied behavioural traits of the children in cluster foster care.[622]

Furthermore, where a cluster foster caregiver has not been adequately trained, they are less likely to remain in service as a caregiver.[623] The turnover of caregivers has a negative psychological effect on the foster children they care for. Financial constraints are also a concern. Simula refers to a participant in her research where such foster-carer reported that the state grant was not enough to cover all the foster child's needs. Consequently, carers might have to resort to using their own salary to provide what is needed by the children in their care.[624] Du Toit, Van der Westhuizen and Alpaslan confirm the concern regarding financial support of child foster care schemes, noting that CFCSs are faced with the challenge to develop fundraising strategies that will not only reflect their core business, but also speak to potential funders.[625]

3 4 3 CONCERNS WITH CHILD AND YOUTH CARE CENTRES

Mudaley points out that "the child in the Children's Home comes from a life world of lack of appreciation, neglect, inadequate and destructive relationships, impaired communication and even ill treatment".[626] Perumel opines that given the recognised

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622 *Developing An Evidence-Based Foster Mother Screening Tool For Cluster Foster Care In The Western Cape, South Africa* 58.

623 Simula *Developing An Evidence-Based Foster Mother Screening Tool For Cluster Foster Care In The Western Cape, South Africa* 53.

624 Simula *Developing An Evidence-Based Foster Mother Screening Tool For Cluster Foster Care In The Western Cape, South Africa* 68.

625 *Du Toit, Van der Westhuizen and Alpaslan Operationalising Cluster Foster Care Schemes as an Alternative Form of Care* 2016 52(3) *Social Work/Maatskaplike Werk* 400.

626 Mudaley as referred to in Perumel and Kasiram "Children's Homes and Foster Care: Challenging Dominant Discourses in South African Social Work Practice" 2008 44(2) *Social Work/Maatskaplike Werk* 165.

philosophical approach that children should be nurtured and develop within a parent- or family-based environment, residential care, whether it is short-term or long-term, must in all instances be considered as an interim means of care.[627] The limited or lack of any emotional, psychological and physical support for a child placed in institutional care prevents a child from experiencing such support typically found in a family environment.

The primary role of child and youth care workers is to provide care and support for such children. However, care within a children's home cannot be viewed as equivalent to that within a family. Therefore, as noted earlier, institutional care is generally viewed as the last option on the continuum of care, which stresses that a child should be placed in an environment that supports his or her growth and developmental imperatives, including social, psychological, cultural and physiological needs.[628]

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627 Perumel *Living in a Children's Home and Living in Foster Care: Hearing the Voices of Children and Their Caregivers* (Master of Social Work (MSW) dissertation, University of KwaZulu-Natal 2007) 12.

628 Meintjies *et al Introduction to South African Law: Fresh Perspectives* 9. The authors list several concerns regarding the care of a child in a residential facility. These include the factors that "[such care] threatens children's normal developmental processes, primarily through a lack of individual attention and opportunities for attachment with adults; Fails to transfer critical life-skills to children, resulting in children being inadequately prepared to cope with life when they leave care and, in instances, predisposing care-leavers to antisocial behaviour; Results in children being dislocated from their families, their communities, and concomitantly, their cultural background and identity; resulting in problems of 'reintegrating' into society; Marginalises children from society, and is accompanied by experiences of stigma and discrimination; Frequently fails to respond to children's individual needs, characteristically prioritising the needs of institutional functioning; Exposes children to overcrowding and a lack of privacy; Frequently exposes children to increased illness, a lack of access to medical care, and/or education; Puts children at risk of sexual and physical abuse by residential care staff and older children, and in extreme circumstances has resulted in trafficking of children; Operates as a 'magnet' in poor neighbourhoods: i.e. residential care settings are used by poverty-stricken caregivers as an "economic coping mechanism", resulting in children being placed there because of lack of access to resources, as opposed to a lack of suitable care" European Parliament "Children Without Parental Care or at Risk of Losing it" (2003) 5 http://www.europarl.europa.eu/hearings/20070417/libe/sos_children_en.pdf (accessed 2017-06-06).

Following a survey by Meintjies *et al*, it became apparent that a large number of children in CYCCs were HIV-positive.[629] This factor raises important considerations regarding the provision of adequate and appropriate care of the children concerned. Concerns include the adequacy of the skills of the appointed caregivers; their training in relation to appropriately providing for the care of the children so infected; the continuity of caregivers in a particular CYCC and children's access to health services.

Meintjes *et al* note that in South Africa children are being cared for by people who are not qualified for the job.[630] Caregivers have expressed the need to have training in how to deal with children who have experienced some form of trauma. Given that many children have experienced a loss of their parent or parents to HIV/AIDS, this is clearly an identified need by such caregivers.[631] Cases were also reported of physical abuse, sexual molestation and emotional abuse, as well as neglect of children in children's homes by untrained staff members or fellow older children.[632]

Although it is true that the CA strongly emphasises the need to provide appropriate programmes that respond to the developmental and therapeutic needs of children in the centres, McKay believes that a child placed in a CYCC is generally a child who needs sensitive, individual attention, familiar surroundings and intellectual stimulation.[633] While it is not guaranteed that the care needed by a child will be available in a CYCC, it is equally true that a depleted, deprived family environment where parents have died of AIDS cannot hope to provide for these needs.[634] However

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629 As referred to by Yorke *The Experience of Caregivers in Registered Child and Youth Care Centres in Gauteng, South Africa, During the First 21 Years of Democracy* (MA Counselling Psychology dissertation, University of Pretoria 2015) 20.

630 Meintjies *et al Introduction to South African Law: Fresh Perspectives* 38. The authors provide that some caregivers have a qualification to care, namely the Basic Qualification in Child Care. But more often than not this is not considered a pre-requisite to be appointed to the position of caregiver in a CYCC. See also Yorke *The Experience of Caregivers in Registered Child and Youth Care Centres in Gauteng, South Africa, During the First 21 Years of Democracy* 15.

631 Yorke *The Experience of Caregivers in Registered Child and Youth Care Centres in Gauteng, South Africa, During the First 21 Years of Democracy* 15.

632 *Ibid*.

633 Mccay *No Love nor Money: Institutional Child Care in South Africa* (1994) 80.

634 Perumal and Kasiram 2008 *Social Work/Maatskaplike Werk* 162.

Casky believes that when considering the increasing number of vulnerable children, the harm brought by institutionalisation outweighs the benefits that it provides to children.[635]

The number of unregistered homes is rapidly increasing.[636] Because of non-registration, the services these homes provide are unmonitored and unsupported (financially or otherwise) by the state.[637] Generally, commentators agree that care given in a CYCC does not correspond with the care generally found in a safe and caring family environment. For example, Heron and Chakrabarti, referring to a child's right to parental care, state that no love, protection and care for children, regardless of how professional the offering person is, can substitute for that of the child's parents.[638] Commentators also note that many caregivers in CYCCs approach their care-giving responsibilities as professionals, rather than as parental figures. Children placed in CYCCs often face cultural neglect and institutional racism. Consequently, such children are prone to have a low self-esteem.[639]

The potential for the child to form a secure attachment to a social worker concerned with the child's case is also negatively influenced by constant changes in caregivers due to a high turnover of staff. Consistency in care provides some form of security for the child. This is confirmed by Bowlby's attachment theory, which states that children

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635 Casky "Keeping Children out of Harmful Institutions: Why we should be Investing in Family-based Care" https://www.savethechildren.org.uk/sites/default/files/docs/Keeping_Children_Out_of_Harm ful_Institutions_Final_20.11. 09_1.pdf (accessed 2017-09-17).

636 Meintjies, Moses, Berry and Mampane *Home Truths: The Phenomenon of Residential Care in the time of AIDS* (2007) 1; Meintjies *et al Introduction to South African Law: Fresh Perspectives* report that "We have little more than an anecdotal picture of how the sector manifests in practice on the ground. In particular, little is known about less formal residential care provisioning, about residential care settings that do not conform neatly in their origins, form or function to conventional institutions and which tend not to be registered with the state as required by law".

637 Meintjies *et al Introduction to South African Law: Fresh Perspectives* 2.

638 Heron and Chakravarty *Exploring the Perceptions of Staff towards Children and Young People Living in Community-based Children's Homes* (2003).

639 Malatji and Dube "Experiences and Challenges Related to Residential Care and the Expression of Cultural Identity of Adolescent Boys at a Child and Youth Care Centre in Johannesburg" 2017 53(1) Issue 7 *Social Work/Maatskaplike Werk* 120.

require a constant and predictable adult caregiver in and to whom they can invest emotionally and form an attachment.[640] Healthy attachment is seen as a pre-requisite for a child to develop in a healthy and confident way.[641]

The question is whether institutionalisation is meeting the needs of the children placed in CYCCs. In most developing countries, institutions providing care for children and the aged are hampered by a lack of resources, often implying poor service delivery.[642] The current approach seems to focus on the need of OACs for shelter, food and clothing, while in fact children have a wider range of needs, most of which are not material, but emotional. Focus needs to be placed on relationships within the current system, particularly with reference to that between caregiver and child and developmental programmes should cater for the child's need to develop into social and cultural individuals, not only for his or her physical growth.

It has been argued that placing a child in a CYCC is impinging on the variable developmental processes of childhood. Casky is of the view that children institutionalised during their early years of growth and development may suffer immense developmental delays.[643] Williamson and Greenberg confirm this view.[644] These revelations and observations mirror the work of psychoanalysts such as Sigmund Freud who perceive future challenges in a child's adult life if he or she is not nurtured in his or her childhood. Negative effects of institutionalisation on the

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640 Zeanah, Berlin and Boris "Practitioner Review: Clinical Applications of Attachment Theory and Research for Infants and Young Children August 2011 52(8) *J Child Psychol Psychiatry*; Zeanah, Schauffer and Dozier "Foster Care for Young Children: Why It Must Be Developmentally Informed" December 2011 50(12) *J Am Acad Child Adolesc Psychiatry* 1199.

641 Yorke *The Experience of Caregivers in Registered Child and Youth Care Centres in Gauteng, South Africa, During the First 21 Years of Democracy* (2016) 11.

642 Molepo *Challenges and Coping Strategies of Child and Youth Care Workers in the South African Context* (DPhil thesis, University of Pretoria 2014) 96.

643 Casky "Children Out of Harmful Institutions" https://www.savethechildren.org.uk/sites/default/files/docs/Keeping_Children_Out_of_Harmful_Institutions_Final_20.11. 09_1.pdf (accessed 2017-09-17).

644 Williamson and Greenberg "Families, Not Orphanages Better Care Network" 2010 Working Paper 5.

emotional, psychological and developmental aspects of children are well documented.[645]

3 4 4 CONCERNS WITH CHHs

An estimated 58,000 children were living in 32,000 CHHs in South Africa in 2017.[646] While children living in CHHs are rare in comparison to those residing in other household forms, the number of children living in this extreme situation is a concern. CHHs highlights some weakened links of the traditional extended family responsibilities and roles.[647] Importantly, however, there has been no increase in the share of children living in CHHs in the period 2002 to 2017. If anything, statistics indicate a decline in CHHs. An analysis of national household surveys to examine the circumstances of children in CHHs in South Africa revealed that most children in CHHs are not orphans, and 84% have a living mother. These findings suggest that social processes, (including migration for employment) other than HIV-related mortality may play important roles in the formation of these households. While children living in CHHs are entitled to a CSG, Rosa highlights these children are often forced to use a variety of strategies to survive and overcome the financial difficulties they face daily.[648] The strategies include working, relying on support from relatives and non-relatives and performing favours in exchange for support. In the absence of a resident adult – children in

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645 Moulson, Shutts, Fox, Zeanah, Spelke and Nelson "Effects of Early Institutionalization on the Development of Emotion Processing: A Case for Relative Sparing? March 2015 18(2) *Dev Sci* 298–313; Van IJzendoorn *et al* 2011 *Monographs of the Society for Research in Child Development* 8; Maqoko *HIV/AIDS Orphans as Heads Of Households: A Challenge To Pastoral Care* (Master of Theology dissertation, University of Pretoria 2006) iii; Children, Orphanages, and Families: A Summary of Research to Help Guide Faith-Based Action (2014) 6.

646 Hall "Child-only Households Children Count: Statistics on Children Living in South Africa" (2018) http://childrencount.uct.ac.za/indicator.php?domain=1&indicator=17 (accessed 2019-02-26).

647 Gumede *An Analysis of Health Behaviour of Children from Child Headed Households in a Selected Health District in Kwazulu-Natal: An Ethnographic Study* (Doctor of Philosophy: University of KwaZulu-Natal 2013) ix.

648 Rosa *Counting on Children: Realising the Right to Social Assistance for Child-headed Households in South Africa A Children's Institute* (2004) Working Paper 4.

a CHH are their own or other children's primary care-givers. A concern arises with respect to such children's access to funding in that they are excluded from accessing social assistance from the government for no other reason than that they are not adult primary caregivers over other children in their care.[649] Although the CSG is intended to be a social grant for the benefit of the child, the law stipulates that the 'primary care-giver' of the child must receive it on behalf of the child. Subject to the provisions of the SAA, any person shall be entitled to a CSG if that person satisfies the Director-General that-

> (a) he or she is the primary care-giver of a child; and
>
> (b) he or she and that child –
>
> i. are resident in the Republic at the time of the application for the grant in question;
> ii. are South African citizens; and
>
> iii. comply with the prescribed conditions.[650]

The SAA defines a "primary care-giver" as follows:

> [I]n relation to a child, means a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child, but excludes – (a) a person who receives remuneration, or an institution which receives an award, for taking care of the child; or (b) a person who does not have an implied or express consent of a parent, guardian or custodian of the child.[651]

In terms of the regulations to the SAA, it is a requirement that a primary caregiver be 16 years old as this is the age when an identity document is first provided,[652] and a 'primary caregiver' has to provide his/her identity document in applying for the grant.[653] Typically, the eldest child in a CHH undertakes to fulfil adult responsibilities and burdens as the caregiver for his or her siblings. Richter opines that CHHs are economically more vulnerable than adult-headed households since research indicates

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649 *Ibid*.
650 S4.
651 S1.
652 S3 of the Identification Act 68 of 1997.
653 *GG* 460 of 2003-03-31 Reg 9 (1) to the SAA.

that income within a CHH is approximately 20–30 per cent less than that of an adult-headed household.[654]

In 2008, the DSD (Gauteng) requested that a report be drafted on the prevalence and experiences of CHHs in Gauteng. Although restricted to Gauteng, the report provides good insight into the plight of these children in South Africa. Following an investigation, the report concluded *inter alia* that since such children lack the presence of a parent in their lives, most of them have limited means to generate any form of income. As a result, they are unable to effectively sustain the household in which they live. Furthermore, the report indicates that children of CHHs are more likely to suffer abuse and exploitation. Many in this study reported multiple losses and traumatic events. This may leave residual trauma that appears to have received inadequate attention, as the children concerned are more likely to have access to physical and financial support than emotional support.[655]

Although the percentage of children living in CHHs is relatively small, the number is not negligible. This is particularly evident when one considers that every one of the children in a CHH may need support services. As Hall, Richter, Mokomane and Lake opine, the children in CHHs are vulnerable in that "they tend to be extremely poor and have low access to social grants, the children may struggle to access schooling or to achieve academically, they may be vulnerable to violence, abuse and exploitation, and experience high levels of anxiety, stress or grief".[656]

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654 Richter and Desmond "Targeting AIDS orphans and child-headed households? A Perspective from National Surveys in South Africa, 1995–2005" 2008 20(9) 1019 1028.

655 Gauteng Department of Social Development "Child-Headed Households in Gauteng Province A survey of the Prevalence and Experiences of Families in Gauteng" (2008) http://www.gauteng.gov.za/government/departments/social-development/Documents/Child%20Headed%20Households.pdf (accessed 2016-09-11) xv.

656 Proudlock and Röhrs "Recent Developments in Law and Policy affecting Children" in Hall, Richter, Mokomane and Lake Children, Families and the State Collaboration and Contestation (2018) 13.

The Nelson Mandela Children's Fund found that forty-three percent of the children in CHHs felt that they lack parental guidance, support and protection.[657] Whilst this statement was made in 2011, the difficulties facing CHHs have not changed. In addition to the emotional strain on children living in CHHs, the DSD (Gauteng) further reports on their health and nutrition. While such children have access to health facilities, especially clinics, the DSD is concerned about how the children are treated by staff members of such clinics and health facilities.[658]

The report states that half of the children living in CHHs are exempt from paying school fees, which makes it possible for them to continue their schooling. However, reports that children receive little if no support from educators at the school children attend.[659] However, since the responsibility of support within the home rests largely on the shoulders of a child-head of the household, the consequences, burden and stress placed on such child cannot be overemphasised. The DSD reports that it was found that schools could play a supportive role in this regard, particularly considering the academic vulnerability of younger siblings.[660]

In relation to children living in CHHs, Sloth-Nielsen refers to the judgment of the Constitutional Court in the *Government of the Republic of South Africa v Grootboom* case, where the court held that the state has a parental responsibility towards children who have no parents: [661]

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657 Nelson Mandela Children's Fund *A Study into the Situation and Special Needs of Children in Child-headed Households* (2001) 118.

658 Gauteng Department of Social Development "Child-Headed Households in Gauteng Province A survey of the Prevalence and Experiences of Families in Gauteng" (2008) http://www.gauteng.gov.za/government/departments/social-development/Documents/Child%20Headed%20Households.pdf (accessed 2016-09-11).

659 Marongwe, Sonn, and Mashologu "Dealing with Children from Child-headed Households: How Prepared Are the Teachers" 2016 48(1,2) *J Soc Sci* 42

660 Gauteng Department of Social Development "Child-Headed Households in Gauteng Province A survey of the Prevalence and Experiences of Families in Gauteng" (2008) http://www.gauteng.gov.za/government/departments/social-development/Documents/Child%20Headed%20Households.pdf (accessed 2016-09-11) xvi.

661 2001 (1) SA 46 (CC) par 77.

When children are orphaned or abandoned and accordingly find themselves without families, the responsibility for fulfilling their socio-economic rights rests squarely on the state. The state consequently has two distinct constitutional duties:

(1) It has a duty to ensure that children in child-headed households are linked with some form of parental, familial or institutional care.

(2) It has a duty to provide the resources necessary for the survival and development of the children.

One of the implications is that the state has a responsibility to provide financial assistance to CHHs. While the children do (in theory) have access to social welfare grants in the form of a CSG, the report of the DSD (Gauteng) indicates that less than one third of such children do in fact rely on the grants for their well-being. The reasons are not clear, but at least half of the children living in CHHs in Gauteng were reported to be living in absolute poverty. Mkhize undertook a study (restricted to CHHs in Kwazulu-Natal) that highlighted the multiplicity of adult roles undertaken by the heads of CHHs out of necessity.[662] The children who participated in the study indicated that carrying out these functions was stressful.[663]

The CA provides that children who care for other children should be eligible for the CSG and that, when these child caregivers are too young to manage the grant, a "household mentor" should be appointed to manage the CSG on the child's behalf.[664]

3 5 CONCLUSION

The most significant protective factor available to most children are their parents and family in that they exercise the most influence on a child's development. Early responsive caregiving is key to the development of any child. However, many children

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662 S137(5)*(a)* and *(b).*

663 Mkhize *The Role of Social Worker in Handling of Child-headed Household* (Masters dissertation, UNISA) 2006 66.

664 *Ibid*.

in South Africa lack such parental care. As such, the various forms of impermanent alternative care as potential appropriate care were considered in this chapter. As a general rule, the alternative care placements recognised in the CA provide a temporary solution for the predicament in which the child finds him- or herself. While the reunification of families and early intervention by authorities to prevent the removal of a child from a family environment is a priority, the reality is that such reunification or prevention is frequently not a potential option, especially in a developing country like South Africa. The obligation that such care be considered appropriate for the child is often fraught with its own challenges. Furthermore AIDS, and the impact the disease has on the children in South Africa is a reality not to be underestimated. For children who are parentless because of this disease, there is no family to return to. This chapter has discussed alternative care in the narrow sense and has set out the advantages and many disadvantages of all forms of this type of alternative care.

Whilst there have been significant innovations and improvements in the care and protection of children, it is submitted that the South African childcare and protection system has not fully achieved its overriding developmental purpose and objectives. The current reality in South Africa is that the majority of children in the country are vulnerable, and the child welfare system is failing in its role to promote and protect those children in need of care. The reality in South Africa is that it has a child welfare system that has failed the children it was supposed to protect. Consequently, many children in care in South Africa do not enjoy their constitutional rights to survive, develop to their full potential, protection and participation.

While OAC in South Africa have the right to appropriate alternative care, the difficulties a child faces when placed in temporary care, and the problems encountered with the present alternative care system leads one to seriously question the ability of the DSD in placing a child in appropriate alternative care that best serves the interests of such child. The lifetime effect such a placement has on any child concerned cannot be over-estimated, and as such, one ought to be able to rely on the skill and expertise of the relevant authorities in making such a determination. Instead, the pressing problems encountered within an inadequate child welfare system, have left the children in need

of care in an extremely vulnerable position, and the system is obviously failing to protect and ensure the best interests for OACs in South Africa. Therefore, it is submitted that not all legal decisions of placement are made in the best interests of the child concerned.

Although the provision and extension of social grants are improvements in the South African child welfare system, too little has been done to ensure that the vulnerable South African child‘s rights to family and parental care are protected, ensured and achieved. In 2016 Hall stated that the capacity of the social welfare system in South Africa, and in particular the child protection system is struggling to cope with the demands of an overburdened system. She states that the “social welfare system has been greatly strained by the need to enrol and monitor large numbers of children in the foster care system, leaving abused and neglected children without the responsive protection services they need”.[665]

Too few staff members, overburdened with high caseloads, has meant that those employed are unable to carry out their duties efficiently. Social workers are unable to be in regular contact with a foster child and foster parents. Globally, institutional care emerged as a quick solution to the pressing problem of a multitude of OACs.[666] International principles of the child welfare sector are united in advocating residential care only as a temporary “last resort” for children.[667] This position is confirmed by the South African state and by other key players in the local child welfare sector.

It is submitted that the position of current alternative care in the narrow sense in South Africa is not providing the protection and ensuring of basic human rights, as envisaged in terms of both national legislation and international instruments. Ignoring or

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665 Hall and Sibanda “Social Assistance for Orphaned Children Living with Family” 2016 *South African Child Gauge* 71.

666 Kang’ethe and Makuyana Exploring “Care and Protection Offered to OVCs in Care Institutions with examples from South Africa and Botswana” 2015 *Journal of Social Sciences* 106.

667 Meintjies, Moses, Berry and Mampane 9 https://open.uct.ac.za/bitstream/handle/11427/4094/CI_researchreports_residentialcare_2007-06.pdf?sequence=1 (accessed 2017-09-27).

downplaying the system's defects, incapacities and limitations amounts to failing in the obligation to protect the child and to promote his or her rights to ensure that such child reaches his or her full potential. It is submitted that the relevant authorities consider each placement in light of the status currently of the alternative care options, the best interest principle and other possibilities that could potentially ensure that the best interests of the child are served. Where a permanent placement is acknowledged as a means of providing stability in the life of an OAC, the legislature and the judiciary ought to play a role in ensuring that a child's fundamental rights are promoted and protected. Failure to place a child in the most appropriate care, is failing the child concerned. Serious concerns have been raised in the current chapter with respect to alternative care for an OAC in South Africa. Viable solutions that cater for a child's best interest must be sought and effected.

The present functioning of the DSD is such that in reality no sufficient assistance can be given to help the child in need of care in South Africa presently. Financial and time constraints create an obstacle to effect changes to the child welfare system. This leaves the OAC in South Africa trapped in a system that fails to acknowledge that other viable options are in fact the only appropriate placement for the number of OAC in South Africa.

Chapters 4 and 5 discuss the potential for adoption and intercountry adoption to meet the constitutional right of a child in ensuring that his or her best interests are protected. This is against the backdrop of South Africa's failing alternative care system (in the narrow sense). A solution that best meets the needs of a child reliant on the services of and placement by the DSD must be considered realistically against the status and quality of care and support available currently in the alternative care options available in South Africa and numbers of children in need of care. Adoption as a permanent means of care is considered from a historical perspective in the chapter that follows. The role played by adoption from Roman law times to present day South Africa is considered in chapter 4. The foundation is also laid for the consideration and recognition of intercountry adoption as another permanent form of alternative care. The regulation of intercountry adoption as well as the reasons why intercountry

adoption is seldom sought out as a placement for a child in need of care is considered in chapter 5.

CHAPTER 4

ADOPTION IN SOUTH AFRICA: A HISTORICAL PERSPECTIVE

4 1 INTRODUCTION

In South Africa, a developing country, the challenges faced in providing appropriate and adequate alternative care to OACs are all too evident, as discussed in chapter 3. Adoption, as a legally recognised permanent alternative form of care in South Africa, is unpacked in this chapter.[668] To fully appreciate this specific form of care in South Africa, a historical perspective of the development of adoption is discussed and evaluated. The long history of adoption as a legal institution makes it apparent that it is not a modern occurrence. As old as humankind, adoption was first practised on an informal basis and references to adoption are found in the writings of the Greeks, Egyptians and Romans.[669]

Roman mythology refers to the legend of Romulus and Remus, who were saved from drowning after being abandoned in a basket on the banks of the River Tiber. According to mythology, the twins were found by a she-wolf who suckled them and they were fed by a woodpecker. A shepherd and his wife came upon the twins and fostered them to manhood.[670] Romulus is given credit for founding Rome and he went on to become King in 735 BC. In Roman times, adoption was practised frequently, largely to provide a solution in the case of sterility and necessitated by frequent deaths in a family, and

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668 It is acknowledged that Islam does not recognise adoption, and that *kafalah* is practiced by followers of Islam where an orphaned or abandoned Muslim child is in need of care.

669 *The Selective Voet* being the Commentary on the Pandects of Johannes Voet Books I–IV tr Gane (1955) 142.

670 Bennett *The Character of Adoption* (1976) 22; Van Zyl *History and Principles of Roman Private Law* (1983) 35.

also to enable those who did not have a natural child of their own to acquire a child considered to be their own.[671] Adoption was popular in Roman times and features strongly in the royal bloodlines of Rome.

Likewise, ancient Egyptian society[672] was structured around the family unit and the purpose of marriage revolved around procreation and maintaining the family. Fertility was very important to the ancient Egyptians and children were considered a blessing. In Egypt, adoption was known and was mainly practised when a child was orphaned. In this instance, those who could not have children would adopt an orphaned child as their own.[673] Forms of adoption were also used in ancient civilisations such as the ancient Japanese Shinto religion, which had its beginnings around 500 BC or even earlier.

References to adoption can also be found in early Hindu scripts that can be traced to the Vedic ages.[674] The Vedic forms of belief are one of the precursors to modern Hinduism. The Vedic household was patriarchal and patrilineal, and the importance of having a son was considered culturally important, for securing spiritual benefits and for the continuation of the lineage of the family. Adoption was limited to a male child, as the adoption of a female child was not recognised in early Hindu philosophy.[675] The Hindu law of adoption is mainly founded on the religious belief that a son is essential for spiritual salvation. Justification for the recognition of exclusively male adoption could be because the scriptures did not permit the wife or a daughter to perform the funeral rites of a man or utter sacred texts. Consequently, a female could not, in theory, redeem the deceased from hell or save him from the suffering of the afterlife. Although

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671 Voet *The Selective Voet* 142.

672 Egyptian civilisation coalesced around 3150 BC according to University College London "Chronology" (2000) http://digitalegypt.ucl.ac.uk/chronology/index.html (accessed 2013-11-12).

673 Parsons "Old Age in Ancient Egypt" http://www.touregypt.net (accessed 2013-11-12).

674 C 1500-c.500 BCE. The Vedic period (or Vedic age) (c. 1500 – c. 500 BCE) was the period in Indian history during which the Vedas, the oldest scriptures of Hinduism, were composed.

675 Adoption in Ancient India https://www.scribd.com/doc/20167904/ (accessed 2017-10-11); Meena "Adoption Laws in India: Challenging Existing Laws" Undated *Manupatra* 2.

the act of adoption remains the same in current day India, the reasons and purpose thereof have changed. This is discussed in more detail in chapter 6.

Some of the earliest written references to adoption can be found in the Bible in the story of Moses,[676] and in the New Testament it is written that Jesus was adopted by Joseph, the carpenter. When Mary married Joseph, he accepted Jesus as his own. Paul makes use of the term for adoption five times in his letters to the Ephesians.[677] The term used in the New Testament when referring to adoption is the Greek word "*huiothesia*".[678]

Adoption is prohibited under Shari'a law and as such is not recognised in Islamic tradition. *Kafalah,* an alternative care option, is practiced. Although adoption was recognised and practised in pre-Islamic Arab societies, a controversy regarding adoption and the Prophet Mohammed led to a revelation indicating that adoption did not form a "real relationship". The Holy Qur'an states:

> Nor hath He made those whom ye claim [to be] your sons. This is but a saying of your mouths. But Allah sayeth the truth and he showeth the way. Proclaim their real parentage. That will be more equitable in the eyes of Allah. And if he [is] not their fathers then (they are) your brethren in the faith and your clients.[679]

Following this, the legal concept and practice of adoption was abolished. Consequently, any practice of adoption constituted a sin of apostasy (*Kufr*). Adoption is seen as a disruption of the pattern of family relationship recognised in Islamic Law. The establishment of parentage through consanguinity (blood ties) constitutes the first right recognised in Islam. All other rights *inter alia* inheritance, custody, fosterage and guardianship derive from this right.

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676 As recorded in Exodus 2: 1–10 (King James Version).

677 Adoption references in the Bible are found at Romans 8:15; Romans 8:23; Romans 9:4; Galatians 4:5; Ephesians 1:5 (King James Version).

678 The meaning of this word is "to place a son".

679 Verse 30.

Further consideration of the historical development of the concept of adoption reveals that despite many changes within society over time, the practice of adoption remained in use consistently in one form or another. Adoption was well known and practised historically and is not an innovation of modern-day family law.

The aim of this chapter is to consider adoption in South Africa, both from an historical perspective as well as its practice in present day South Africa. A brief exposition is made of the international instruments and concomitant resolutions and guidelines that have been formulated with respect to adoption and intercountry adoption of vulnerable children. The focus of the current chapter is on the historical perspective of the institution of adoption as a potential placement for a child in need of care.

The common law of South Africa is Roman-Dutch law and it is as such necessary to first provide an overview of adoption in both Roman and Roman-Dutch law. Thereafter, an outline of South African legislation regulating adoption is presented. Although South African law has been influenced in various significant respects by English law, it has not influenced the law of adoption. Adoption has remained based on Roman-Dutch law.

4 2 ROMAN LAW

4 2 1 INTRODUCTION

Although the origins of Rome prior to 450 BC are unsure and largely based on speculation,[680] it is apparent that adoption was practised in Roman times virtually from its beginnings.[681] The adoption practised was based on dynastic adoption,[682] which has as its purpose the need to provide the family with an heir. Adoption played an

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680 Bennett *The Character of Adoption* 22.

681 Boberg *The Law of Persons and Family* (1977) 350; Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 193; Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* (LLD thesis, University of Pretoria 2009) 29.

682 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 29.

important role in Roman times, both as a means to continue the family name and unit, as well as the importance accorded to the preservation of the domestic deities.[683] The institution of adoption in Roman law was developed specifically as a means of acquiring an heir and successor to maintain the family name.[684] Thus, the relevance and focus of adoption was in relation to serving the needs of the family.

In early Roman law, a man was not regarded as an individual, but rather as a member belonging to a particular group, with the family being the smallest recognised group. A family grouping consisted of those persons united through agnatic[685] ties of relationship, including collateral relatives of every *paterfamilias* as well as their descendants. The Roman family formed a monocratic legal unit that consisted of the *paterfamilias* as the head and all persons who fell under the extensive power of the *paterfamilias*. This included his wife, if she was *uxor in manu*,[686] as well as his children who had not passed out of his *paterfamilias*, and also his bondsmen and slaves. The family unit also formed a religious entity that together worshipped deities of the particular household.[687]

In Rome, the perpetuation of the family name and unit as well as the preservation of the cult of the domestic deities was of great importance. Where the family did not have its own heir, adoption was a means to acquire one.[688] Adoption was thus an important option to a family, particularly one of influence, as an heir was essential to carry on the family name. The Roman aristocracy in early Roman law commonly used this as a

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683 Kaser *Romisches Privatrecht (Roman Private Law tr Dannenbring)* 2ed (1968) 261.

684 Van Zyl *History and Principles of Roman Private Law* 92.

685 Agnatic ties are those that exist between two persons where it is possible to trace a connection to a common male ancestor.

686 Meaning as the wife passes into the *potestas* of her husband, she is not an agnate of her own children. She only becomes an agnate of her children if, in consequence of her marriage, she passes into the *manus* (*patria potestas*) of her husband and is thereby united with her children under the same *patria potestas*. A wife *in manu* is legally speaking the sister of her children. As a wife falls under the general power her husband held over the family, she too is seen as a member of her husband's household. She holds the position of *familiaefamilias loco*.

687 Kaser *Romisches Privatrecht (Roman Private Law tr Dannenbring)* 2ed (1968) 50.

688 Kaser *Romisches Privatrecht (Roman Private Law tr Dannenbring)* 261.

stratagem with the focus being primarily to serve the family's needs, whilst the needs of the adopted person were considered less important. However, in later Roman times, during the reign of Emperor Justinian,[689] an important change in public policy became apparent, and for the first time, the needs and interests of the adopted person were taken into consideration.

Two distinct forms of adoption were recognised in Roman law, namely *adrogatio* and *adoptio*.[690] In both instances, the adopted person fell under the *patria potestas*[691] of the person adopting. *Adrogatio* and *adoptio* differed from each other significantly, in both form as well as function.[692] The adoption of a person previously *sui iuris*[693] was known as *adrogatio*, whilst the adoption of a person *alieni iuris*[694] was referred to as *adoptio.*[695] Both were popular and widely practised.[696] Through adoption, the adopted person became the *filius*[697] of the adoptive person and all relationships with the former family of the adopted were terminated.

The aim of both *adrogatio* and *adoptio* was to confer the adopted person with the same rights and responsibilities as a person would have had as the birth child of the adopter. The people under the adopted person's power, as well as all his property passed to the new *paterfamilias*.[698]

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689 Sixth Century AD.

690 Schulz *Classical Roman Law* (1951) 143; Sohm *The Institutes of Roman Law tr Ledlie* 3ed (1907) 479.

691 The adoptive parent acquired an almost unfettered power – the right of life and death, the so-called *patria vitae necisque*.

692 Buckland *A Text-Book of Roman Law* 2ed (1932) 121; Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 15L.

693 The meaning of this word is an independent person.

694 The meaning of this word is a dependant or a subordinate member of the family. G.1.48. as referred to in Buckland *A Text-Book of Roman Law* 101.

695 Buckland *A Text-Book of Roman Law* 121.

696 Boberg *The Law of Persons and the Family* 350.

697 Meaning the child (son) of the person concerned.

698 Kaser *Romisches Privatrecht (Roman Private Law tr Dannenbring)* 262.

4 2 2 *ADROGATIO*

Adrogatio was the earlier form of adoption and was popular during the period pre-dating 450 BC and the time of the Law of the Twelve Tables.[699] *Adrogatio* was a legislative act, but no formalistic legal rules existed to effect *adrogatio.*[700] In this instance, the adopting parent acquired *patria potestas* of another who was *sui iuris.*[701] The relationship that the *sui iuris* had with his former family was terminated through adrogation and in effect reduced an independent person to a *filiusfamilias.*[702] *Adrogatio* brought the *adrogatus* completely into the family.[703] As adoption brought paternal power into existence, a woman was automatically disbarred from adopting.[704] The adoption was subject to the approval of the popular assembly.

Under the influence of Diocletian, a new form of *adrogatio* took place. This procedure took place before the emperor, who was Pontifex Maximus (the supreme pontiff), who then conferred the decree of *adrogatio* by means of an order known as the *rescriptum principis.*[705]

Over time, the function of the *comitia* became a mere witnessing of the act. No formal legal rules regulated adoption, which was based on the legislative act of approval of the popular assembly only. Eventually, it became a discretionary decision taken by the emperor of the time. The decree of *comitia* had become a mere formality of the popular assembly, although it had originated as a legislative act.[706] The *comitia* was

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699 *Lex Duodecim Tabularum*.

700 Schulz *Classical Roman Law* 144.

701 The meaning of this word is independent person. G.1.99–107; Buckland *A Text-Book of Roman Law* 124.

702 The meaning of this word is a dependent status.

703 Buckland *A Text-Book of Roman Law* 125.

704 Schulz *Classical Roman Law* 144; Buckland *A Text-Book of Roman Law* 123; D.1.7.40.1.

705 The meaning hereof is imperial rescript. The formula ran as follows: "*velitis iubeatis, uti L.Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eis natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est, haec ita ut dixit, ita vos Quirites rogo*". Kaser *Romisches Privatrecht (Roman Private Law tr Dannenbring)* 261; Schulz *Classical Roman Law* 148; Sohm *The Institutes of Roman Law tr Ledlie* 479.

706 Schulz *Classical Roman Law* 144.

sovereign.[707] With *adrogatio* it was essential that the adopted person renounce his former domestic cult. Although it appears as though the consent of both the adoptive parent and the adopted person was required,[708] they were not required to be present during the procedure, nor were their need to consent legislated.[709]

The consequence of such a decree meant that the relationship between the former family and the *filius* was terminated legally, and a new legal relationship between the *filius* and the adoptive parent was created.[710] Thus, *adrogatio* had a far-reaching impact on both the adopted person and all his descendants.[711] The effect of adoption was accordingly that the *adoptatus*[712] was removed from the *potestas* of one and placed under that of another. The cognatic blood tie remained unaffected by *adrogatio*[713] and although the *adoptatus* acquired the rights of a natural son through the procedure, these rights were dependent on the agnatic tie.[714] *Adrogatio* had the effect that the adopted person was brought completely into the family of the *adrogatus*,[715] and the *adrogatus* brought with him all of those under his *potestas*[716] at the time of adoption.[717]

Adrogatio was restricted and was only allowed as a means of last resort to a family who had no successor. Where a family already had a child, the *adrogatio,* when allowed, was allowed once only.[718] The adopter had to provide sound reasons for

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707 Schulz *Classical Roman Law* 146.
708 Buckland *A Text-Book of Roman Law* 127.
709 Schulz *Classical Roman Law* 144–145.
710 Buckland *A Text-Book of Roman Law* 125, refers to the following: "*adrogatio* destroyed a family and thus was only allowed to save another *ie*, to provide a *heres*".
711 Thomas *Textbook on Roman Law* (1976) 437–438 refers to G.1.107; D.1.7.15 and Inst.1.11.11; Buckland *A Text-Book of Roman Law* 125; Van Zyl *History and Principles of Roman Private Law* 92.
712 The word translates into the adopted child.
713 Buckland *A Text-Book of Roman Law* 122.
714 Sohm *The Institutes of Roman Law tr Ledlie* 479.
715 Schulz *Classical Roman Law* 124.
716 Buckland *A Text-Book of Roman Law* 125.
717 Sohm *The Institutes of Roman Law tr Ledlie* 480.
718 Buckland *A Text-Book of Roman Law* 126.

adrogatio and the *impubens* were thus protected against any disadvantages that might result from his adoption.[719]

Adrogatio underwent certain changes over time, but it retained its essential character throughout the development of Roman law. This form of adoption was frequently practised by influential families to secure an heir and successor to the family name. An example is found where Octavius (later known as Emperor Augustus) was adrogated by Julius Caesar after his death in 44 BC. When Julius Caesar died, he did not have a natural heir, although he had made moves to establish his nephew, Octavius, as his successor. The process was not completed before his demise, but Caesar had stated his intention in his will. Octavius was adopted posthumously through the process of *adrogatio.*

4 2 3 *ADOPTIO*

Adoptio as an institution developed later than *adrogatio* and was based on certain principles in the Law of the Twelve Tables[720] and the rules of the *ius civile*, which provided that where a son was sold three times, he would be freed from his natural father's *potestas.*[721] *Adoptio* was the procedure recognised to adopt a dependent person. The act of adoption was artificial and formalistic and was not legislative in nature.[722]

Adoptio took place in two stages, consisting firstly of the preliminary sales followed by the act of adoption. The preliminary sale or sales had the effect of destroying the *potestas* that a father had over his son, who was *alieni iuris*, and these sales were

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719 Sohm *The Institutes of Roman Law tr Ledlie* 481.

720 A comprehensive collection of rules framed by the officers called the *Decemviri*. These men were especially appointed for this purpose.

721 Buckland *A Text-Book of Roman Law* 121; G.1.98,99; Ulp. 8. as referred to in Buckland *A Text-Book of Roman Law* 121 fn 11; Sohm *The Institutes of Roman Law tr Ledlie* 480.

722 Schulz *Classical Roman Law* 146.

followed by a repeated sale. This transaction was based on the rule of the Law of the Twelve Tables.

It was essential to the adoption that the *patria potestas* be abolished.[723] The first sale would take place to the confidant, who could be the adopter himself. The confidant or adopting person would free the son who would then revert to the *potestas* of his natural father. The second sale then took place with the confidant or adopting person, and again the confidant (or adopting person) would free the son. The third sale had the effect that the bondage that the natural father had over his son was destroyed.[724]

The claim by the adopting father against the natural father that the *filius* was *his* son is the act of adoption. There was no defence against this claim and the judgment went accordingly.[725] The transferral of the son was through formal *mancipatio.* The consent of the *filius* was not required.[726] Once the adoption process was completed, the adoptive son (based on his agnatic tie to the adopter) acquired the same rights as that of a natural son to the adopter.[727] The cognatic tie was not affected.[728] Any children that the adopted son may have had prior to the third sale remained in the *potestas* of his natural father, while those conceived after the third sale fell to the new family.

During the period of Justinian, significant changes were effected in respect of adoption. Although the fictitious sales were dispensed with as useless, their essence was preserved.[729] The former procedure was abolished and replaced by a far simpler one. The original father, as well as the adoptive parent and the *alieni iuris*, would appear before the magistrate. The original father would express his desire to give up his son

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723 *Ibid*.
724 Sohm *The Institutes of Roman Law tr Ledlie* 480.
725 *Ibid*.
726 Buckland *A Text-Book of Roman Law* 127.
727 Buckland *A Text-Book of Roman Law* 122.
728 *Ibid*.
729 Lee *An Introduction to Roman-Dutch* 3ed (1931) 42; Gr.1.6.1. Van Leeuwen, 1.13.3; Voet, 1.7.7.; *Robb v Mealey's Executor* (1899) 16S.C.133.

for adoption and the adoptive parent would declare his desire to adopt the son as his own. The transaction of *adoptio* was then entered on the *acta* of court.[730]

Furthermore, it is not clear whether the consent of the *adrogatus* was required in classical law, but it certainly was not required in early Roman law. The practice of adoption was common late in the Republic and early in the Empire. Diocletian extended the rule of adoption in 291 AD, allowing a woman to adopt where she had lost her natural children. Justinian accepted this rule as a general practice where the Emperor had given his permission. It is apparent that throughout the development of adoption in Roman times, the focus was more on the interests of the adoptive parent than those of the child; the child's interests were of secondary importance.

4 3 ROMAN-DUTCH LAW

South African common law evolved essentially from three countries. Our law had its origins in Roman territory for a thousand years prior to 535 AD, in the Netherlands for centuries prior to the 19th Century, and in South Africa from 1652. Roman-Dutch law is a fusion of Roman principles and early law from the Netherlands; these laws form the core of our common law today (with English law as a lesser influence).

The popularity of adoption waned over time and was not formally practised in Roman-Dutch law, which did not incorporate the Roman principles of adoption.[731] The concept of *patria potestas* was foreign to Roman-Dutch law and, although there are no formal references to adoption, it is quite plausible that informal adoptions took place. However, no legal consequences arose from such informal agreements and, in the eyes of the law; the child remained the child of the original family. Parental power could

730 Buckland *A Text-Book of Roman Law* 123; Sohm *The Institutes of Roman Law tr Ledlie* 480.

731 Gr.1.6.1 Van Leeuwen, 1.13.3; Voet, 25.7.6.; Van der Linden 1.4.2.(as referred to in Lee *An Introduction to Roman-Dutch* 42 fn 4); Boberg *The Law of Persons and the Family* 350; Du Bois (ed) *Wille's Principles of South African Law* 193; Voet *The Selective Voet* Book 1 Title 7 143.

not be transferred from the natural parent to another through adoption. Van Leeuwen states:

> [t]he adoption of children as it existed among the ancients is unknown and not practised among us, although children adopted i.e. taken into our family and educated by us may, like other persons, be instituted our heirs, without, however, our being obliged to do so: but, unlike children or blood relations, they cannot inherit *ab intestate.*[732]

Friesland was an exception to the rule.[733] Voet states that it seems as though adoption still existed in Friesland as the statute regulating adoption was never *per se* abolished.[734] Whether adoptions did in fact take place has been open to question.[735]

4 4 SOUTH AFRICAN CUSTOMARY LAW

Customary law is an integral part of South African law. Doubt has been raised as to whether adoption was known and practised in customary law,[736] but Ferreira suggests otherwise.[737] She notes that adoption was known to customary law, but that customary adoption differs substantially from statutory adoption. Referring to Bennet she states that whilst the consequences of the adoption are the same between the two systems, there are significant differences between African customary law adoption and common law adoption.[738] According to Ferreira, the process of adoption in customary law involves a private arrangement between the parties to such adoption.[739] An agreement to adopt is entered into between the child's biological father and the prospective adoptive parents. On reaching an agreement that the child under consideration is to

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732 Van Leeuwen in Gotnm (as translated by Kotze) Vol 1.87.
733 Boberg *The Law of Persons and Family Law* 350 fn 2; Grotius Inleidinge 1.6.1; Voet *Commentarius* 1.7.11.13.
734 Voet *Commentarius* 1.7.7.
735 Studiosus "Die Aard van die Gesagsregte van Ouers ten Opsigte van hul Minderjarige Kinders" 1946 *THRHR* 45.
736 Bennett *Customary Law in SA* (2004) 107.
737 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 20.
738 Bennett *Customary Law in SA* 319.
739 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 21.

be adopted an expectation exists that the biological father of the child must inform the relevant traditional leader or chief. The biological mother of the child has no say in the adoption and is merely informed thereof.[740] Therefore while the process itself of adoption differs from civil law adoption, the outcome of the adoption is the same. Following the agreement of adoption in customary law, the child becomes the child of the adoptive parents.

4 5 LEGISLATIVE HISTORY OF ADOPTION

4 5 1 INTRODUCTION

Although informal adoptions would have taken place in South Africa, adoption as a legal act was unknown before 1923. These informal adoptions generally took place by private agreement between parties.[741] In terms of our common law, where parents informally agreed to give custody and control of their child to another, such agreement was of no force and effect.[742] Such an "underhand" or "private" adoption could not be enforced and created no legal relationship between the adoptive parents and the child concerned. Adoption as a legal act, creating a legal relationship between a parent and a child, was unknown to the (then) Cape of Good Hope. This position was confirmed in *Robb v Mealey's Executor*,[743] where the court held that adoption was not recognised as a means of transferring parental power from the natural parent to another person. It is a factual objection to this contention that the law of the colony does not recognise adoption as a means of creating the legal relationship of a parent and the child.[744]

Under Roman law, this relationship was created but Roman-Dutch law did not, in this respect, follow the Roman law. The court pointed out that there was no machinery for

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740 *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) 1147.
741 *Edward v Fleming* (1909) TH 232 (testamentary provision); *Robb v Mealey's Executor supra* 133–136 and contractually *Fibinger v Botha* (1095–1910) 11 HCG 97.
742 *Van der Westhuizen v Van Wyk* 1952 (2) SA 119 (GW).
743 *Robb v Mealey's Executor* 133–136.
744 *Ibid*.

adoption in the Cape Colony, and that the positive law of the time did not recognise adoption as a means of creating a legal relationship of parent and child. Such a relationship was only established between a natural parent and a child.

The need for legislated adoption became apparent during the early twentieth century. Adoption legislation was first enacted in 1923 in the form of the Adoption of Children Act, which recognised adoption as a means of legally creating the relationship of parent and child.[745] Provision was made for adoption as a legally recognised institution, allowing such adoption to take place where it was in the interests of the child concerned. The Adoption Act was superseded first by the Children's Act 31 of 1937, followed by the Children's Act 33 of 1960, Children's Amendment Act 50 of 1965, Child Care Act 74 of 1983 (CCA) and finally the Children's Act 38 of 2005 (CA). With a view to strengthening and increasing its international commitments, a post-democracy South Africa has become party to a number of international instruments. These instruments together with the resolutions and guidelines they have adopted were discussed in chapter 2.

4 5 2 LEGISLATION

4 5 2 1 ADOPTION OF CHILDREN ACT 25 OF 1923

The Adoption of Children Act[746] was promulgated on 30 June 1923,[747] and the Act became operational on 1 January 1924.[748] Adoption was thus legalised for the first time in South Africa. The absence of the institution of adoption in early South African law can be explained by the fact that Roman-Dutch law, the South African common law, did not recognise the legal concept of adoption and English law also had no influence on South African law in this regard.[749] Prior to this Act, adoption of a child

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745 Adoption of Children Act 25 of 1923.
746 25 of 1923.
747 *GG* 1330 of 30 June 1923, GN 1074.
748 By Proc 244 in *GG* of 30 November 1923.
749 De Bruin *Child Participation and Representation in Legal Matters* 75.

took place by private arrangement.[750] South Africa's adoption legislation was therefore based on neither Roman-Dutch nor English law but rather on legislation originating in New Zealand.[751]

Private adoptions were not recognised as having legal consequences and, as a result, no legal parent-child relationship was possible between the child and the adoptive parent. The legal relationship of the natural parent and the child remained intact. As an informal adoption led to insecurity of position for prospective adoptive parents, many shied away from adopting a child, which then led to the child being brought up in a state institution instead of in a family environment.[752]

The main objective of the adoption of the Children's Act was to formulate the legal requirements to sever the existing legal bond between a child and its natural parents or guardians and to create a new relationship between the adoptive parent and the child.[753] Only adoption was regulated by this Act. The Act made provision for the adoption of a child subject to the provisions of the Act and the confirmation of adoption by a magistrate. The core policy was that adoption was allowed where it was in the interests of the child and in order to promote the welfare of the child.[754]

The Act provided that, before making an order for adoption, the magistrate had to be satisfied that the person proposing to adopt a child was of good repute and that he or she was a fit and proper person to be entrusted with the care and custody of the child.[755] Such prospective adoptive parent/s had to be able to bring up, maintain and educate the child sufficiently.[756] Where an order for adoption was made, the adopted

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750 *Robb v Mealey's Executor supra* 136; *Edward v Fleming supra* (testamentary provision); *Fibinger v Botha supra* 97 (contractually).

751 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 25

752 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 24.

753 Joubert "Interracial Adoptions: Can We Learn from the Americans?" 1993 *SALJ* 726; De Bruin *Child Participation and Representation in Legal Matters* 75.

754 S 4(1).

755 S 4(1)(c); De Bruin *Child Participation and Representation in Legal Matters* 75.

756 S 4(1)*(c)*.

child would legally be deemed the child born of lawful wedlock of the adopting parent.[757]

There was no explicit ban on inter-racial and inter-cultural adoptions in the adoption of the Children's Act, but it is submitted that the racial consciousness of the day was so deeply entrenched that a legislative bar was not necessary.[758] Joubert[759] submits that no formal inter-racial adoptions are known to have taken place, and although there were no legal provisions prohibiting such adoptions, "it can be accepted that such adoptions would have run contrary to the accepted social views of the time".[760] This too is the view of Mosikatsana[761] who opines that racism was so firmly rooted in the national psyche that it was felt that there was no need for legislative intervention. It can accordingly be assumed that the legislature did not contemplate that anyone would wish to adopt a child that differed from them in race and/or culture.[762] The Adoption of Children Act was repealed and replaced by the Children's Act of 1937.[763]

4 5 2 2 CHILDREN'S ACT 31 OF 1937

The Children's Act was assented to on 13 May 1937 and came into operation on 18 May 1937.[764] This Act repealed the Adoption of Children Act. The basic policy of permitting adoption where it was conducive to the welfare of the child was retained in this Act, although its scope was much broader than its predecessor.[765] Provision was made for all matters relating to children and not exclusively for matters relating to adoption. The provisions relating to adoption were contained in chapter VII. In terms

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757 S 8(1)*(a)*.
758 Zaal "Avoiding the Best Interests of the Child: Race-matching and the Child Care Act 74 of 1983" 1994 10 *SAJHR* 374.
759 Joubert 1993 *SALJ* 726.
760 *Ibid*.
761 Mosikatsana "Transracial Adoptions: Are We Learning the Right Lessons from the Americans and Canadians? A reply to Professors Joubert and Zaal" 1995 *SALJ* 607.
762 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 26–27.
763 31 of 1937.
764 The Afrikaans text was signed by the Governor-General of the time.
765 S 69(2)*(c)*.

of this Act, a child up to the age of 19 years remained eligible for adoption[766] on condition that the proposed adoption would serve the interests of the child and furthermore was conducive to the welfare of the child.[767]

The new Act was also responsible for the establishment of Children's Courts. Since their establishment, the Children's Court in the area in which a child resides has considered all adoption applications.[768] Giving jurisdiction to a district court to hear matters that relate to adoption is contrary to the general rule that all matters that have an effect on status are to be heard by the High Court.[769] In *AD v DW*, the Constitutional Court held:

> With or without the necessary information, the High Court was correct in holding that the appropriate route for the proposed intercountry adoption was to bring the proceedings for adoption in the Children's Court.[770]

It can be argued that adoption has a profound effect on status and it may even be argued that it has a more profound impact on status than any other legal action or application. However, the Constitutional Court has considered this issue on two occasions and in both instances found that the Children's Court was the correct forum to make orders of adoption.[771]

No specific provision was made in the Act requiring the consideration of race or culture of the parties, and thus theoretically, inter-racial or inter-cultural adoption was not prohibited.[772] However, given the social views of the day, it is unlikely that inter-racial adoptions would have taken place. According to Mosikatsana, it appears that no such

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766 S 1.
767 S 69(2)*(c)*.
768 S 69(1).
769 Skelton and Carnelley *Family Law in South Africa* 284.
770 *AD v DW* 2008 [2007] ZACC 27 par 29.
771 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *AD v DW* 2008 (4) BCLR (CC) 359.
772 Mosikatsana 1995 *SALJ* 607; see also Joubert 1993 *SALJ* 726.

adoptions were confirmed,[773] notwithstanding the fact that they were not expressly prohibited.[774] As referred to above, Mosikatsana bases the omission by the legislature on the racial and political trend in South Africa at the time. Racism was already firmly established in the nation at the time, and there was thus no need for legislative intervention in this regard.[775] The Children's Act of 1937 was repealed by the Children's Act of 1960.

4 5 2 3 CHILDREN'S ACT 33 OF 1960

4 5 2 3 1 INTRODUCTION

The Children's Act 33 of 1960 was assented to on 7 April 1960 and came into operation on 14 April 1960.[776] Some changes were made to the existing law in South Africa relating to adoption, but the basic policy of its predecessor was retained – namely, that adoption was to be considered where it was in the interests of the child and where it would be conducive to the welfare of the child. The aim of the Act was to promote the welfare of the child by admitting him or her to an authentic family while at the same time safeguarding the interests of his or her natural and prospective parents.

4 5 2 3 2 QUALIFICATIONS OF ADOPTING PARENT

In his or her application to the commissioner, an applicant wishing to adopt a child had to satisfy the commissioner that he or she was a person of good repute and was a fit and proper person to be entrusted with the custody and care of the child concerned. Furthermore, he or she had to have adequate means to maintain and educate the child.[777] Besides the technical requirement for the prospective adoptive parent to be a

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773 Joubert 1993 *SALJ* 727.
774 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 26.
775 Mosikatsana 1995 *SALJ* 606.
776 The Governor-General appointed at the time signed the Afrikaans text.
777 S 71(2)*(b)*.

South African citizen, section 72 provided the only attempt by the legislature to define the qualifications for a parent.

The role of the social worker was important in terms of the Act in this regard. It was apparent that the social worker concerned was expected to undertake a thorough investigation into the background of the natural parents, the child and the prospective adoptive parent or parents. The assessment of the suitability of a particular applicant weighed heavily with the commissioner tasked with making a decision on adoption.

4 5 2 3 3 THE ISSUE OF RACE

The then-deputy Minister of Education, Science and Social Welfare and Pensions, Mr BJ Vorster, initiated the publication of clause 1*(x)(j)* of the Children's Bill of 1960. Read together with section 35(2), this clause would have had the effect that a child could be forcibly and permanently removed from his/her family. Such removal would have been based solely on the fact that the race of the family members and the child differed. This mandatory termination of a parent-child relationship was in line with the existing political ideology in South Africa and the existing race-conscious legislation – *inter alia*, the provisions of the Immorality Act.[778] Concern that this clause would lead to much international criticism led to its withdrawal before its enactment. Despite the withdrawal of the proposed clause, the approach of the government to interracial adoptions was clear. The ideology of race segregation superseded the considerations of the child.

Although nowhere is inter-racial adoption prohibited in chapter VII of the Act, section 35(2) was an indication of the intention of the legislature. This section read as follows:

> In selecting any person in whose custody a child is to be placed, *regard shall be had* to the religious and cultural background and the ethnological grouping of the

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778 23 of 1957.

> child and, in selecting such a person, also to the nationality of the child and the relationship between him and such person (my own emphasis).

The meaning and extent of "regard shall be had" was vague and uncertain and it was left to the judiciary to determine these issues. Rapid urban expansion and social integration in the 1960s led the existing *apartheid* government to introduce legislation that provided for the segregation of the races. In keeping with this approach, the legislature included "race" as a consideration in the parent-child relationship for the first time. Certain terms were introduced into the Act to achieve this end – namely, the "culture" and the "ethnological grouping" of the adoptive parents and the adoptive child were deemed relevant.[779] These terms first appeared in section 35(2), a section that later became section 35(2)*(a)*.[780] This was in keeping with the enactment of a series of measures introduced as a means to prohibit certain heterosexual trans-national relationships between adults.[781]

In effect, section 35(2) was a modified version of the withdrawn clause of 1960. Read together with the proposed clause 1*(x)(j)*, section 35(2) was clear: where the parent or family of a child was registered in the population register as classified under a particular race, and the race of the child differed from its family members, such child could be forcibly removed from the care of its family. Race could effectively serve as a total bar on adoptions. Placement would have operatively been rendered impossible as such placement would have rendered the child *ipso facto* as a "child in need of care".[782]

Without clause 1*(x)(j)*, section 35(2) was unclear. The provision stipulating that "regard shall be had" to the race, religion and culture of the child was confusing and

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779 S 35(2).

780 This took place when ss 35(2)*(b)* and 35(2)*(c)* were added to the Children's Amendment Act, 50 of 1965.

781 Immorality Act 5 of 1927 (renamed the Sexual Offences Act 23 of 1957).

782 Zaal 1994 10 *SAJHR* 375.

ambiguous. To what extent did regard need to be taken of these considerations, and, under what circumstances would a court or social welfare worker treat the difference in race, culture or religion as a bar to (transracial) adoption? Spiro interpreted this to mean that a child might not have been adopted where the race of such child differed from that of the adopting person, unless he or she was the natural guardian or custodian of the child.[783]

Where the child was illegitimate and classified as belonging to the same race as his natural mother, the child was deemed to be of the same religion, nationality and cultural background as his mother.[784] The legal directive of section 71(1)*(b)*, when incorporating the provisions of section 35(2)*(b)*, created the legal basis of the so-called "matching like to like" and resulted in an extensive set of criteria to which "regard need be had" by social workers involved in adoption matters.

4 5 2 3 4 THE *JOFFIN* CASE

Section 35(2) was first tested in the case of *Joffin v Commissioner of Child Welfare, Springs*.[785] The proceedings were initiated by way of review. The plaintiffs in the case requested that their names be placed on a waiting list to adopt in January 1962. They were a married professional couple of good character and were followers of the Jewish faith. In August 1962, an illegitimate child was born to a mother who belonged to the Protestant Christian Dutch Reformed Church. The natural mother gave the baby up for adoption and the plaintiffs had had continuous care of the child for the first 30 days from the child's birth with the full consent of the child's mother.

On their application to adopt the child, the commissioner of the Children's Court refused to confirm the application. The reason for the refusal was the vast difference in religious practices of the parties; the natural mother belonged to the Christian Dutch

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783 Spiro *Law of Parents and Child* (1985) 58.
784 S 35(2)(b).
785 1964 (2) SA 506 (T).

Reformed Church whereas the prospective adoptive parents were followers of the Jewish faith.[786] The court was called upon to decide whether the words "shall have regard to" in the Act were mandatory or whether the wording conferred a discretion on the court in making its decision.[787] In October 1963, the plaintiffs were informed that their application to adopt the infant had been refused.[788]

Application was made to the second defendant on 8 October 1963 for the plaintiffs to adopt the infant. The second defendant delivered an oral judgment on 30 October refusing the application. It was submitted to the court that the decision of the second defendant was based on the consideration of the facts of the particular case and that it had found that in this instance the court had no discretion in its application of section 35(2), read with section 71*(b)*, given the differences that existed between the Jewish and Dutch Reformed faiths in the matter under consideration.[789]

The matter was taken on review on the basis that section 35(2) of the Act enjoined the Commissioner to consider the matters in section 35(2) and to exercise his discretion based on all the factors. Section 71(1)*(b)* provided further and reads as follows: "[i]n considering any such application the Children's Court shall have regard to all the matters mentioned in sub-section (2) of section 35."

And section 35(2) provided:

> In selecting any person in whose custody the child is to be placed or any children's home, other than a children's home established in terms of sub-sec (3) of section 39, to which a child is to be sent, regard shall be had to the religious and cultural background and ethnological grouping of the child and, in selecting such a person, also to the nationality of the child and the relationship between him and such a person.

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786 *Joffin v Commissioner of Child Welfare, Springs supra* 507 B.
787 *Joffin v Commissioner of Child Welfare, Springs supra* 508 par Hashal not just "par??[F H].
788 *Joffin v Commissioner of Child Welfare, Springs* 507 G.
789 *Joffin v Commissioner of Child Welfare*, *Springs supra* 507 508 H.

The plaintiffs contended that the only issue to be decided was whether the second defendant had discretion in terms of section 71(2)*(a)*, read with section 35(2) of the Act.[790] In his consideration of the issue before the court, Ludorf J referred to the English decision of *Illingworth v Walmsey*,[791] where the court held that the words "regard shall be had to [the difference]" meant that the tribunal in question had to bear the difference in mind as a factor, but that the tribunal had a discretion in reaching its decision.[792] Referring to the fact that each case had to be considered on its own merits, Ludorf J held that "[T]he Commissioner did not exercise any discretion. He had no facts to apply the law to. He was called upon to decide one question which was "does the section give me a discretion?" and he gave the wrong answer in law".[793] Furthermore, in *Perry v Wright*,[794] the court held that similar words were "a guide, not a fetter".[795]

Citing the cases as persuasive authority for his decision, Ludorf J concluded that the words "have regard to" were in fact not mandatory in their application. The court held that section 71(1)*(b)* softened section 35(2)*(c)* in that, where a decision of adoption was considered and it appeared there was a difference of religion, as in the case at hand, the tribunal should bear this difference in mind to exercise a discretion in regard thereto. Section 35(2) granted a discretion that should be exercised but was not mandatory in its application.

The review court set aside the commissioner's refusal to allow the Jewish couple to adopt the child concerned and the application by the plaintiffs was granted. This approach to the interpretation of section 35(2) granted leeway to legally permit interracial adoptions. Although laudable, it did not take effect in practice. Once an adoption application was granted, the provisions of segregation laws would come into

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790 *Joffin v Commissioner of Child Welfare*, *Springs supra* 507 H.
791 (1900) 2 QBD 142.
792 *Joffin v Commissioner of Child Welfare, Springs supra* 508 F.
793 *Joffin v Commissioner of Child Welfare, Springs supra* 510 C.
794 (1908) 1 KB 441.
795 *Perry v Wright* 458.

effect and bar persons of differing race classification from living together. The segregation laws of the day effectively prevented a child from being placed with foster parents of a different race classification before the adoption process was finalised. However, once finalised, the child could not be prevented from living with the adoptive parents. To give effect to the legislative intention of the withdrawn clause 1*(x)(j)*, the legislature published two further subsections to section 35(2) in 1965.[796]

4 5 2 3 5 THE CHILDREN'S AMENDMENT ACT 50 OF 1965

With the promulgation of the Children's Amendment Act of 1965 two subsections of these amendments, namely section 35(2)*(b)* and section 35(2)*(c)*, had relevance to section 35(2). They provided as follows:

> *(b)* Any illegitimate child whose classification in terms of the Population Registration Act, 1950[797] is the same as that of his mother shall be deemed to have the same religious and cultural background and nationality as his mother and only relatives of the mother of any such child shall be regarded as being related to such child.
>
> *(c)* A child shall not be placed in the custody of any person whose classification in terms of the Population Registration Act, 1950, is not the same as that of the child except where such person is the parent or guardian of the child.

Because of the above statutory conditions, it is evident that the classification of a child in terms of the population register played a decisive role in the placement of the child. Race became an overriding consideration in placements for adoption and in terms of section 35(2)*(c)*. No child could be placed in the custody of a person who was classified as being of a different race.

The exclusion of a parent or guardian was considered as a means of defending the legislative position in South Africa in that humanitarian grounds had formed the basis for the parental exception clause in inter-racial adoptions. Those who were aware of

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796 Children's Amendment Act 50 of 1965.

797 30 of 1950.

the full machinery of the Act were not fooled and the parental exception clause was treated as meaningless. The introduction of the terms “culture” and “ethnological grouping” left no uncertainty as to the intention of the legislature concerning the relevance of these factors in making a placement of the child. The Children’s Amendment Act accordingly confirmed the approach to inter-racial and inter-cultural adoptions.

The defenders of South Africa’s image contended that the inclusion of the exception in favour of a child’s parent or guardian meant that the legislature’s intention was that a child’s custody determination rested solely on the criterion of the best interests of the child. However, it is clear that this was not so when one has reference to other provisions of the Amendment Act. Section 35(2)*(c)* did not alter the legal position of the mother of the illegitimate child, as it was accepted that generally the mother would have been able to keep her child in her custody.

The parental exception (when read in isolation) however, appeared to benefit the father of an illegitimate child – in that where the race of his child varied from his own official classification, a father might then be considered as the exception under section 35(2)*(c)*. However, when read with section 35(2)*(b)*, it is evident that the father did not classify as the exception to the bar in terms of the provision of section 35(2)*(c)*.

Section 35(2)*(b)* provided that where the child was illegitimate, only “relatives of the mother shall be regarded as being related to such child”. When the legal provisions are read together, it is clear that the father of an illegitimate child was excluded from the parental exception. Furthermore, an admission of having had intercourse with a person of colour would have been an admission of guilt of a crime under the Immorality Act.[798]

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[798] S 16 of 23 of 1957.

Section 71(1)*(b)* of the CA dealt with adoption requirements and indicated that the court adjudicating the adoption should have regard to the provisions of section 35(2), which were inclusive of the provisions of section 35(2)*(c)*. The reference to the provision that "regard shall be had" resurfaced and subtly, but effectively, confirmed the fact that the parental exception to transracial placement in section 35(2)*(c)* was more apparent than real in its supposed objective from a humanitarian perspective.

Defenders of the government at the time could rely on the pretext that natural parents formed an exception to the rule where their race classification differed from that of their child. However, in practice, this translated differently.

Although the terminology used by the Act was vague and ambiguous when stating that "regard" need be had to the racial bar when considering the rights of natural parents, in practice, those persons involved in the placement of children were fully aware of the machinery of the whole Act which, when read holistically, rendered the exception to the racial bar meaningless. Adoption and placement of children in effect continued along the lines that the racial bar was mandatory and not discretionary. The courts were called upon to pronounce on the meaning of the provision that "regard shall be had" in *Ex Parte Kommissaris van Kindersorg, Boksburg: In Re N.L*.[799] A discussion hereof follows.

4 5 2 3 6 *EX PARTE KOMMISSARIS VAN KINDERSORG, BOKSBURG: IN RE N.L*

In 1979, the Supreme Court (as it was then), as upper guardian to all minors, was called upon to determine the validity of an adoption order in *Ex Parte Kommissaris van Kindersorg, Boksburg: In Re N.L*. The reason was that the commissioner in the adoption application was concerned that he had not paid sufficient attention to the provision of section 35(2)*(a)*. The adoptive parent was classified as belonging to a

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[799] 1979 (2) SA 432 (T).

different race to that of the adoptive child.[800] Under consideration was the question whether sections 35(2)*(c)* and 71(1)*(b)*, read together, provided a mandatory bar to any placement of a child where the adoptive parents were not the biological parents of such child and were classified as belonging to a different race.

The facts of this case were that an illegitimate child was born of an intimate relationship between the mother of the child, and a coloured man. The mother consented to the adoption of the infant by a black adoptive mother who had been married legally to her coloured husband. The prospective adoptive mother had been re-designated as a "coloured" person. Before the finalisation of the adoption, the prospective adoptive father passed away.

Although her husband was deceased, the adoptive mother of the infant resided in a coloured area and was fully accepted within the coloured community. She had been re-designated as "coloured" in terms of section 12(1)*(c)(ii)* the Group Areas Act,[801] but following the death of her husband and before the adoption was finalised, she reverted to her African status, as the Group Areas Act only made provision for re-designation where the marriage of the party subsisted. This marriage was terminated by the death of the husband and before the finalisation of the adoption process.

The child was placed in the care of the couple on 14 September 1977. Although the social worker involved supported the proposed adoption and the commissioner signed the consent form, the commissioner was concerned that the adoption was in fact illegal as it was prohibited in terms of section 35(2)*(c)* of the Act. The Supreme Court set down the matter for review.

Pending the decision of the court, the child was found to be "in need of care" in terms of section 1(1) of the Children's Act and was placed in the care of the prospective

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800 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 31.

801 36 of 1966.

adoptive mother awaiting the decision on review. The court under Esselen J referred to the decisions of the court in *Illingworth v Walmsey* and *Joffin v Commissioner of Child Welfare, Springs* with respect to the interpretation of the meaning of *"had regard to"* in section 35(2*).* In both instances, the court held that the commissioner retained discretion in reaching a final decision where the race of prospective adoptive parent/s and the infant child differed and that the provision of section 35(2) was not mandatory in nature. The welfare of the child was to be considered in all instances and the court held that it could find no reason to interfere with the decision of the commissioner to allow the adoption of the infant child by the parents. The adoption order was confirmed by the court.

The decision did not mean that inter-racial adoption was now permissible. Rather, it emphasised the placement of "like-with-like".[802] Esselen J made it clear that he had based his judgment partly on the fact that the adoptive mother had totally integrated into the coloured community – so much so that she was deemed to be coloured in all respects bar her classification in the population register. The discussion turns to the Child Care Act 74 of 1983 which replaced the Children's Act of 1960, and all its amendments.[803]

4 5 2 4 CHILD CARE ACT 74 OF 1983

4 5 2 4 1 INTRODUCTION

The Child Care Act was assented to on 15 June 1983 and came into operation on 1 February 1987.[804] The aim of the Act was to provide *inter alia* for adoptions and chapter 4 set out the framework for adoption.[805] The CCA included new developments and mechanisms to change the existing practice of adoption and expanded the possibilities

802 The requirement for race matching was finally done away with in 1991 in terms of the Child Care Amendment Act, 86 of 1991.
803 74 of 1983.
804 The State President signed the English text.
805 Ss 17–27 of 74 of 1983.

for adoption in South Africa. The *status quo* regarding private or underhand adoptions was retained and an attempt to secure an adoption in this manner resulted in it being of no force and effect.

4 5 2 4 2 FACTORS TO CONSIDER IN ADOPTION

The CCA retained the provision that the Children's Court in the district in which a child resided had the jurisdiction to effect an adoption order of the child and all requirements in terms of the Act had to be complied with before an adoption order was granted. Only when a child has been declared as a child in need of care may he or she be made available for adoption. Parents must be "fit and proper" to be entrusted with the custody of a child. Section 17 of the CCA stipulates who may adopt such child: spouses jointly; a widower or widow, or an unmarried or divorced person; a person who is married to the child's parent; or the natural father of a child born out of wedlock.

The CCA provided that the Children's Court "shall have regard" to factors set out in the Act. The single most important requirement when considering adoption was that the proposed adoption should serve the interests of the child and be conducive to the welfare of the child.[806] Davel states that this consideration was ultimately the deciding factor and is to be measured by all factors that will affect the future of the child and is not restricted only to financial and physical comforts. The Constitution provides that the best interests of the child are paramount in all matters concerning the child. The following requirements must also be met:

(a) The court must have regard to the religious and cultural background of the child and his parents, as against that of the prospective parents.

(b) The court must consider the prescribed report from a social worker.

(c) The court must be satisfied that the applicant is, or both the applicants are qualified to adopt the child; that they have adequate means to maintain and educate the child; that they are of good repute, fit, and

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806 Schäfer and Schäfer "Children, Young Persons and the Child Care Act" in Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 78.

proper to be entrusted with the custody of the child; and that they qualify for South African citizenship.

(d) The court must be satisfied that the necessary consent for the adoption was obtained or that it has been dispensed with.

(e) The court must be satisfied that, if relevant, the child has consented to the adoption.

(f) The court must be satisfied that, where required, the child's foster parent has furnished a statement confirming that he or she does not wish to adopt the child.

Of special relevance to this research is the fact that regard must be had to the religious and cultural background of the parties involved in the adoption. This will be dealt with in more detail in chapter 7. Davel suggested that this did not mean that an exact correlation was required in all instances:

> Differences in religious or cultural background would therefore not exclude the possibility of adoption but will be factors taken into consideration when recommending a proposed adoption. Such differences will presumably be more significant where the child to be adopted is older and more likely to have identified with a particular religion or culture and less important where a very young or 'hard to place' child is adopted.[807]

Racial classification in the population register dictated that a child could not be placed in the custody of a person where the racial classification of the child and person differed, unless that person was the parent or guardian of the child (section 35(2)*(c)*). The question as to whether or not to adopt or promote transracial adoptions led to much debate. Mosikatsana made his point clear when he stated as follows:

> [T]ransracial adoptions do not conduce to the welfare of the child, for a child whom is transracially adopted may suffer racial prejudice from the adoptive parents or the community in which the adoptive parents live, which may damage the child's self-concept. Transracial adoptees may also suffer identity crises resulting from

807 Maithufi "The Best Interests of the Child and African Customary Law" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 140.

> the loss of racial or cultural identity, which is fairly important in South Africa, because it is a race-conscious society.[808]

The effect of the adoption is that an adopted child is deemed to be the legitimate child of the adoptive parents for all intents and purposes, as if he or she were born of the parent during the existence of a lawful marriage.

The CCA retained the *status quo* in regard to trans-racial adoption. Provision was made that "regard shall be had" to factors set out in the Act.[809] These factors included:

(a) The religious and cultural background of the child and his or her parents compared to that of the proposed adoptive parent/s; and,

(b) The racial classification of the child and his or her prospective adoptive parent/s respectively.

With respect to the religious and cultural background of the parties concerned, every application for adoption had to be considered *ad hoc*. Ferreira[810] opines that where

> [A]n attempt has to be made to place the child with suitable parents of the same or at least a similar culture (not necessarily race) to that of the biological mother and/or father, but should that not be possible, there is no reason why parents of a different culture cannot raise that child just as well as or maybe even better than parents of the same culture. In fact, the quality of the parenting, not race or culture, seems to have the principal influence on outcomes in placements.[811]

This approach is confirmed by Heaton who notes that

> [i]f the child is an infant or is still very young and has not yet formed links with his/her "own" culture, few objections can be raised against adoption of the child by parents of a different culture.[812]

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808 Mosikatsana 2000 *SAJHR* 48.
809 S 40 of 74 of 1983.
810 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 168-169.
811 *Ibid*.
812 Heaton *The Meaning of the Concept 'Best Interests of the Child' as Applied in Adoption Applications in South African Law* (LLM dissertation, UNISA 1988) 97.

A difference in the official race classification between the child to be adopted and the prospective adoptive parent created an absolute bar to the potential adoption, except where the adopting person or persons was or were the parent or guardian of the child concerned. The CCA provided that a child "shall not be" given in adoption where the race classification of the child and the prospective adoptive parent/s differed.[813] The Act further provided that certain matters had to be "to the satisfaction"[814] of the Children's Court before an adoption order was made. The matters concerned were as follows:

(a) The qualification and financial position of the prospective adoptive parent or parents;[815]

(b) Whether the prospective adoptive parents were "fit" and "of good repute";[816]

(c) Whether the proposed adoption was conducive to the interests and welfare of the child;[817]

(d) Whether the required consent of the various parties was obtained; and,[818]

(e) South African citizenship as a requirement.[819]

Section 18(4)*(c)* set the "best interests" of the child as the standard for all adoptions. With respect to the consideration of interests and welfare of the child, the court considered whether the proposed adoption was generally beneficial to the child concerned. It is submitted that the reality in South Africa is that there is an increasingly large number of children in need of care. The majority of these children come from

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813 Ss 18(3) and 40*(b)*.

814 The difference in the language used by the legislature indicates what is deemed as "overriding" *versus* "subsidiary" considerations.

815 S 18(4)*(a)* of 74 of 1983.

816 S 18(4)*(b)* of 74 of 1983.

817 S 18(4)*(c)*.

818 Ss 18(4)*(d)*,18(4)*(e)* and 18(4)*(g)*.

819 S 18(4)*(f)*.

disadvantaged communities, where, due to *inter alia* cultural beliefs and economic factors, the number of potential prospective adoptive parents is low and on the decline. The reality is that there is no time, and very little prospective potential for these children to wait to be placed pending a determination that satisfies same race and same culture placements.

If the choice is between an inter-cultural family or placement in a state institution, then surely the former ought to be accepted as the preferred option and not disallowed for theoretical and political reasons? All factors were taken into consideration and the circumstances of the child *vis-à-vis* the proposed adoptive parent or parents were considered. Where a child was born of a South African citizen and the prospective adoptive parent was not married to the natural parent of the child, the applicant or one of the applicants concerned had to be a South African citizen resident in the country. Alternatively, the applicant or applicants needed the necessary residential qualifications as determined in the African Citizenship Act to qualify for the grant of a certificate of naturalisation.[820]

The adoption order had the legal effect that all rights and obligations existing between the child and its natural parent or parents (and their relatives) were terminated. The adopted child was deemed legally and for all intents and purposes to be the legitimate child of the adoptive parent or parents.[821] With respect to intercountry adoption, the approach of the legislature was clear. Intercountry adoption was prohibited. The Child Care Amendment Act 96 of 1996 and section 1 of the Welfare Laws Amendment Act 106 of 1997, the Adoption Matters Amendment Act 56 of 1998 and the Child Care Amendment Act 13 of 1999 amended the CCA.

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820 44 of 1949.

821 S 20 of 44 of 1949; see *Board of Executors v Vitt* 1989 (4) SA 480 (C).

4 5 2 5 THE CONSTITUTIONAL ERA

4 5 2 5 1 INTRODUCTION

It must be noted that *intra*-country and intercountry adoption differs significantly. *Intra*-country adoption is a private affair with the involvement of public authorities limited to the role of the commissioner of child welfare concerned and the respective registrar of adoptions. In contrast, intercountry adoptions involve a foreign central authority and foreign accredited adoption service provider, a local central authority and local service provider, and a locally accredited intercountry adoption service provider. Furthermore, the emphasis in modern law is to seek a permanent placement for a child in need of care in a family environment and to provide the same rights to the child concerned as any other child experiences with his or her natural parents. This is in stark contrast to the focus when arranging the fostering of a child.

4 5 2 5 2 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993 (THE INTERIM CONSTITUTION)

A fundamental change in the legal sphere of South Africa was made with the dawning of the constitutional era in 1994. During the transition to democracy, an interim Constitution came into force on 1 April 1994 and remained operative during the drafting of the final Constitution.[822] This Act established the Constitutional Court as a court of final instance over all matters that related to the interpretation, protection and enforcement of the provisions of the Act. The jurisdiction of the Constitutional Court was not exhaustively defined in the Act. This Act makes provision for the securing and protecting of basic human rights and freedoms, not least of all, within the private context of “family”.

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

4 5 2 5 3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The final constitution was adopted by the Constitutional Assembly in 1996 and became operative on 4 February 1997. The Constitution embraced the principles of democracy. Equality before the law was guaranteed to all. Parliamentary sovereignty was abolished and in terms of the new legal order, the courts were given a testing right with the provisions of the Constitution reigning supreme. The Bill of Rights is of utmost importance and in *Daniels v Campbell NO,* Ngcobo stated that the Constitution contemplates that there would be a coherent system of law founded on the fundamental principles of human rights and dignity in the Bill of Rights.[823] In terms of the Bill of Rights, a court must apply, or develop, the common law to the extent that our legislation does not give effect to the aims of the Bill.[824]

With the acceptance of the Constitution, a new legal culture was inaugurated with "the objective value order" of the Constitution forming the foundation of legal reasoning. Chaskalson CJ (as he then was) pointed out as follows:

> There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law derives its force from the Constitution and is subject to constitutional control.[825]

The Constitution gives recognition to most sources of South African law, and authorises the use of both public international law as well as foreign law. The Bill of Rights applies to all law, that is, common law, legislation, court decisions and customary law. A child receives constitutional protection of his-or-her rights in two ways: Firstly, in terms of section 8 like any person (in terms of the general provisions of the Bill of Rights), and secondly, through the protection afforded by the rights

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823 *Daniels v Campbell* (CCT 40/ 03) [2004] ZACC 14 par 45.
824 *Daniels v Campbell* par 56.
825 *The Pharmaceutical Manufacturers Association of South Africa* Case CCT 31/99 par 44.

applicable to children exclusively in section 28.[826] The Constitution provides that every child has the right to family care or parental care or to appropriate alternative care.[827] The legislature had constitutionalised in the explanatory memorandum the right to adoptive care. This provision is in line with article 20 of the CRC, article 20 of which provides that a child in need of care shall be entitled to special protection from the state and such protection shall include foster placement and adoption. The Constitution has entrenched the principle of best interests in South Africa. Applying the principle simply means considering the child before a decision affecting his or her life is made. This includes those decisions relating to the alternative care of a child, and the placement of a child in intercountry adoption.[828]

However, the best-interests principle has long been criticised for being vague, general and indeterminate, on the basis that it had no fixed criteria for our courts to consult to determine whether a decision would in fact be in the best interests of the child.[829] There are many factors to be considered when deciding what the best interests of a child are, and what constitutes the child's best interests in a given case would depend on the particular circumstances of that case.[830] The principle is therefore based on a

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826 Chidi *The Constitutional Interpretation of the "Best Interests" of the Child and the Application by thereof by the courts* 11.

827 S 28(1)*(b)*.

828 Burman 2003 17(1) *International Journal of Law, Policy and the Family* 28.

829 Bonthuys "Policy and the Family" 2006 *International Journal of Law* 6; Pretorius *Intercountry Adoption and the Best Interests of the Child* 32; Cantwell *The Principle of Best Interests of the Child in Intercountry Adoption* UNICEF 5; Ferreira "The Best Interests of the Child: From Complete Indeterminacy to Guidance by the Children's Act" 2010 *THRHR* 202; Van Bueren *The International Law on the Rights of the Child* 51; Clark "A 'Golden Thread'? Some Aspects of the Application of the Standard of the Best Interest of the Child in South African Family Law" 2000 *Stell LR* 1, 3 and 15; Reece "The Paramountcy Principle: Consensus or Construct?" 1996 49 *Current Legal Problems* 268; Heaton "Some General Remarks on the Concept 'Best Interests of the Child'" 1990 53 *THRHR* 95; Bekink and Bekink "Defining the standard of the best interest of the child: Modern South African Perspectives" 2004 *De Jure* 22; Bennett "The Best Interests of the Child in an African Context" 1999 *Obiter* 155–156; Clark 2000 *Stell LR* 15; Davel and De Kock "In 'n Kind se Beste Belang" 2001 *De Jure* 274; Heaton 1990 53 *THRHR* 95; Mosikatsana "Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution" 1998 *MJRL* 391.

830 Ferreira 2010 *THRHR* 202; Davel and De Kock 2001 *De Jure* 274.

consideration of various criteria, and a determination as to a particular child's best interests is made on a case-by-case basis.[831] The judiciary objectively assesses what is deemed to be in the child's best interests on an *ad hoc* basis.

4 5 2 5 4 THE CHILD CARE AMENDMENT ACT 96 OF 1996

Certain provisions of the CCA were amended by the Child Care Amendment Act of 1996, through the insertion or deletion of certain provisions. In terms of the Amendment Act, an "accredited social worker" is defined as a registered social worker in private practice who has registered a speciality in adoption services under the Social Work Act of 1978.[832]

4 5 2 5 5 THE CHILDREN'S ACT 38 OF 2005

With the dawn of the constitutional era, it soon became apparent that the CCA fell short of constitutional provisions, among other shortcomings, and this Act was therefore superseded by the provisions of the CA. The CA is constitutionally compliant and is in harmony with international law and international conventions on the rights of children that have been ratified by South Africa. See chapter 2 for a discussion hereof. The CA spans a much broader area than its predecessors in its application to children's rights and it provided the much-needed and long-overdue overhaul to adoption law.[833] Previously, childcare legislation was limited to matters concerning adoption matters and children in need of care.

The CA was assented to on 8 June 2005. Certain provisions of the CA came into operation on 1 July 2007, but the remaining provisions became operative in April 2010. Among the latter, were chapter 15 (26 sections, dealing with matters relating to adoption) and chapter 16 (20 sections on intercountry adoption). Although the legal

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831 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 86.

832 110 of 1978.

833 Adoption is provided for in ch15 of the Act and intercountry adoption is provided for in ch 20.

effect of an adoption order is the same as it was in the 1983 Act,[834] major changes were effected to the existing legislation regarding the process of adoption. More efficient procedures for the management of adoption were provided, not least of all being the creation of a register for adoptable children and prospective adoptive parents.

The CA provided new developments and mechanisms in order to change adoption practice and expand possibilities for adoption in South Africa.[835] South Africa is faced with the challenge of an increasing number of OACs who are vulnerable and in need of care and placement. Factors such as HIV/AIDS, poverty, illegal immigration and child abandonment all contribute to the current situation in Africa as a whole and South Africa specifically. The CRC, ACRWC, the Hague Convention and the South African Constitution reinforce the principle that every child has the right to family life or appropriate alternative care.

Adoption is clearly a potential solution for these children. The primary purpose of adoption was originally considered as a means of providing a child for childless couples. However, adoption is now seen as a means of providing a child with stability and security within a family context. A challenge currently facing the relevant authorities is that, despite high levels of child abandonment in South Africa,[836] levels of domestic adoption are low.[837] One factor militating against domestic adoption is the culture of the biological family. According to Blackie, adoption is not acceptable in terms of cultural beliefs and is in fact perceived as the "severing the child's relationship

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834 Louw in Boezaart *Child Law in South Africa* 193.

835 Proudlock and Jamieson "Guide to the Children's Act No 38 of 2005" (2008) *Children's Institute, University of Cape Town* (not paginated) http://www.ngopulse.org/press-release/guide-childrens-act-no-38-2005 (accessed 2018-08-08).

836 Blackie *Sad, Bad and Mad* 26, reports that of abandoned children in South Africa 65 per cent are new-born, 90 per cent are under the age of one year and 70 per cent are abandoned in places that are deemed unsafe – e.g., drains, toilets, sewers and street gutters.

837 National Adoption Coalition "New Research on Child Abandonment and Declining Adoption Rates" (not paginated) http://www.adoptioncoalitionsa.org/ (accessed 2017-02-10).

with his or her family of origin and clan roots".[838] Other factors include for example financial considerations and the stigma attached to being HIV positive (in the family and in the community).[839] The disinclination to adopt is predictable given *inter alia* the hardships faced by the majority of the population. While the CA provides guidelines in section 7 which assist in determining what would be in the best interests of a child, it does not provide an exhaustive list of factors that decision-makers can rely on in reaching a determination as to the placement of an OAC.[840]

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838 Blackie *Sad, Bad and Mad* 26.

839 There is also no financial assistance in instances where a child is adopted.

840 To guide the process of determining what is in the best interests of the child, section 7 of the CA provides a list of factors that the judiciary needs to consider. The list of the CA provides that the following criteria must be considered:

"(*a*) the nature of the personal relationship between –
(i) the child and the parents, or any specific parent; and
(ii) the child and any other care-giver or person relevant in those circumstances;
(*b*) the attitude of the parents, or any specific parent, towards –
(i) the child; and
(ii) the exercise of parental responsibilities and rights in respect of the child;
(*c*) the capacity of the parents, or any specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;
(*d*) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
(i) both or either of the parents; or
(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(*e*) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(*f*) the need for the child –
(i) to remain in the care of his or her parent, family and extended family; and
(ii) to maintain a connection with his or her family, extended family, culture or tradition;
(*g*) the child's –
(i) age, maturity and stage of development;
(ii) gender;
(iii) background; and
(iv) any other relevant characteristics of the child;
(*h*) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(*i*) any disability that a child may have;
(*j*) any chronic illness from which a child may suffer;
(*k*) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

Referring to statistics gathered by Children's Institute and Child Gauge, the DSD noted that only 1033 national adoptions were effected in South Africa from 01 April 2017 to 31 March 2018.[841] Archary notes that following a review of the Register of Adoptable Children and Parents (RACAP) in 2018, it became evident that most adoptive parents sought a child of their own race. There are 297 unmatched parents for every 428 unmatched children available for adoption.[842] There has been a steep decline in the number of adoptions in South Africa in the past nine years. In an attempt to increase this number, in 2017 the DSD (in partnership with the various relevant stakeholders) was urged to promote adoption services through marketing and public awareness campaigns, such as the annual Prism award, both nationally and provincially.[843] It is recognised that there is a need to assess children in foster care to make a determination whether such children could be adopted and a permanent placement could be made.[844]

"Adoption" is defined as the "placement in permanent care of a person in terms of a court order".[845] Clearly, the rights of a child to protection and care were now constitutionalised. These rights far surpassed the existing alternative form of

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(*l*) the need to protect the child from any physical or psychological harm that may be caused by –
  (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
  (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
(*m*) any family violence involving the child or a family member of the child; and
(*n*) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child."

841 Child Protection Statistics http://becomingamom.co.za/statistics/ (accessed 2018-07-01).

842 Archary "Adoption in South Africa – Fact sheet #KayaKnowYourRights" http://www.kayafm .co.za/ adoption-in-south-africa-fact-sheet-kayaknowyourrights/ (accessed 2018-07-01).

843 Department of Social Development "Social Development Portfolio Committee Briefed on Children's Amendment Bills" http://www.dsd.gov.za/index.php?option=com_content&task= view&id=735&Ite mid=106 (accessed 2017-03-01).

844 *Ibid*.

845 S 228 of 38 of 2005.

placement. Security and stability in the life of the child is the primary aim of the former.[846] The purposes of adoption are listed as being to:

> (1) Protect and nurture children by providing a safe, healthy environment with positive support; and
>
> (2) Promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.[847]

The CA provides that any child under the age of 18 years of age, who was not married, was eligible for adoption.[848] The age was set at 18 years in line with the dictates of both the Constitution as well as the CRC.[849] The CA removed the legal requirements regarding the age of the adoptive parent/s or the age difference between the adoptive parent/s and the child. This was left to the discretion of the adoption agencies and the Children's Court.

Through adoption, all parental rights and responsibilities to and for a child, as either parents, stepparents or partners in domestic life partnerships, are terminated. The rights that the child should have experienced while in the care of parents are also terminated by adoption. Hence, on the conclusion of adoption, the adoptive parents essentially become the parents of the adopted child.[850]

Opportunities to facilitate adoption are provided for in the CA, one of the most important being that of the RACAP, whereby an integrated approach to the screening and matching of adoptable children and prospective adoptive parents is created.[851]

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846 South African Law Commission: *Discussion Paper 103 on the Review of Child Care Act Project 110* 25 December 2001.

847 S 229.

848 S 1.

849 Art 1 of the CRC.

850 *Board of Executors v Vitt* 1989 (4) SA 480 (C) (A), in which the court held that an adopted child should be included in the term "lawful issue" where this term had been used by the testator who was the adoptive father of the child.

851 S 232.

This register is probably the single most important innovation of the CA.[852] The aim of the register is to keep a record of all adoptable children and fit and proper adoptive parents. In order to register as an adoptable child, the child must meet the requirements as provided for in section 230(3) of the CA.

In terms of section 230:

1) any child may be adopted if –

(a) The adoption is in the best interests of the child;

(b) The child is adoptable; and,

(c) The provisions of this Chapter are complied with.

Further:

(3) A child is adoptable if –

(a) The child is an orphan and has no guardian or care-giver who is willing to adopt the child;

(b) The whereabouts of the child's parents or guardian cannot be established;

(c) The child has been abandoned;

(d) The child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or

(e) The child is in need of a permanent alternative placement.[853]

The "best interests" of a child is of paramount importance and outweighs any other consideration. "Best interests" includes the child's right to security, need for affection, and continuing and long-term stability. These factors should be the basis for any adoption plan or model.

Section 157(3) of the CA provides that a very young child who has been abandoned or orphaned, must be made available for adoption in the prescribed manner and within the time frame. However, adoption can only be processed if and when in the best

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852 Mosikatsana and Loffell *Commentary on the Children's Act* (2007) 15–10; Louw in Boezaart *Child Law in South Africa* 167.

853 S 230(3).

interests of the child concerned. Cognisance must be had to the requirement that the biological mother of the child has sixty days within which to withdraw her consent to the adoption of her child.[854]

Children who can most benefit are abandoned, neglected, abused and orphaned children. It is submitted that where such child is found to be adoptable, such adoption should be processed as soon as possible to avoid or limit adjustment problems. This is subject first to the fact that the biological mother of the child concerned has 60 days within which to withdraw her consent to her child's adoption, and secondly that all efforts must be made to locate the family of an abandoned child. The adoption social worker makes an assessment as to whether the child is adoptable or not (section 230(2)), and in certain instances a child may not be deemed adoptable.[855] "Adoption social worker" has a limited definition in terms of section 1(1) of the CA.

The CA makes provisions about who may adopt as follows:

A child may be adopted –

(a) Jointly by –

(i) A husband and wife;

(ii) Partners in a domestic-life-partnership; or,

(iii) Other persons sharing a common household forming a permanent family unit;

(b) By a widower, widow, divorced or unmarried person;

(c) By a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;

(d) By the biological father of a child born out of wedlock; or,

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854 38 of 2005.

855 Bosman-Sadie and Corrie (eds) *A Practical Approach to the Children's Act* (2010) 25.

(e) By the foster parent of the child.[856]

4 5 2 5 6 THE AMENDMENTS TO THE CHILDREN'S ACT

The Children's Amendment Bill and the Children's Second Amendment Bill were introduced to Parliament in 2015 and 2016. The National Assembly passed the Children's Amendment Bill and the Children's Second Amendment Bill in 2016**.** The amendment Bills were promulgated in 2017.[857] The date of commencement of the Child Amendment Act,[858] and the Children's Second Amendment Act,[859] was the 26th January 2018.[860] Of particular relevance to the current research are amendments in respect to the adoption of a child in need of care. The definition of 'adoptable' children was expanded to include stepchildren and children whose parent or legal guardian have consented to the proposed adoption. The Second Amendment Act also makes provision for state social workers to render adoption services thereby removing the prohibition of the DSD social workers performing adoptions. Since January 2018 DSD social workers are accordingly allowed to perform adoptions. However, the DSD has not completed many adoptions since 2018 possibly because social workers employed by the DSD have not been sufficiently specialised to facilitate the adoptions.[861] The DSD presently has almost 900 social workers trained to execute adoptions.[862] Since 2018 free adoption through the DSD is accordingly available. Social workers who have a speciality in adoption services and where such social workers are registered in terms of the Social Services Professions Act.[863] Access to adoption therefore has already been broadened by this amendment. In January 2019 it became apparent that the proposed third amendment to the CA contained provisions prohibiting the charging of

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856 S 231.
857 17 of 2016.
858 *Ibid*.
859 18 of 2017.
860 See *GG* 41399 of 2018-01-28.
861 Vorster "Adoptions Related Amendments to the Children' Act: The Arguments and the Elephants in the Room"
862 *Ibid*.
863 110 of 1978.

fees for national and intercountry adoptions. The justification for the proposed amendments is that it will increase adoption access and allow poor people in rural areas to adopt. This justification is unconvincing, since poor people already have access to free adoption since the Second Amendment to the CA. Access to adoptions, is therefore already quite extensive, and by removing private social workers and social workers at CPO's from providing adoptions since they are not allowed to charge their fees, will in fact retard adoptions and not promote them, particularly in the face of the overburdened workload of social workers employed by the DSD. There is also no suggestion from the DSD that additional social workers will be appointed as a result of the increasing adoption case load. Commentators have criticised the proposed amendments. Vorster pointed out that adoption social workers in private practice are not permitted to apply for a state subsidy and, that they, in the absence of fees, will close. Some CPO's receive state subsidies, but mostly do not cover a social worker's salary. CPO's will accordingly also be seriously affected if the prohibition of payment of fees is legislated.

Another consequence of the amendments is that intercountry adoptions may altogether stop from South Africa. About 10 accredited CPO's render intercountry adoption services in South Africa presently. These CPO's have concluded working agreements approved by the South African Central Authority (SACA).

Regulations provide for the receipt of professional fees regulated and capped by the SACA. The proposed amendment to section 259 may have the consequence of making intercountry adoption from South Africa almost impossible. Given that the majority of children placed in intercountry adoption have special needs or are older and therefore not likely to be adopted locally, this amendment will have dire consequences. Intercountry adoption is a specialised process, and because of the complexity of changing a child's identity across countr and the need to prevent the inducement, sale and trafficking of children as well as improper gain through

adoptions, it is unlikely that inexperienced departmental social workers will be capable or willing to perform them.[864]

Section 250(3) of the CA will also be removed by the proposed amendments. The effect will be the prohibition of involvement of any professionals other than social workers in the adoption process. It is understandable that the adoption community is concerned about how the best interests of children will be served if attorneys and advocates cannot assist in adoption cases, and psychologists, trauma counsellors and medical practitioners cannot assist with assessment and preparation of children for adoption.

4 6 CONCLUSION

Notwithstanding that fact that adoption of a child within such child's country of origin provides the ideal solution where the child concerned is in need of care, the majority of the South African population is unwilling to adopt. A large portion of the South African community does not culturally accept adoption.[865] This has resulted in OACs seeking care through other means. Furthermore, social workers employed by the DSD, are unwilling to proceed with an adoption application, even where there are children in need of care, and eligible parents applying to adopt a child.[866]

It is not surprising then, given the approach of the DSD to adoption, that adoption rates show a steady decline over the past decade. Cognisance must be taken of the challenges facing the entire system of alternative care in South Africa, and the large

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864 *Ibid*.

865 Blackie "Why Adoption is a Problem in South Africa" https://www.dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem (accessed 2019-01-30).

866 See Carte Blanche "KZN in Grips of Adoption Crisis" https://m-net.dstv.com/show/carte-blanche/news/adoption-crisis/news (accessed 2019--02-03); SAMDB "Coming Up in Carte Blanche – 3 September 2017" (8 August 2017) http://www.samdb.co.za/blogs/blog/2017/08/31/coming-up-on-carte-blanche-3-september-2017/ (accessed 2019-02-03).

number of children in need of care who are placed in state institutions. This notwithstanding the large amount of research, all indicating that institutionalising a child should in all instances be a matter of last resort.

Given the current state of the DSD in South Africa and the hesitance of the majority of South African nationals to adopt a child in South Africa, one is left questioning the wellbeing and future of those children who are not adopted domestically. As the Constitution provides that a child's best interests are of paramount importance in any matter concerning a child, it would be expected that a solution that fulfils an OAC's best interest ought to be considered seriously. The obvious alternative-to-alternative care in the narrow sense has already received recognition in international and national law in South Africa. The potential solution to not placing a child in adoption in his or her country of origin, is intercountry adoption. Intercountry adoption in South Africa is considered in the chapter that follows.

CHAPTER 5

THE DEVELOPMENT OF INTERCOUNTRY ADOPTION IN SOUTH AFRICA

5 1 INTRODUCTION

The previous chapters have considered the origins and developments in national and international law of alternative care options for an orphaned or abandoned South African child. Adoption as a form of permanent alternative care was considered in the previous chapter. As noted in previous chapters, South Africa faces a major child welfare challenge to secure permanent placement for an increasing number of abandoned and vulnerable children, and concerns regarding the capacity of the DSD to ensure that placements take place in the best interests of the children, have only increased with time. Proof hereof is found for example where additional concerns regarding the payment of social grants by the DSD have materialised in 2017.[867]

In 2004, Richter opined that the devastation resulting from the HIV/AIDS pandemic in Southern Africa, impacted on the constitutional and conventional rights of children.[868] Smart expressed that a child's right to love, nurture and protection was likewise negatively affected by the pandemic.[869] Whilst the number of deaths from HIV/AIDS is on the decline, the Southern African region remains at the epicentre of the HIV/AIDS

867 Ngoepe "Social Development Promises to Pay Grants, But Does Not Say How" (2017) *HuffPost South Africa* http://www.huffingtonpost.co.za/2017/02/17/social-development-promises-to-pay-grants-but-does-not-say-how_a_21716023/ (accessed 2017-10-10).

868 Richter, Manegold and Pather "Family and Community Interventions for Children Affected by AIDS" 2004 *HSRC* 4.

869 Save the Children South Africa Programme *Children Affected by HIV/AIDS in South Africa A Rapid Appraisal of Priorities, Policies and Practices* (2003) 3.

epidemic.[870] This concern was has proved a reality in present day South Africa, and is typically found with respect to *inter alia* rights to home, health care and education.[871] The poverty and the marginalisation experienced by the children concerned, and the lack of legal protection of their legal rights, further impacts on children's rights . The future for such children is clearly compromised. International research reveals an approach that favours prioritising the placement of an OAC in a permanent environment offering nurture and care. Adoption is the obvious solution. However, South Africa lacks sufficient prospective domestic adoptive parents.[872]

With national adoption rates on the decline, intercountry adoption is a means of alternative permanent care that could be considered. Intercountry adoption potentially provides a permanent solution for a child in need of family and parental care. However, the practice of intercountry adoption remains contentious.[873] Proponents view this form of alternative placement as an opportunity to deliver children from destitute lives, while opponents perceive intercountry adoption as "imperialistic" in nature.[874] Both proponents and opponents to intercountry adoption rely on the principle of a child's best interest to support their approach. See chapter 1 in this regard.

Although the CA does not provide a definition of intercountry adoption, in essence intercountry adoption entails the adoption of a child by parents who live in a country other than the child's country of origin, and who use legal, permanent means to effect

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870 Sarumi *The Protection of the Rights of Children Affected by HIV/AIDS in South Africa and Botswana: A Critical Analysis of the Legal and Policy Responses* (PHD University of Kwa-Zulu Natal 2013) 1.

871 Wood and Goba "Care and Support of Orphaned and Vulnerable Children at School: Helping Teachers to Respond" *South African Journal of Education* (2011) 276.

872 Rawoot "Deep Read: For Orphaned Babies, Time is Always Running out" (2012) *Mail and Guardian* https://mg.co.za/article/2012-07-06-adoption-in-south-africa (accessed 2017-10-14).

873 Moodley "Unravelling the Legal Knots around Intercountry Adoptions in *De Gree v Webb*" 2007 10 *PER/PELJ* 147; Ryan 2008 *Australian Journal of Gender Law* www.austlii.edu.au /au/journals/AUJlGendLaw/2008/4.pdf 137–138 (accessed 2017-10-14); Bartholet "International Adoption" in Askeland (ed) *Children and Youth in Adoption, Orphanages, and Foster Care* (2005) 107.

874 Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 83.

such adoption. The child adopted is taken to the home country of the adoptive parents in order to stay with them on a permanent basis.[875] The current chapter considers the development and practice of intercountry adoption in South Africa in light of the right that a child has to family and parental care.

5 2 DEVELOPMENTS IN INTERCOUNTRY ADOPTION WORLDWIDE

During the 1980s, the increasing number of intercountry adoptions taking place worldwide, in combination with the realisation that international legal instruments did not provide sufficient protection for the children involved, led to a number of multi-lateral and bi-lateral initiatives aimed at seeking to ensure the protection of the children concerned.[876] In 1989, the Permanent Bureau of the Hague Conference on International Private Law recommended the drafting of an international instrument that would establish legally binding standards on intercountry adoption in combination with a system to regulate such intercountry adoptions.[877] Irregularities in intercountry adoption practices at the time served to emphasise the urgent need for regulation in this area. As a solution to concerns regarding the placement of a child in intercountry adoption, legislators introduced the principle of a child's best interests in all matters concerning children, and then elevated the principle to one of paramount importance in instances concerning adoption of the child concerned.

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875 Duncan "Regional Developments and the Hague Children's Conventions, and the Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance" in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African and Family Law* (2008) 61. In effect, this essentially means that the child's nationality differs from that of the adoptive parents irrespective of the country of residence of the parties concerned. This is in contrast to *intra*-country adoption, where the nationality and country of residence of the child and adoptive parent or parents, coincide. Adoption is considered in greater detail in ch 4.

876 Darnovsky and Beeson *Institute of Social Studies Working Paper No 601* (2014) 24; Van Loon "Managing International Migration: Time for a New Approach" Presentations and Contributions from the Special Session on the Implementation for the Inter-American Program About Promotion and Protection of Human Rights from Migrants, Included Migrants Workers and their Families [Ag/Res. 2224 (Xxxxvi-06) *Conferencia de la Haya sobre Derecho Internacional Privado* (2007*)* (not paginated).

877 United Nations Department of Economic and Social Affairs "Child Adoption: Trends and Policies" 2009 52.

When considering the importance of a child growing up in a stable, permanent family environment, it is understandable that the drafters of the Hague Convention focussed on the importance of seeking out such a family environment for a child in need of care. The importance of developing within a family environment is reflected in the provisions of the Hague Convention, which also recognises the importance of a child being cared for in a suitable family environment in his or her country of origin.[878] However, all decisions regarding the placement of a child must be considered in light of the principle of serving the best interests of a child.

To this effect, the Hague Convention made provision for much-needed principles of co-operation and communication between countries with regard to intercountry adoptions and for protecting vulnerable children by providing strict regulation of placements abroad. The safeguards of the Convention aim at preventing the abduction, trafficking and sale of children. Whilst recognising the important role that intercountry adoption could play in providing an OAC with a stable and permanent environment in which to develop and grow, the Convention prioritises the development of national solutions which result in the placement of a child in a family environment.[879] The Hague Convention was discussed in greater detail in chapter 2.

5 3 THE POSITION IN SOUTH AFRICA: DEVELOPMENT THROUGH THE JUDICIARY AND NATIONAL LEGISLATION IN THE CONSTITUTIONAL ERA

Prior to 2000 and preceding the judgment in *Minister of Social Welfare and Population Development v Fitzpatrick*,[880] intercountry adoption in South Africa was unlawful.[881]

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878 Duncan in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African and Family Law* 61.

879 Duncan in Sloth-Nielsen and Du Toit (eds) *Trials and Tribulations, Trends and Triumphs: Developments in International, African and South African and Family Law* 62.

880 2000 (3) SA 422 (CC).

881 S 18(4)*(f)* of the CCA.

The *Fitzpatrick* case highlighted weaknesses in the existing law in the new constitutional order. The applicants in *Fitzpatrick*, a British couple, approached the court seeking adoption of a South African child. “K”, a baby of two-and-a-half months at the time, had been placed in foster care with the Fitzpatricks in November 1997. During March 1998, baby K was placed in another foster home. The Fitzpatricks did not oppose the move as they believed that the citizen requirement contained in section 18(4)*(f)* would preclude them from adopting baby K. A month later, baby K was returned to the respondents because he had not settled in his new foster home. A strong family bond had already been forged between the Fitzpatricks, their four biological children and baby K. Consequently, the Fitzpatricks decided to take whatever steps were necessary to adopt baby K. They applied to the Cape High Court for an order declaring section 18(4)*(f)* to be inconsistent with the Constitution and, therefore, invalid.[882] In the alternative, they applied to be appointed as joint guardians and custodians of baby K. If their application was successful, the prospective adoptive parents intended to take the child to the United Kingdom, where they intended to live with the child. Two considerations were important in this case: the prospective parents adopting the child had a different nationality; and, the prospective parents intended that the child would live with them abroad.[883] This was clearly an instance of intercountry adoption.

The legislation in force at the time, the CCA,[884] prevented a foreign couple from adopting a South African child.[885] The CCA provided that prospective adoptive parents of a South African child had to satisfy the citizenship requirement contained in section 18(4)*(f)* of the CCA. This requirement was satisfied where the adoptive parents were South African citizens resident in South Africa, or if they had the necessary residential

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882 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 2.

883 *Minister of Social Welfare and Population Development v Fitzpatrick*2000 (3) SA 422 (CC) par 22.

884 74 of 1983.

885 S 18(4)*(f)*.

qualifications to be granted South African citizenship in terms of relevant national legislation. Application had to be made to acquire South African citizenship.

Referring to section 18(4)*(f)*, the Cape High Court held that this provision was "too blunt and all-embracing" in that it absolutely proscribed the adoption by a foreigner of a South African child in need of care.[886] The provisions was also held to be unconstitutional in that it did not take into account the recognised right of a child to have his or her best interests considered in any matter. As such, section 18(4)*(f)* did not give paramountcy to the principle of the best interests of a child.[887] This was clearly inconsistent with the provisions of section 28(2) of the Constitution, and no limitation could potentially be considered justifiable under the Constitution. The violation led to a declaration of invalidity of the offending provision. The enactment of the interim Constitution and the final Constitution, had ensured that the rights of a child were recognised, protected and constitutionally entrenched in South Africa.[888] In line with the provisions of the Constitution, the placement of the child in an environment that ensures security and stability in the life of the child concerned, is of fundamental importance.

The court in *Fitzpatrick* declared the existing law, namely section 18(4)*(f)* of the CCA, to be invalid with immediate effect. Furthermore, the court held that the Children's Court was the correct forum to hear adoption matters. The respondents were appointed as interim joint guardians of the child by the High Court.[889] The court held: The curator points out that there are no members of the biological family of the child who would be suitable foster parents and that most other prospective adoptive parents would wish to adopt a younger child. He states further that unless the child is adopted

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886 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 20.

887 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 16.

888 200 of 1993 and the Constitution of the Republic of South Africa, 1996 respectively.

889 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 3.

by the respondents, he will spend his early years in foster care and his later years in an institution.[890] The court also noted, "[t]hat the best interests of the child lie in his being adopted by the respondents is accepted by the Minister and the *amicus curiae*".[891]

The court *a quo* suspended the finding of invalidity for a period of two years to allow the legislature an opportunity to correct the law.[892] The Constitutional Court held that the suspension of the court ***a quo's*** order of invalidity was unwarranted and that there were sufficient safeguards to ensure the protection of children placed abroad until such time that the legislature promulgated more comprehensive legislation.[893] In deciding that it would be in the best interests of the child to be adopted by the Fitzpatricks, the judge made the following statement:

> South African nationality is no guarantee that adoptive parents will continue to reside within the jurisdiction of South African social welfare services. What is more, the protection conferred by section 18(4)*(f)* does not extend to children, orphaned or abandoned in South Africa, but born of non-South African parents.[894]

In *Fitzpatrick*, the prohibition against non-South Africans adopting a South African child was deemed to be inconsistent with section 28 of the Constitution.[895] Following *Fitzpatrick*, intercountry adoption was recognised as a lawful potential alternative placement for a South African child in need of parental and family care. Such adoptions

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890 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 11.

891 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 12.

892 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 3.

893 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 36.

894 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 19.

895 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 3.

were processed as ordinary domestic adoptions in terms of chapter 4 of the CCA.[896] Although South Africa had ratified the Hague Convention, it would take some years before the CA was finally promulgated.[897] Section18(4)*(f)* was subsequently omitted from the CA and the judgment in *Fitzpatrick* can be accredited for laying the foundation for intercountry adoption to be accepted as an alternative care option for a South African child.[898]

The vehicle for change in child law in South Africa came in 2005 with the enactment of the CA.[899] Although the CA has retained the jurisdiction of the High Court in matters relating to guardianship, adoption matters continue to be determined in the Children's Courts. The CA acknowledges the need to give effect to the provisions and spirit of the Geneva Declaration on the Rights of the Child,[900] the CRC, the ACRWC and the UDHR, as well as the provisions in the relevant statutes and instruments of specialised agencies and international organisations that are concerned with the welfare of children by securing permanent placement.[901]

During the 10-year period preceding the promulgation of the CA, members of the DSD were processing intercountry adoptions in "uncharted waters" as the safeguards provided for in the Hague Convention had, as yet, not been incorporated into domestic legislation.[902] No special provisions applied for the regulation of the process of intercountry adoptions before the promulgation of the CA, despite the increased risks associated with the practice.[903] Although the DSD took on the role of interim central

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896 Louw "Intercountry Adoption in South Africa: Have the Fears become Fact" 2006 39 *De Jure* 504–506.

897 South Africa ratified the Hague Convention on 21 August 2003.

898 Criticised by Davel *Child Law in South Africa* (2000) 136.

899 Van der Walt "The Regulation in Intercountry Adoption in South Africa" 2016 37(3) *Obiter* 676.

900 UN General Assembly, *Declaration of the Rights of the Child*, 20 November 1959, A/RES/1386(XIV).

901 The Preamble of 38 of 2005.

902 Skelton and Carnelley *Family Law in South Africa* 306.

903 Mosikatsana 2000 *SAJHR* 52, refers to the fact that the South African Law Reform Commission concluded that children in countries like South Africa, where legislative mechanisms governing

authority in South Africa pending the incorporation of the provision of the Hague Convention into national legislation, its powers were very weak in the absence of national legislation enabling it to exercise meaningful control over intercountry adoptions.[904] While the DSD issued guidelines for private practitioners and organisations involved in intercountry adoptions, incorporating standards similar to those of the Hague Convention, whether these guidelines were binding (*pre*-CA) was disputed. The Constitutional Court held that the role of the DSD was in fact "limited to exercising an advisory and monitoring role".[905]

The increased risk that OACs could be victim to abusive practices pending the enactment of the Hague Convention provisions into domestic legislation could not be overlooked. The aim of the DSD acting as the South African Central Authority during this 10-year period, was to ensure the protection of children placed abroad. Notwithstanding that South Africa had acceded to the Hague Convention in 2003, legislative incorporation of intercountry adoption only took place with the promulgation of the CA.[906] As Louw opines, the DSD was acting in a role "as if to implement the protective mechanisms provided for in the Convention."[907] Louw refers to this period as though the practice of intercountry adoption was in a "state of limbo".[908] With incorporation of the provisions of the Hague Convention into the CA, the legal recognition of intercountry adoption was firmly established in South African law. The Preamble of the Hague Convention states 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. Intercountry adoption may offer the advantage of a permanent

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the practice of intercountry adoption are non-existent, inadequate or filled with gaps and loopholes, tend to be at risk of abusive practices associated with intercountry adoption.

904 Couzens 2009 *PER/PELJ* 57.

905 *Ibid*.

906 Central Authority of South Africa "The Hague Convention of the Civil Aspects of International Child Abduction: Inter-Country Adoptions" http://www.justice.gov.za/hague/inter-country-adopt.html (accessed 2019-02-03).

907 Louw in Boezaart *Child Law in South Africa* 482.

908 *Ibid*.

> family to a child for whom a suitable family cannot be found in his or her State of origin.

It is therefore clear that following the judgment in *Fitzpatrick*, intercountry adoptions in South Africa were processed in a statutory vacuum, raising the concerns of international human rights bodies.[909] Without regulation, the challenges involved in intercountry adoption soon became apparent, and problems resulting from conflicting laws emerged.[910] Some examples highlight the challenges the relevant authorities faced. For instance, a person seeking to adopt domestically may be unsuitable to adopt, but the same person may seek to adopt outside his or her country of origin, relying on potentially less stringent eligibility requirements for intercountry adoption.[911]

Furthermore, legal recognition of foreign court orders is not necessarily automatic, leaving an adoptive parent or parents in a position where they may be unable to return to their own country accompanied by the child adopted. This places the child concerned in an extremely vulnerable position. A further risk involved in intercountry adoption is the potential for local adoption agencies to provide intercountry adoption for their own financial benefit, so that the best interests of the child are superseded by profit-making greed. It was clear that the phenomenon of intercountry adoption was fraught with particular problems and complexities. The judgment in *Fitzpatrick* is of particular relevance to the current research, as the court made reference not only to adoption of a South African child by a person whose nationality differed from that of the child concerned, but also because that adoption was considered to be an intercountry adoption.

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909 Couzens 2009 *PER/*PELJ 56.

910 Schäfer *Child Law in South Africa: Domestic and International Perspectives* 511; Bartholet "International Adoption: Current Status and Future Prospects" 1993 3(1) *The Future of Children ADOPTION* 90.

911 Bartholet *JSTOR* 3.

In another case concerning intercountry adoption, *De Gree v Webb,* the parties, non-South African citizens, initiated proceedings in the High Court, Witwatersrand, for an order of sole custody and guardianship of a child referred to as R.[912] As ancillary relief, the applicants sought an order that the High Court to declare the child abandoned, and that the foster order issued out of the Children's Court be discharged. The facts of the case indicate that a new-born baby, baby R, was found abandoned in a bucket in the veld. The parents and the family of the child concerned could not be traced. An American couple, who did not have South African citizenship, applied to adopt baby R. They were considered suitable adoptive parents for baby. The applicant's sought authority to leave South Africa with the child concerned and noted their intention to legally adopt the child in the United States of America. The couple wished to adopt baby R and were advised to seek an order of sole guardianship and sole custody of the child. They contended that it would be in the best interest of the child it she were to be adopted by them and given the opportunity to be nurtured in a stable home environment.[913] The decision in the court *a quo* found that it was not for the High Court to decide what is in R's best interests. Goldblatt J held that the Children's Court was the correct forum to decide on matters of adoption of a child and as such he dismissed the application.[914]

The couple appealed the decision of the High Court. On appeal to the Supreme Court,[915] Theron J held that it is trite law that the High Court in South Africa is considered as the upper guardian of all children, and as such has inherent jurisdictions to grant an order for custody and/or guardianship of a child.[916] The legal effect of such court granting the order sought by the parties, would in fact "result in the sanction, by this court, of an alternative route of an intercountry adoption, under the guise of a

912 *De Gree v Webb* 2006 (6) SA 51 par 1.
913 *De Gree v Webb supra* par 66.
914 *De Gree v Webb supra* par 67.
915 *AD v DW* [2007] SCA 87 (RSA).
916 *AD v DW* [2007] SCA 87 (RSA) par 4.

custody and guardianship application".[917] Theron held that the question to be considered was whether it was in the child's best interests to grant the adoption order should be founded or should the court require that the application be referred to the Children's Court.

The court took note of the evidence led by Dr Mabetoa, Chief Director: Children, Youth and Family of the DSD. The adoption policy of placing a child in intercountry adoption was noted as follows:

> A profile on every child that cannot be placed locally, including the efforts undertaken to place the child, must be submitted to the Department …. Only after the Department has agreed in writing, [can an] inter-country adoption … be considered. The Department … reports relevant cases to the national missing person register of the South African Police Service to ensure that a child considered for an inter-country adoption is not a missing child. The inter-country adoptions are done via the Children's Court and according to provisions prescribed in Chapter 4 of the current Act. The rules as prescribed in the [Hague] Convention are followed as [the] Central Authorities in [both] the countries agree to the adoption.[918]

Referring to the fact that the principles of best interests and subsidiarity are accepted as fundamental principles of international law, and the relevant safeguards and protections for a child provided for in the current policy in South Africa, Theron J held that it was necessary to first investigate whether a South African child could be placed in alternative care locally.[919]

Heher J wrote a dissenting judgment in which he held that the best interests of baby R were met if the application to adopt her was granted by the court.[920] Relying on section 28 of the Constitution, Heher J held that the best interest of the child must be considered on a case-by–case basis, and that all relevant aspects concerning baby R's, would determine what would best met the right of Baby R's right in terms of section

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917 *Ibid.*
918 *AD v DW* [2007] SCA 87 (RSA) par 7.
919 *AD v DW* [2007] SCA 87 (RSA) par 23.
920 *AD v DW* [2007] SCA 87 (RSA) par 29.

28. South Africa had ratified the CRC and as such its provisions must be considered in the case under consideration. South Africa had adopted the Hague Convention, but the provisions of this convention had as yet no been incorporated into national legislation.[921] The court referred to the decision in *Fitzpatrick* where the principle of subsidiarity was described as

> The principle that intercountry adoption should be considered *strictly as an alternative* to the placement of a child with adoptive parents who reside in the country of birth.[922]

Heher found it of particular importance that the religious and cultural background of the child concerned be taken into consideration before reaching a decision to place a child abroad*, and* that pending the implementation of the provisions of the Hague Convention in national law, any "recognition of the 'Interim Central Authority' or the Children's Courts as an implementer of inter-country adoption in relation to the present application would be inappropriate'. The substance of the Hague Convention was to ensure that a child's best interests were met and safeguarded through processing matters through the formal structures provided for by the Convention.[923] Regarding the principle of subsidiarity, the judgment held that wherever a child could enjoy parental care in a culture familiar to such child, preference must be given thereto. In presenting their case the applicants stated that:

a) that since birth the child has been cared for by Mr and Mrs W and has been given their surname;

b) no other potential parents have expressed an interest in having the child placed permanently with them;

c) the Third Respondent, the Roodepoort Child and Family Welfare Society does not have any prospective parents for the child;

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921 *AD v DW* [2007] SCA 87 (RSA) par 47.
922 *AD v DW* [2007] SCA 87 (RSA) par 50.
923 *AD v DW* [2007] SCA 87 (RSA) par 51.

d) the applicants are of African descent and have been interested in African culture throughout their lives; they have done extensive research on and study in South African history, people, culture and art.

e) the applicant's own children have been raised 'with a real sense of what it means to be an African-American', believing that each child should be imbued with a sense of pride as to who they are and where they come from;

f) the applicants intend to raise R 'with an in-depth knowledge of her roots and her history, and to travel back to South Africa with her in future so that she can develop an intimate knowledge of her country of origin'.[924]

An appeal from the court *a quo* was dismissed and the parties approached the Constitutional Court.[925] The four separate judgments by the judges in the appeal court in *De Gree* signifies how contentious the question of intercountry adoptions has become in South Africa.[926] The matter was considered by the Constitutional Court under an anonymised case name to protect the privacy of the child concerned.[927] In its judgment, the Constitutional Court confirmed that the High Court was correct in its finding that the correct forum to hear all matters concerning adoption, including intercountry adoption, was a Children's Court.[928] However, the Constitutional Court agreed that in certain exceptional circumstances, such matters could be heard before the High Court.[929]

The inadequacies in the South African system in the exercise of intercountry adoption were finally addressed in *De Gree v Webb*. The main contention in the Supreme Court of Appeal against the awarding of sole custody and guardianship to the parties concerned was based on the legal principle that the child's best interests would not be served by by-passing the correct forum to consider adoption matters, namely the

924 *AD v DW* [2007] SCA 87 (RSA) par 62.
925 *AD v DW* (CCT48/07) [2007] ZACC 27.
926 Moodley 2007 *PER/PELJ* 147.
927 Reported as *AD v DW.*
928 *AD v DW* (CCT48/07) [2007] ZACC 27 par 29.
929 *AD v DW* (CCT48/07) [2007] ZACC 27 par 34.

Children's Court.[930] In support of its case, the appellants in the Supreme Court of Appeal relied on a statement made by a member of the DSD, which indicated as follows:

> [The Department's] concern lies with the need of our children to be placed inside the country as far as possible before considering intercountry adoptions, and to ensure that all avenues to recruit *adoptive parents locally* are explored (my own emphasis).[931]

In the Constitutional Court, two primary questions had to be considered: firstly, did the High Court have jurisdiction to hear applications for sole custody and sole guardianship when these were intended as a first step towards adopting a South African child abroad? Secondly, what was the constitutionally correct application of the subsidiarity principle, which required that intercountry adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth?[932]

It was held that the High Court would have jurisdiction to hear such matters in exceptional circumstances only.[933] As far as the question of subsidiarity is concerned the court held that while the principle of subsidiarity should be adhered to as a core factor governing intercountry adoptions, the principle of subsidiarity is not the ultimate factor determining the appropriate placement for a child in need of care. A particular child's need for "a permanent home and family can in certain circumstances be greater than their need to remain in the country of their birth".[934]

The security and stability in the life of any child are the primary aims of the Constitution's provisions on children's rights. When the CA incorporated the provisions of the Hague Convention, the existing scope of alternative permanent-placement

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930 *AD v DW* 2007 (5) SA 184 (SCA) par 18.
931 *Ibid*.
932 *AD v DW* (CCT48/07) [2007] ZACC 27 par 29 and 34.
933 *AD v DW* (CCT48/07) par 38.
934 *AD v DW* (CCT48/07) par 48.

options needed to be expanded in national legislation to achieve this aim. This was necessary as the relevant rights in the Hague Convention far surpassed the recognised forms of alternative permanent placement in existing legislation. The Constitution provides that every child has the right to "family care or parental care or to appropriate alternative care".[935] The Explanatory Memorandum to the CA confirmed a child's constitutional right to adoptive care. This provision is in line with that of the CRC, ACRWC and Hague Convention, which provide that a child in need of care shall be entitled to special protection from the State, and that such protection shall include foster placement and adoption.

Opponents and proponents of intercountry adoption both attempt to prevent any potential exploitation and suffering for the children concerned. It is submitted that the right of the child to family or parental care can only be appreciated if cognisance is taken of the specific socio-economic background underlying the need for the protection of these rights in the Constitution. In this regard it is submitted that opponents to intercountry adoption like Smolin for example, approach intercountry adoption as an inherently corrupt process which sees children removed from their often-impoverished country of origin, and placed in a family in an affluent receiving country.[936] As such intercountry adoption is criticised as removing a child from his or her struggling family and from the child's culture and heritage, without seriously attempting to first support the retention of the care of the child within his or her family of birth. Whilst the underlying objective is noble, this approach fails to consider what options are in fact viable and in the best interests of a child in a developing nation such as South Africa, where the devastating impact of *inter alia* the resultant orphaning or abandoning of a child as a consequence of the HIV/AIDS pandemic has left families, communities and the government struggling to adequately care for the children in need of such care. In

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935 S 28(1)*(b)* of the Constitution.

936 Smolin "The Two Faces of Intercountry Adotion: The Significance of the Indian Adoption Scandals" 2005 35(2) Seton Hall Law Review 1.

addition, since adoption is not recognised as an acceptable option on the basis of culture in South Africa, the potential of being adopted domestically is small. This therefore means that in fact intercountry adoption may in fact be the only option that sees an OAC placed in a nurturing, permanent family environment, albeit abroad. As Mezmur opines

> However, while we Africans pride ourselves in our culture, it is important that the rights of individual African children are not enmeshed in discussions of the larger trends of history, of intercountry adoption being "essentially a vestige of colonialism," and of national pride. Having named children as the bearers of rights, no ideas of national pride or children as national "resources" should be used to deny children a suitable alternative form of care, even if such suitable care could only be found through intercountry adoption.[937]

Section 28 of the South African Constitution provides an important benchmark for the protection of children in South Africa. The Preamble to the CA further states that the State has an obligation to respect, protect, promote and fulfil such rights. The CA supplements any rights that a child has in terms of the Bill of Rights. The Preamble to the CA makes it clear that in determining whether intercountry adoption should take place, the decision must always be based on a determination as to what is in the best interests of the child concerned. The CA provides that, in protecting and promoting the rights of the child, it is neither desirable nor possible to do so without seeking improvement in the lives of the community, nor in isolation from their families and communities.

The CRC and the Constitution reinforce the principle that every child has the right to family life or to appropriate alternative care. After the ratification of the Hague Convention and the promulgation of the CA in 2005, intercountry adoption has become a distinct solution for South Africa's children in need. In 2005, the CA was enacted to govern the laws relating to the care, contact and protection of children. Besides

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937 Mezmur "Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child rather than the Right to a Child" 2009 6(10) *Sur. Revista Internacional de Direitos Humanos* 98.

defining parental responsibilities and rights, the CA also makes provision for the establishment of Children's Courts and the appointment of social workers and child-care experts. Although the legal effect of an adoption order in the CA remains the same as that in the CCA, major changes were effected to the existing legislation regarding the process of adoption. More efficient procedures for the management of adoption were provided. An example is the provision for a RACAP, probably the most important innovation of the CA and discussed in more detail below.

In terms of the Hague Convention, before a state of origin (a "sending" state) can consider an application for intercountry adoption, the CA provides that the competent authorities of the state must establish the following: (a) Is the child in question is adoptable?;[938] (b) Is there is no possibility of adoption or placement nationally?;[939] (c) Is intercountry adoption is in the best interests of the child.[940]

Responding to the Hague Convention, the CA recognises four categories of intercountry adoption, namely:

1. Adoption of children from South Africa by a person in a convention country.[941]
2. Adoption of children from South Africa by a person in a non-convention country.[942]
3. Adoption of children from a convention country by a person within South Africa.[943]
4. Adoption of children from a non-convention country by a person in South Africa.[944]

These adoptions can be further separated into "convention adoptions" and "non-convention adoptions". Convention adoptions are adoptions involving firstly, the adoption of a child habitually resident in South Africa by persons habitually resident in

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938 Art 4(a) of the Hague Convention.
939 Art 4(b) of the Hague Convention.
940 S 230 of 38 of 2005.
941 S 261.
942 S 262.
943 S 264.
944 S 265.

another convention country, and secondly, the adoption of a child habitually resident in another convention country by a habitual resident of South Africa. Non-convention adoptions involve the adoption of a child habitually resident in South Africa by a person habitually resident in a non-convention country, or the adoption of a child habitually resident in a non-convention country by a person habitually residing in South Africa.

The CA endorses the principle of subsidiarity in that domestic measures to place a child are prioritised before a placement is sought in terms of intercountry adoption. The CA states that the name of a child should be placed in the RACAP for at least 60 days to determine if no fit and proper adoptive parent for the child is available in the Republic of South Africa.

The application of the subsidiarity principle suggests a hierarchical approach to the choice of forms of alternative care for an OAC. Such a hierarchical approach to placing a child in alternative care may conflict with the paramountcy of the best-interests principle and at times might work against it. It is submitted that treating the hierarchical structure as a rigid, pre-determined formula for appropriate placement of a child may, in certain circumstances, work against finding a placement that would meet the particular child's best interests. An overarching objective of this thesis is to explore whether, and if so how, the principle of subsidiarity and the paramountcy of the best interests of the child can be harmonised when deciding whether placement in intercountry adoption is appropriate for a child.

5 4 THE REGULATION OF INTERCOUNTRY ADOPTION IN SOUTH AFRICA

Following the adoption of the Hague Convention, questions were raised as to whether the previous concerns about potentially abusive practices in intercountry adoption were addressed by better regulation in order to make this form of alternative care a

safe and potentially viable option for otherwise OACs worldwide.[945] The Hague Convention, has been ratified by South Africa, and its provisions have been incorporated into national legislation by the CA.[946] The CA aims to give full effect to the Hague Convention,[947] which is incorporated into the CA as Schedule 1. The CA makes provision for new developments and mechanisms to change the practice of adoption in South Africa, and to expand the possibilities for adoption domestically.[948] The DSD achieved this through marketing and a number of national and provincial public awareness campaigns in response to policy supporting permanent placements expressed in the CA. In an ideal world this would be a perfect solution for the many children in need of alternative placement. However, the realities do not reflect this. Adoption statistics remain low, and in fact are declining. Alternative care offered domestically is far from ideal and has been shown to be struggling to cope in South Africa. The OAC remains vulnerable and in need of appropriate care- care which best meets the interests of the child concerned.

The African continent has increasingly been referred to by the African Child Policy Forum (ACPF) as "the new frontier for intercountry adoption".[949] The focus on Africa is partly due to increased media attention highlighting the plight of vulnerable and orphaned children on this continent.[950] In accordance with the provisions of the Hague Convention, the South African Central Authority facilitates intercountry adoptions. It is clear that the regulation of adoption, whether local, national or international, is

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945 Rotabi and Gibbons "Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?" Springer 2012 21 *Child Fam Stud* 106.

946 Ch 16 of the CA is particularly relevant. South Africa acceded to the Hague Convention on 21 August 2003.

947 Sloth-Nielsen, Mezmur and Van Heerden *Intercountry Adoption from a Southern and Eastern African Perspective International Family Law* (2010).

948 Sloth-Nielsen and Mezmur "Surveying the Research Landscape to Promote Children's Legal Rights in an African Context" 2007 7(2) *AHRLJ* 330.

949 ACPF "Africa: The New Frontier for Intercountry Adoption" 2012 1 *The African Child Policy Forum* 6; BBC "Out of Ethiopia: is International Adoption an Ethical Business?" (2012) http://www.bbc.co.uk/news/world-africa-18506474 (accessed 2016-02-15).

950 Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 83.

desirable for a number of reasons.[951] The main reasons for an optimal outcome include: the need to avoid monopolistic abuse; imperfect information; and/ or the existence of external effects or public goods.[952]

Hansard and Pollack referred to the above-listed three reasons that economists note leads to market failure, stating that an unregulated outcome "fails to produce the optimal quantity or quality of the good or service. Regulation can move the outcome towards the optimal quantity or quality in the cases". As pointed out in chapter 2, the Hague Convention provides such regulation. Regulation of intercountry adoption has had a positive effect on the previous position where imperfect information lead to less than optimal outcomes in adoption services. One of the objectives of the Hague Convention is to establish safeguards to ensure that all intercountry adoptions take place in accordance with the best interests of the child and with respect for the child's fundamental rights as recognised in international law.[953] The provisions of the Hague Convention are of particular relevance in this regard.[954]

In South Africa, intercountry adoption is governed by chapter 16 and Schedule 1 of the CA. Chapter 16 came into operation on 1 April 2010 and is supplemented by the

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951 The CRC and the ACRWC refer to intercountry adoption but neither instrument defines the term. However, the main legal instrument governing intercountry adoption, namely the Hague Convention, provides in Art 2 that: "(1) The Convention shall apply where a child habitually resident in one Contracting State ('the State of Origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such as adoption in the receiving State or in the State of origin. (2) The Convention covers only adoptions which create a parent-child relationship".

952 Hansen and Pollack "The Regulation of Intercountry Adoption" 2006 *Berkeley Electronic Press* 4.

953 Art 1 of the Hague Convention.

954 The Hague Convention is only binding on those countries that have ratified it and incorporated its provisions into national law. The objectives of the Hague Convention include the establishment of safeguards to ensure that intercountry adoptions take place in the best interests of the child; to establish a system of co-operation between the contracting states to ensure that those safeguards are protected and respected, and thereby prevent potential abductions, sale of, or trafficking in children, and, to secure the recognition in contracting states of adoptions made in terms of the provisions of the Hague Convention.

relevant provisions found in chapter 15 of the CA. Chapter 15 makes provision for domestic adoptions. While Schedule 1 contains the text of the Hague Convention, chapter 16 contains the provisions concerning the process of intercountry adoption in South Africa.

The purpose of intercountry adoption is to provide children deprived of families with permanence and security. The CRC,[955] the ACRWC,[956] and the Hague Convention all mandate States Parties to make provision within their national laws and procedures to determine persons who are eligible and best suited to adopt a child. In essence, the CA gives effect to the provisions of the Hague Convention[957] by: providing for the recognition of certain foreign adoptions; determining who is a fit and proper adoptive parent for an adoptable child; and finally, generally regulating intercountry adoption.[958] The Hague Convention does not dictate the content of national law of States Parties to the convention, nor does it supersede other existing international legal obligations with respect to the practice of intercountry adoption.[959] However, the competent authority of a State Party has an obligation to ensure that the provisions of the Hague Convention have been complied with. The CRC recognised the importance of the role played by competent authorities, by providing that the adoption of a child is only allowed when authorised by a competent authority.[960]

Vité and Boechat note that the implementation of competent authorities to regulate adoption is one of the most crucial aspects of the legal process.[961] It is essential that

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955 Art 1(a) of the CRC.

956 Art 24(a) of the ACRWC.

957 From the outset the negotiating parties agreed that two international instruments, in particular, were to be taken into consideration, namely the CRC and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Specific Reference to Foster Placement and Adoption Nationally and Internationally. This agreement is reflected in the Preamble of the Hague Convention.

958 S 254.

959 Schäfer *Child Law in South Africa: Domestic and International Perspectives* 520.

960 Art 21(a) of the CRC.

961 Vité and Boechat in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 29.

adoption services are regulated by competent bodies, namely that such authorities need be competent in child protection. To operate optimally, such authorities should be multi-disciplinary, subject to accreditation and review by national authorities. The authority should consist of personnel that is well trained, proceedings must be carried out by relevant public authorities and should be capable of adequate procedural guarantees ensuring the rights of the parties' subject to the process. Those authorities involved in the adoption of a child should be guided in their decision by the needs and rights of the child concerned.[962]

Internal monitoring requires that the competent authority within each state has an obligation to notify the Central Authority if it is concerned that an aspect of the convention has not been adhered to, or, alternatively, where there is a potential that an aspect of the Hague Convention will not be adhered to. Upon such notification it is incumbent on the Central Authority to take appropriate measures against the state concerned.[963]

The CA provides that the President of South Africa may enter into an agreement concerning intercountry adoption with a state that is not a State Party to the Hague Convention[964] and may also, where required to supplement the provisions of the Convention, enter into an agreement with a state that is a State Party to the Hague Convention.[965] Such agreement may not be in conflict with the provisions of the Hague Convention.[966]

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962 Vité and Boechat in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 30.

963 Art 33 of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption provides as follows: "A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken."

964 S 255(1)*(a)*.

965 S 255(1)*(b)*.

966 S 255(2).

In terms of regulation 98(3) under the CA, if an adoption social worker is satisfied that a child is adoptable, he or she must apply for the child's name to be registered in the RACAP. This serves to ensure that children who are placed for intercountry adoption are genuinely adoptable. Competent authorities must also ensure that consent has been given by the relevant parties in order for the adoption to proceed and that consent has not been withdrawn or given under duress.[967] Where a mother consents to the adoption of her child, the consent must be obtained only after the birth of the child in question. Similarly, having regard to the age and maturity of the adoptable child, the competent authority must ensure that the child has been counselled and understands the consequences of adoption. The authority must also take into consideration the express wishes and opinions of the child, where applicable. Where the child's consent is required for an adoption, such consent must have been given freely and not under duress.[968] Once it has been established by the competent authorities that the provisions of article 4 of the Hague Convention have been met, the state of the child's origin may consider the application for intercountry adoption.

Both opponents and proponents to intercountry adoption are guided by the aim to serve the best interests of the child concerned. As an accepted principle in international law, this is uncontroversial. Breuning refers to the argument oft used by opponents to intercountry adoption who point out that while many older children are "left languishing in developing world orphanages", a demand for young infants from developing countries is noted, giving rise to concerns regarding corruption.[969] The desire to provide a living, stable permanent home to a child in need of care is questioned, where the adoptive parents are primary interested only in adopting a young child. Where the adoptive parents specifically wish to adopt a younger child, the

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967 Art 4(c)(2) of the Hague Convention.

968 Pretorius *Intercountry Adoption and the Best Interests of the Child* 24.

969 Breuning *Samaritans, Family Builders, and the Politics of Intercountry Adoption International Studies Perspectives* (2013) 420.

assumption is that infertility is the central reason why such parents are seeking to adopt a child in the first instance.[970]

However, Breuning opines that this is not necessarily so. She refers to McBride who has done a study that indicates this is not always the case. McBride undertook a study of adoptions by adoptive parents from the Evangelical Protestant Christians (EPC), concluding that in these instances, the adoptive parents were rather motivated by the inherent need to help others, namely OAC. She concludes that a "humanitarian motive coexists alongside the desire for a child".[971] The EPC are referred to as the "Samaritans" in that the adoption of a child is motivated by their desire to provide a family for an OAC who needs one. As Breuning opines, the decision to adopt a child is most likely to be based on the need of the child concerned.[972] Samaritans are more likely to adopt a "waiting" child, that is, an older child.

Another motivation, namely adoptive parents who adopt based on their desire to create their own family, are referred to as "family-builders".[973] Such adoptive parents base their adoption of a child more on their own needs as opposed to that of the child. Family-builders are more likely desirous of adopting an infant.

It is important to note from the above that the nationality of the adoptable child and the prospective parents is irrelevant to the adoption. It is where the child and prospective parents are habitually resident that has bearing on the adoption that will ultimately determine whether the intercountry adoption is a "convention adoption" or a "non-convention adoption.[974]

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970 *Ibid.*
971 *Ibid.*
972 Breuning *Samaritans, Family Builders, and the Politics of Intercountry Adoption International Studies Perspectives* 422.
973 *Ibid*.
974 Art 2(1) of the Hague Convention.

5 4 1 ADOPTABILITY

When acting as a “sending” country, it is incumbent on the relevant national bodies to:

> establish the adoptability of the child; ensure the application of the subsidiarity principle; ensure that the relevant consents of the parties are given; and ensure the participation of the child in the process.[975]

The adoptability of the child is established according to the legal requirements of provisions in terms of the CA. A child is adoptable internationally where he or she meets at least one of the criteria set in section 230(3), namely:

(a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child;
(b) the whereabouts of the child's parent or guardian cannot be established;
(c) the child has been abandoned;
(d) the child’s parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or
(e) the child is in need of a permanent alternative placement.

An adoptable child is registered in the RACAP by the Director-General of the DSD[976] at the request of an adoption social worker, provincial head of social development, child protection organisation accredited to provide national adoption services, and organisation accredited to provide intercountry adoption services.[977]

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975 Art 4 of the Hague Convention.
976 Reg 111(7) of Draft Regulations.
977 Reg 111(5) of Draft Regulations.

5 4 2 CENTRAL AUTHORITIES

Each signatory nation to the Hague Convention is required to establish a central authority, which must carry out the duties imposed on it by the Hague Convention.[978]

Article 6 of the Hague Convention provides as follows "[a] Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities."

As such, the Hague Convention requires each contracting state to elect a central authority which acts as "the point of contact, coordination, and responsibility" within each country for the implementation of the various duties and activities called for by the Hague Convention.[979] Article 7(1) further provides that it is the aim of the central authorities to "co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention". Furthermore, central authorities are tasked to prevent illicit activities. Article 8 provides in this regard as follows:

> Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

In South Africa, the Director-General of the DSD appoints the central authority. applications for intercountry adoption are made to the central authority. While the Convention does not define "central authority", the CA includes a definition of a central authority indicating that a central authority in relation to South Africa means the Director General, and furthermore in relation to a Convention country, a central authority means a person or office designated by such country under article 6 of the Convention.[980]

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978 Art 6 of the Hague Convention.
979 Mezmur *Intercountry Adoption in an African Context* 448.
980 Art 257(1)(a) and (b) of the Hague Convention.

Mezmur opines that in order to fulfil their important objectives, central authorities should have the necessary capacity to effectively undertake their respective obligations.[981] Furthermore, such central authorities should be placed under or within the appropriate state organ or office that is closely related to intercountry adoption activities. The role of the central authority seeks to protect the best interests of children involved in the process of intercountry adoption. The Hague Conference on Private International Law refers to the Hague Convention as operating through a central authority that reinforces article 21 of the CRC, in seeking to ensure that intercountry adoptions are made in the best interests of the child.

This task is of paramount importance. The central authority is also tasked with maintaining relationships and promoting co-operation among the competent authorities within the state to protect children and to achieve the objectives of the Convention. In addition, where an adoption takes place after the child has been transferred to the receiving state and the central authority of the receiving state is of the view that the continued placement of the child with the prospective adoptive parents is not in the best interests of the child, the central authority of the receiving state is required to take the necessary measures to protect such child. These measures include withdrawing the child from the prospective adoptive parents and arranging temporary care and a new placement for the child in consultation with the central authority of the state of origin. The central authority therefore acts as a "gatekeeper" with all adoptions in and out of the country being channelled through its checks.

The main goal of the central authorities is to realise the objectives of the Hague Convention and to ensure that they are properly implemented.[982] As such central authorities strive to ensure the protection of a child's best interests and the elimination

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981 Mezmur *Intercountry Adoption in an African Context* 448.

of the abusive practices that have plagued the system of intercountry adoption. According to the Hague Conference on Private International Law, the Hague Convention "protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad".[983] One of the aims of the central authorities is to eliminate or to minimise independent adoptions.

The CA provides for the establishment of a central authority in accordance with these provisions.[984] In terms of the CA, the central authority of South Africa is the Director-General of the DSD. In relation to a convention country, the CA provides that a central authority is a person or office designated by such country under article 6 of the Convention.[985] All intercountry adoptions between Convention countries are channelled through the central authority.[986] As central authority for South Africa, the Director-General of the DSD performs the central authority functions after consultation with the Director-General of the Department of Justice and Constitutional Development.[987] The functions of the central authority include the regulation and monitoring of intercountry adoption, accrediting child protection organisations to provide intercountry adoption services, approving adoption working agreements with foreign countries and preventing any improper financial gain by service providers. Staff is appointed by the Director-General to assist in the performance of these functions. This staff consists of professional social workers with experience in child care and adoption matters. A competent authority has capable, skilled and knowledgeable persons who are appointed to deal with intercountry adoption.[988]

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983 HCCH "Adoption Section" https://www.hcch.net/en/instruments/conventions/specialised-sections/ intercountry-adoption (accessed 2016-07-25).

984 Art 257 of the Hague Convention.

985 S 257(1).

986 S 256.

987 *Ibid.*

988 See the meaning of "competent authority" in Department of Social Development of the Republic of South Africa "Practice Guidelines on Intercountry Adoption" *Department: Social Development* 8 http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=148&Itemid=3 (accessed 2017-09-30).

The central authority is responsible for facilitating and expediting the adoption process. A core function is to maintain relationships with central authorities of the State's Parties concerned and ensure that they co-operate with each other and share all relevant information to ensure a successful placement of a child in a "receiving" country.[989] The co-operation between the "sending" and "receiving" countries is of utmost importance in the prevention and combatting of abusive practices in intercountry adoptions.[990]

All applications for intercountry adoption are made to the central authority. The central authorities are required to collect, preserve and exchange information pertaining to a child and prospective adoptive parents as well as promote the development of adoption counselling, and provide evaluation reports regarding experiences with intercountry adoptions. It is the duty of the central authority to confirm the validity of the biological parent's consent to the adoption of his or her child, and also to verify that such consent is obtained in an acceptable manner.[991]

In addition, central authorities are mandated to take appropriate measures to ensure that an adoption does not result in financial gain. Where more than one central authority is designated, the CA requires that the states concerned appoint a particular central authority to be responsible for all communication and co-operation with the counterparts in other contracting states concerning the provision of information on legislation and statistics and other relevant information. A further function of the central authority is said to be the elimination or minimisation of private adoptions.[992]

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989 Art 7(1) of the Hague Convention; Bainham "Interim Care Orders: Is the Bar Set Too Low? The Implementation of Care Plans, and its Relationship to Children's Welfare" 2003 71 *CFLQ* 230.

990 Smolin "The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals" 2005 35(2) *Seton Hall Law Review* 476; Smolin 2006 *Wayne Law Review* 167; International Social Service/International Reference Centre for the Rights of Children Deprived of their Family (ISS/IRC) (2005) www.iss.ssi.org (accessed 2017-09-11).

991 Szejner *Intercountry Adoptions: Are the Biological Parents' Rights Protected?* (2006) 217.

992 Private adoptions are those adoptions which are carried out between the prospective adoptive parents and the adoptive child's family without state involvement.

While promoting proper performance of the functions and duties by the central authority, the Director-General of the South African Central Authority may delegate any of the powers and duties of the central authority, as set out in the Convention, to an official in the Department.[993] Any of the powers and duties of the central authority, as provided for in articles 15 to 21 of the Hague Convention and sections 261(3) and (4), 262(3) and (4), 264(2) and 265(2) of the CA, may be performed by either another organ of state or by a child protection organisation that is accredited in terms of section 259, to provide intercountry adoption services.[994]

Where an adoption takes place after the child has been transferred to the "receiving" state and the central authority of the receiving state is of the view that the continued placement of the child with the prospective adoptive parents is not in the best interests of the child, the central authority of the receiving state is required to take the necessary measures to protect the child. These measures include withdrawing the child from the prospective adoptive parents and arranging temporary care and a new placement for the child in consultation with the central authority of the state of origin.[995]

The DSD drafted specific guidelines on the practice of intercountry adoption.[996] These guidelines outline the role the DSD, as a Central Authority in South Africa, to regulate intercountry adoption. The Guidelines were developed to ensure South Africa's compliance with the provisions of the Hague Convention as well as to meet

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993 S 258(1). Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their state, all appropriate measures, in particular to –
(a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
(b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;
(c) promote the development of adoption counselling and post-adoption services in their States;
(d) provide each other with general evaluation reports about experience with intercountry adoption;
(e) reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.

994 S 258(1)*(a)* and *(b)* of 38 of 2005.

995 S 261(6)(*a*).

996 Department of Social Development Practice Guidelines on Intercountry Adoption.

international obligations in relation to the CRC, and to facilitate the implementation of the CA. Section 261(6)*(a)* of the CA expressly provides that the central authority has the right to withdraw its consent to the adoption of a child within a period of 140 days if it is in the best interests of the child to do so. The 140-day period starts from the date on which the adoption was consented to by the central authority. Furthermore, in terms of section 261(7) of the CA, an adoption order issued by a South African court only takes effect after the lapsing of the period referred to in subsection (6) above. In addition, the central authority must not have withdrawn its consent within the stated period.

Where the consent to a child's adoption has been withdrawn, provision is made for a suitably qualified or experienced person, employed by the DSD or by a child protection organisation accredited to provide intercountry adoption services, to accompany the child on his or her return to South Africa. The travel arrangements for the child and escort must be made by the central authority of the Republic, which also bears the costs of such travel. Exactly the same provisions apply to the return of a child from a non-convention country.

Where it becomes apparent that illegal adoptions are being processed, such adoptions are liable to criminal sanctions. Section 1 of the CA provides that any adoption that is "facilitated or secured through illegal means" constitutes child trafficking and is punishable by law. Where it appears that the employees or agents of an adoption agency are involved in illegal adoptions, the agency is held responsible for the acts committed. Section 284(4) provides that such an agency may have its accreditation revoked as a consequence of the illegal adoption.

Where an intercountry adoption takes place where the receiving state has not ratified the Hague Convention, the provisions of the Hague Convention do not apply.[997] In this

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997 Art 2(1) of the Hague Convention.

instance, the provisions of the CA apply, with due regard must be had to the principle of subsidiarity of the CRC and the ACRWC. The South African Law Commission[998] has indicated its concerns where intercountry adoptions take place to a non-Convention country. The reason therefore can be found largely in the fact that whilst the CA attempts to provide safeguards for the children concerned by appearing to replicate the Hague Convention's protective measures, it has not met the expectations to meet, and ensure the protection of the children who are placed abroad.[999]

Finally, authorities may exchange general evaluation reports and, depending on the law of the state, reply to justified requests from foreign authorities about a specific adoption situation. In addition to these international functions to be carried out by the central authority directly, there are other case-specific duties that need to be performed by other public authorities or duly accredited bodies. The CA expressly permits for another organ of state or an accredited child protection organisation to perform any powers or duties required when performing intercountry adoptions.

5 4 3 ACCREDITED BODIES

Article 22(1) of the Hague Convention provides that it is possible for the functions of the central authority to be performed by public authorities. These functions are found in articles 14 to 21 of the Hague Convention. The activities in articles 14-21 are most of the direct, routine activities involved in intercountry adoptions, such as the selection and transfer of the child. The authorities that can perform the listed functions of the central authorities are known as "accredited bodies". Chapter 3 of the Hague Convention sets the basic standards and requirements for accreditation. To be recognised as an accredited child protection organisation,[1000] the CA provides that an

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998 The South African Law Reform Commission *The Review of the Child Care Act (Report Project 110)* 2002 par 21.2.2.

999 Schäfer *Child Law in South Africa: Domestic and International Perspectives* 535.

1000 S 108 of 38 of 2005 provides that "Any adoption social worker who has registered a speciality in adoption services in terms of the Social Service Professions Act 110 of 1978 and any

application must be made by the organisation to the central authority.[1001] Before accreditation, or renewal of accreditation, is granted, all bodies applying for accreditation must comply with certain minimum standards.[1002] Furthermore, it is incumbent on the accredited bodies to satisfy certain minimum requirements as stipulated in article 11 of the Hague Convention, which requires that they:

> a) pursue only non-profit objectives within such limits as may be established by the competent authorities;
> b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption;
> c) be subject to supervision by the competent authorities of the State as to its composition, operation and financial situation.

The 2000 Special Commission made recommendations on accreditation on the practical operation of the Hague Convention on accreditation as follows:

> The following principles should apply to the process by which accreditation is granted under Article 10, to the supervision of accredited bodies provided for in Article 11 c), and to the process of authorisation provided for in Article 12.
>
> a) The authority or authorities competent to grant accreditation, to supervise accredited bodies or to give authorisations should be designated pursuant to clear legal authority and should have the legal powers and the personnel and material resources necessary to carry out their responsibilities effectively.
>
> b) The legal powers should include the power to conduct any necessary enquiries and, in the case of a supervising authority, the power to withdraw, or recommend the withdrawal of, an accreditation or authorisation in accordance with law.
>
> c) The criteria of accreditation should be explicit and should be the outcome of a general policy on intercountry adoption.[1003]

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organisation designated as a child protection organisation in terms of section 107 of the Act may apply for accreditation in terms of s 251(1) of the Act."

1001 S 110 of the 38 of 200. The CA states: "Any organisation designated as a child protection organisation in terms of section 107 of the Act may apply to the Central Authority for accreditation in terms of s 259(1) of the Act."

1002 Art 10 of the Hague Convention; Pretorius *Intercountry Adoption and the Best Interests of the Child* 10.

1003 Permanent Bureau of the Hague Conference on Private International Law *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice No 1* (2008) par 23.

All States Parties to the Hague Convention are obliged to send reports of all designated central authorities and their functions, as well as details of all accredited bodies, or any other body permitted to perform central authority functions, to the Bureau of the Hague Conference on Private International Law.[1004] Section 250 of the CA specifies that only certain persons are allowed to provide adoption services. Section 251 recognises that both social workers in private practice and child protection organisations that provide adoption services need to be accredited.[1005] According to the accreditation guidelines issued by the DSD, accreditation of service providers in the adoption field is:

> one of the crucial elements in the care and protection of children. Adoption services must be rendered by competent and experienced adoption service providers, who are adoption social workers in the employ of the Department of Social Development, accredited child protection organisations as well as adoption social workers in private practice who are accredited to provide adoption services.

While child protection organisations must be accredited in order to participate in intercountry adoptions, it is not necessary for lawyers, psychologists or members of another profession to be accredited in order to provide professional services during the process. Once application has been made, the central authority may grant accreditation to provide intercountry adoption services for such periods and on such conditions as it determines.

Louw opines that it is of the utmost importance that the accreditation is performed diligently as great reliance is placed on these organisations to do the work necessary to placing a child in intercountry adoption.[1006] She further opines that the DSD often merely plays an oversight role in the process and relies heavily on the task performed

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1004 Boezaart *Child Law in South Africa* 383; Pretorius *Intercountry Adoption and the Best Interests of the Child* 10; Art 13 of the Hague Convention.

1005 Skelton and Carnelley *Family Law in South Africa* refer to the fact that private social workers may not be accredited to perform intercountry adoptions. Such private social workers may however, perform domestic adoptions in South Africa.

1006 Louw in Boezaart *Child Law in South Africa* 486.

by the accredited bodies. Following accreditation, a child protection organisation may receive fees and make payments in respect of intercountry adoptions. To prevent misappropriation of the monies, the organisation must submit an annual audited financial statement to the central authority, reflecting fees received and payments made in respect of intercountry adoptions.[1007] In addition to receiving fees and making payments,[1008] accredited child protection organisations may also enter into adoption working agreements with accredited adoption agencies from other countries.[1009] Certified copies of all adoption working agreements concluded must be submitted to the central authority for approval.[1010] Only once approval has been granted may the agreements be implemented.

The main purpose of introducing duly accredited bodies is to recognise that, in practice, private organisations often fulfil an important role as intermediaries and facilitators in the process of intercountry adoption. The Hague Convention puts in place standards that should be met by accredited bodies. These bodies are also subject to strict regulations and requirements in terms of the treaty. Inclusive here, is proof of competence, non-profit objectives, qualified personnel and supervision by the State. According to the Guide to Good Practice, the accreditation of bodies is one of the safeguards of the Hague Convention intended to protect children from illicit activities.[1011] The Hague Convention expressly provides for contracting states to make a declaration precluding intercountry adoptions where any functions are performed in the receiving state by a non-accredited body.[1012] South Africa has remained silent in

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1007 S 259(3).
1008 *Ibid.*
1009 S 259(1)(*b*).
1010 S 260(2)(*a*).
1011 Permanent Bureau of the Hague Conference on Private International Law *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice No 1* (2008) 54.
1012 Parra-Arranguren *Permanent Bureau of the Hague Conference on Private International Law Explanatory Report on the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoptions* par 395.

respect of this declaration but, as Schäfer opines, silence is generally accepted as an implied acceptance by the state concerned.[1013]

Accredited bodies can also perform the functions of the central authorities as set out in articles 14 to 21 of the Hague Convention relating to the procedural requirements involved in intercountry adoption. However, not all functions of the central authority can be performed or delegated to accredited bodies. Section 259(4) allows for the rendering of services of a lawyer, psychologist or a member of another profession, as and when required. The involvement of legally accredited bodies in the adoption process is a positive development in preventing system abuses and eliminating illegal adoptions.

5 4 4 ADOPTION WORKING AGREEMENTS

An adoption working agreement is one entered into between a child protection organisation in the country of origin of the child concerned with the corresponding child protection organisation in the country of the prospective adoptive parents. All such child protection organisations must be accredited by the central authority in their own country. The agreement reached between the two child protection organisations sets out the procedure to be followed in the intercountry adoption process.[1014] Referring to the organisations involved in processing intercountry adoptions, Couzens points out:

> Only organisations/private social workers that have registered a speciality in adoptions, who have a working agreement in place with a foreign accredited organisation, can do intercountry adoptions. Organisations and social workers do therefore not work randomly with any country, but with a country they know well and where procedures were spelt out in the working agreement. Most of the working agreements currently in place are with other Hague countries that have also ratified the convention.[1015]

1013 Schäfer *Child Law in South Africa: Domestic and International Perspectives* 538.
1014 Skelton and Carnelley *Family Law in South Africa* 310.
1015 Couzens 2009 *PER/PELJ* 58.

Certified copies of the working agreement must be lodged with the central authority.[1016]

5 4 5 REGISTER OF ADOPTABLE CHILDREN AND ADOPTIVE PARENTS (RACAP)

The predecessors of the CA made no provision for the efficient processing of adoption. This has largely been rectified by the innovation in the CA of the RACAP that provides a central database for use by adoption practitioners in matching a suitable parent to a child needing a home. It falls within the scope of duties of the Director-General of the DSD to keep and maintain such register. Once a child has been assessed by a social worker and deemed to be adoptable, his or her identifying information is entered into the register.[1017] Once the child has been adopted, all his or her information is removed from the register. Consequently, only names of children who are currently adoptable remain on the list.

On application by a social worker to the Director-General, a person who has been assessed to be an eligible prospective adoptive parent can have his or her name placed on the register. Once successfully registered, the social worker and the prospective adoptive parent will be notified and given a registration number. This process ensures the efficient processing of adoption. A registration remains valid for three years and can be renewed. The register can be accessed by the Director-General and those officials in the DSD designated by the Director-General.

5 5 FOUR CATEGORIES OF INTERCOUNTRY ADOPTION FROM AND TO SOUTH AFRICA

The CA, reflecting the provisions of the Hague Convention, provides for four categories of intercountry adoption. These are discussed below under the following headings:

1016 S 260(2) 38 of 2005.
1017 Reg 98(1).

1. adoption of a child from South Africa by a person in a convention country;

2. adoption of child from South Africa by a person in a non-convention country;

3. adoption of a child from a convention country by a person in South Africa; and

4. adoption of a child from a non-convention country by a person in South Africa.

5 5 1 ADOPTION OF A CHILD FROM SOUTH AFRICA BY A PERSON IN A CONVENTION COUNTRY

Any person who resides outside South Africa, but within a convention country, and who wishes to adopt a child residing in South Africa, must make an application for adoption to the central authority in the country where they reside (the receiving state).[1018] If the central authority is satisfied that the applicant is deemed eligible in terms of the provisions of the Hague Convention, and is fit and proper to adopt a child, it must prepare a report on the potentially adoptive parent or parents in accordance with article 15(1) of the Hague Convention and with all requirements in terms of the CA regulations.[1019]

The report must include the identity of the person wanting to adopt; their eligibility and suitability to adopt; their background (including their family and medical history) and also their reasons for considering intercountry adoption.[1020] Once the report has been completed, it must be forwarded to the South African Central Authority.[1021] Having received the report, the South African Central Authority must establish whether there is a child available for adoption in South Africa. Once this has been confirmed, the

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1018 S 261(1).

1019 S 261(2); Schäfer *Child Law in South Africa: Domestic and International Perspectives* 524, refers to these provisions as meaningless as no South African legislation can impose an obligation on an organ of a foreign state. The real authority in this regard are Art 5 and 15 of The Hague Convention.

1020 S 239(1)(*b*).

1021 S 257(1)(*a*) read in combination with the definition of “Director-General” and “Department” as provided for in s 1(1).

central authority must prepare a report on the child in accordance with the requirements of the convention.[1022] The report takes the form of a comprehensive child study report which is compiled by an adoption social worker who is employed by an accredited child protection organisation.[1023] It should include the child's identity; family and medical history and information about any special needs.[1024] It should also include information about the child's siblings and birth parents and whether the parents have consented to the adoption and received counselling. More importantly, where possible, the report should include the views of the child in relation to the adoption and if over the age of ten, their consent to the adoption.[1025]

Prior to submitting the report, the central authority must determine whether intercountry adoption is in the best interests of the minor child concerned.[1026] While it is always desirable that a South African child should grow up in South Africa, if, after investigation it is clear that no suitable local placement can be made, and it would be in the best interests of the child to be adopted out of country, the report on the child must be forwarded to the central authority of the convention country.[1027]

After submission of the respective reports and if both the South African central authority and the central authority of the receiving state agree on the adoption, the adoption application, with all relevant documents and reports, is submitted to the Children's Court for consideration.[1028] Upon receipt of the application, the Children's Court must apply the adoption procedure set out in chapter 15 of the CA.[1029] When considering granting the order, the court must be satisfied that the prospective

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1022 S 261(3); Art 16 of the Hague Convention,
1023 Art 16 of the Hague Convention.
1024 Department of Social Development of the Republic of South Africa "Practice Guidelines on Intercountry Adoption" *Department: Social Development* 8 http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=148&Itemid=3 (accessed 2018-01-28).
1025 *Ibid*.
1026 Art 16(1)*(d)* of the Hague Convention.
1027 S 261(3).
1028 S 261(4).
1029 S 230(1)(*c*).

adoptive parents meet the requirements as set out in section 231 of the CA and are eligible to adopt. The court must also take into account the religious and cultural background of the child, the child's parent or parents and the prospective adoptive parent or parents, as well as the expressed preferences of the parent provided that they are reasonable.[1030] The court should be satisfied that the adoption will be in the best interests of the child,[1031] and that the proposed arrangements for adoption are in accordance with the requirements of the Hague Convention.[1032]

In addition, the court must be able to conclude that: the central authorities of the receiving state and South Africa have agreed to the adoption;[1033] the child is not prevented from leaving South Africa;[1034] that the child's name has been listed in the RACAP for at least 60 days;[1035] and that a fit and proper adoptive parent is not available in South Africa.[1036] Thereafter, the court may grant the adoption order.[1037]

Where it is in the best interests of the minor child to do so and provided that no more than 140 days have lapsed since consenting to the adoption, the South African Central Authority may withdraw its consent to the adoption.[1038] In such a case, the central authority must forward a letter to the receiving state's central authority, either electronically or by post, setting out the withdrawal of consent and request its co-operation for the return of the child to South Africa. If consent is withdrawn, the South African Central Authority must appoint an escort who is employed by the Department or by an accredited child protection organisation to accompany the child back to South Africa.

1030 Reg 111(1)(e).
1031 S 261(5)(*a*).
1032 S 261(5)*(d)*.
1033 S 261(4).
1034 S 261(5)*(c)*.
1035 S 261(5)*(g)*.
1036 *Ibid*.
1037 S 261(5).
1038 S 261(6)*(a)*.

Within seven days of the child's return to the country, the central authority must amend the adoption register and notify the Director-General of Home Affairs of the child's return. If the central authority does not withdraw its consent and a period of 140 days has lapsed since consent was given, the Children's Court order granting the adoption will take effect. The central authority may thereafter also issue an "adoption compliance certificate". This certificate is confirmation that all the prescribed legal procedures for an intercountry adoption have been complied with.[1039] It is the responsibility of both central authorities to facilitate the transfer of the adopted child to his or her new home.[1040] This means that both authorities must ensure that the child may leave South Africa and enter and reside permanently in the receiving state. It is important to note that the provisions of section 261 do not apply in cases where children who are habitually resident in South Africa are adopted by family members who reside outside South Africa.[1041]

5 5 2 ADOPTION OF A CHILD FROM SOUTH AFRICA BY A PERSON IN A NON-CONVENTION COUNTRY

A person residing in a non-convention country is not precluded from adopting a child habitually resident in South Africa. However, such adoptions are discouraged.[1042] In terms of section 262(1) of the CA, a person residing in a non-convention country may apply to the competent authority of the non-convention country in which they reside to adopt a child from South Africa.[1043] Section 262 of the CA makes provision that where the competent authority is satisfied that the applicant is a fit and proper person to adopt a child, it must prepare a report in accordance with the requirements of article 15(1) of the Hague Convention and regulation 111 of the CA and send it to the South African

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1039 S 263.
1040 Bartholet in Askeland (ed) *Children and Youth in Adoption, Orphanages, and Foster Care* 121.
1041 The CA.
1042 Art 28 of the Hague Convention.
1043 S 262(1).

Central Authority for consideration.[1044] Where a child who is deemed adoptable is available for adoption, the central authority of South Africa will prepare a report and forward it to the competent authority in the non-convention receiving state.[1045] Where the central authority and the relevant competent authority of the foreign State agree, the necessary documentation may be submitted to the Children's court for consideration.[1046] The court must follow the same process as in the case where a child is to be adopted by persons habitually resident in a convention country. In other words, the court must be satisfied that the prospective adoptive parents are fit and proper and are willing and able to care for the minor child. The court must further take into account the background of the child, the child's parent or parents and the prospective adoptive parent or parents in order to ascertain whether the adoption will be in the best interests of the child. Moreover, the court must be satisfied that the child's name has been listed in RACAP for at least 60 days and that no fit and proper South African parent or parents are available to adopt the child.[1047] Having satisfied itself that sections 231, 240 and 262(5) have been complied with, the court may grant the adoption order.

As with a convention country, the central authority is entitled to withdraw its adoption consent from a non-convention country, where it deems intercountry adoption not to be in the best interests of the child.[1048] This is possible where such withdrawal is done within the prescribed time limit – namely, 140 days from the date on which consent was given.[1049] The adoption is considered finalised after the 140-day period.[1050] As with a convention adoption, the withdrawal of consent for the non-convention adoption must be forwarded to the competent authority in the receiving state in a letter, requesting its co-operation and setting out the specific terms regarding the return of

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1044 S 262.
1045 S 262(3).
1046 S 262(4).
1047 S 262(5)*(g)*.
1048 S 262(6).
1049 S 262(6)*(a)*.
1050 S 262(7).

the child. If after 140 days the central authority does not withdraw its consent, the court order will take effect.

5 5 3 ADOPTION OF A CHILD FROM A CONVENTION COUNTRY BY A PERSON IN SOUTH AFRICA

The second type of convention adoption is the adoption of a child habitually resident in a convention country by a person habitually resident in South Africa. As with other intercountry adoptions, application for the adoption of a child from another convention country must be made to the South African Central Authority.[1051] If the central authority is satisfied that the applicant is a fit and proper person to adopt a child, it will prepare and submit a report to the central authority in the convention country or the state of origin for consideration. The report must comply with the requirements of the Hague Convention as well as any other prescribed requirements. If a child is available for adoption from the desired convention country, the central authority of that convention country must prepare a report in respect of the child and submit it to the central authority of South Africa. This report should likewise comply with the requirements as set out in the Hague Convention and should include information regarding the child's medical history, family background and any special needs. If, after considering the reports, both central authorities agree to the adoption, the central authority of the convention country will refer the adoption application for consent.

5 5 4 ADOPTION OF A CHILD FROM A NON-CONVENTION COUNTRY BY A PERSON IN SOUTH AFRICA

Prospective adoptive parents habitually resident in South Africa are not restricted or limited to adopting children only from another convention country. Section 265 of the CA makes provision for those persons habitually resident in South Africa to adopt a child from a non-convention country. In such instances, application must be made to

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1051 S 264(1).

the South African Central Authority by the party wishing to adopt. If the central authority is satisfied that the applicant is fit and proper to adopt, it will prepare and submit a report to the competent authority in the respective non-convention country. Should a child be available for adoption in the non-convention country, the competent authority prepares a report on the child and forwards it to the South African Central Authority.

Thereafter, and provided that both the central authority and competent authority agree to the adoption, the competent authority of the non-convention country must refer the adoption application for consent through the appropriate channels in that country. As the adoption order may be granted in the non-convention country, it must be ascertained whether it will be recognised in South Africa (as the receiving state). The central authority in South Africa may issue a declaration recognising the adoption of a child from a non-convention country if: firstly, the adoption is in accordance with the laws of the non-convention country where the order was granted and same has not been rescinded, and; secondly, the adoption in the non-convention country (country where the adoption order was made) has the same effect as if the order had been made in South Africa.[1052] Once a declaration has been issued by the South African Central Authority, the adoption order as granted by the non-convention country will have the same effect as if the adoption order had been granted in South Africa, and the adopted child will for all intents and purposes be regarded as the child of the adoptive parents.

In terms of section 255 of the CA, the President, subject to approval by Parliament, may conclude an agreement regarding intercountry adoptions with a non-convention country, provided that the agreement is one that does not conflict with the provisions of the Hague Convention. The President may further enter into an agreement with a non-convention country to extend co-operation and relations between the countries, alternatively, to facilitate the application of the principles of the Convention. This

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[1052] S 268*(a)* and *(b)*.

agreement should not be in conflict with the Convention. However, in terms of article 39(2) of the Convention it is permissible for States Parties to derogate from the provisions of articles 14 to 16 and 18 to 21 of the Convention when concluding agreements with each other.

5 6 THE IMPACT OF INTERNATIONAL LAW ON THE SOUTH AFRICAN APPROACH TO INTERCOUNTRY ADOPTION

The Hague Convention aims to regulate intercountry adoption. The Hague Convention is based on article 21 of the CRC, in terms of which intercountry adoption is recognised as a form of alternative care for those states that "permit" or "recognise" adoption. Article 24 of the ACRWC reflects the same approach. In terms of international law, children who are deprived of family or parental care are entitled to appropriate alternative care. According to both the CRC and the ACRWC, intercountry adoption is seen as a measure of last resort. The form of alternative care which is available for and OAC in South Africa, albeit temporary or permanent in nature, with respect to the in the present climate in South Africa – economic and otherwise – remains debatable. Efficacy of the alternative care system, the discussion in chapter 3 highlights the failings of the system in South Africa and shows that is often unable to guarantee and protect the rights of a child in such a way that his or her best interests are ensured. The security and stability in the life of any child are the primary aims of the Constitution's provisions on children's rights. When the CA incorporated the provisions of the Hague Convention, the existing scope of alternative permanent-placement options needed to be expanded in national legislation to achieve this aim.[1053]

In line with the aforementioned relevant international and regional instruments, legislative policy in South Africa encourages the placement of an OAC in some *permanent* form of alternative care. Clearly, adoption of a child qualifies as such a form

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[1053] Van der Walt 2016 *Obiter* 677.

of care. Support for adoption placements is premised on the fact that, unlike less permanent forms of care available nationally (for example, foster care and placement in a CYCC), adoption potentially provides a child with permanency and protection in his or her adoptive family. The current legislative framework in South Africa supports adoption over fostering or residential care.[1054] However, adoption does not necessarily enjoy cultural approval by many South Africans.[1055] This is highlighted in the RACAP statistics, which indicate that the number of adoptions in South Africa (2002–2009) remains low and static.[1056] In fact, research indicates that adoption rates in South Africa declined from 2004 to 2013. While a recorded 2 840 adoptions were formalised in 2004, only 1 699 adoptions were recorded in 2013. This is particularly concerning when compared to the number of children in CYCCs. This worrying phenomenon was discussed in chapter 3.

It is submitted that the principle of the best interests of the child as recognised in international and South African national law should be the deciding factor in where to place a child in care. Furthermore, the factors considered in making this decision

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1054 Mokomane, Rochat and The Directorate *Adoption in South Africa: Trends and Patterns in Social Work Practice Child and Family Social Work* (2011) 1.

1055 Culturally, the belief by many communities in South Africa is that where a child is deprived of his or her ancestral roots, such child will lose contact with their ancestors. Rochat *et al Public Perceptions, Beliefs and Experiences of Fostering and Adoption: A National Qualitative Study in South Africa; Fostering and Adoption in South Africa Children and Society* 30 (2016)124, state that the belief is that this uprooting could result in unpleasant, punitive consequences for the future happiness of the child concerned. The authors refer to the following statement made: "When you are born, there are certain things that ancestors require of us. They know who our child is and where he is. Just imagine if you adopt a Biyela child and join the child to the Mthembu's. There will be war between the Biyela and Mthembu ancestors, both ancestors will fight over who owns the child" (Biological parent, male, Gauteng, 40–50 years).

1056 Mokomane, Rochat and The Directorate *Adoption in South Africa: Trends and Patterns in Social Work Practice Child and Family Social Work* 2; Blackie "New Research on Child Abandonment and Declining Adoption Rates: The Alarming Increase of Abandonment Requires Deeper Research Insights and Understanding of Cultural Beliefs to Stem Crisis" (2014) http://www.adoption coalitionsa.org/ (accessed 2017-09-06) states that research indicates that abandonment and declining adoption rates in South Africa is an alarming social challenge largely influenced by traditional indigenous ancestral beliefs. Following research, Blackie found that instances exist where the mothers and community members believe that, "in the eyes of their ancestors, to abandon a child is better than formally relinquishing their rights as parents so that the child can be adopted".

should be an open-ended and flexible list Goldstone J touches on this point in the *Fitzpatrick* judgment, stating as follows: “it is necessary that the best interests’ standard should be flexible as individual circumstances will determine which factors secure the best interests of the child.”[1057]

However, the current debate regarding the place and recognition of adoption and intercountry adoption for an orphaned or abandoned South African child is evidently influenced by attitudes regarding the cultural identity of the child being considered for adoption. Mokomane *et al* report that following an investigation into the reasons for the low number of adoptions and, in particular, intercountry adoptions in South Africa, it became apparent that concerns about loss of cultural roots were commonly a matter of concern for the communities.[1058]

It is submitted in this research that intercountry adoption requires equal consideration with other factors when a determination as to the placement of an OAC is considered. This is discussed in more detail in chapter 7, which deals with the necessity of determining firstly, what factors must be considered when determining the best interests of a particular child, and secondly, what weight ought to be accorded to such factors considered in light of the principle of best interests and international law. Determining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options. To this end, the CA strongly reflects international standards and best practices by setting out principles related to the care and protection of children, and by making provision for Children’s Courts and extensive adoption infrastructure as a structure ensuring protection of a child’s right to family and parental care. This is discussed in more detail in chapter 4.

In intercountry adoption, a child is removed from his or her country of origin, and so, in most instances, from his or her cultural and religious environment. The language or

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1057 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 16.

1058 *Ibid.*

languages the child will learn to speak will often be foreign to his or her place of origin. This reality is understandably used to oppose intercountry adoption. As a result, the concept of subsidiarity was introduced into decisions concerning intercountry adoption. Whether and how this principle should be applied in intercountry adoption is a fundamental question in this research. The final section of this chapter explores how this principle has been addressed in South Africa.

5 7 THE PRINCIPLE OF SUBSIDIARITY IN SOUTH AFRICA

The principle of subsidiarity in South Africa needs first and foremost to be understood in its constitutional context. Following the enactment of the Constitution of South Africa, children's rights in general as citizens of South Africa, as well as children's rights specifically, are established as constitutional rights. In terms of the provisions of section 28(1), the state owes certain duties towards children. One such duty is to ensure that children have access to family and parental care, and where such care is lacking, the state has an obligation to provide appropriate alternative care for these children.[1059] In terms of the provisions of the CRC, "alternative care" includes:

> Foster placement, *kafalah* of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children.[1060]

Article 21(b) of the CRC provides that where the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin, intercountry adoption may be considered as an alternative means of child's care.

1059 S 28(1)*(b)*.
1060 Art 20(3) of the CRC.

5 7 1 A BRIEF HISTORY OF SUBSIDIARITY IN LIGHT OF RELEVANT INTERNATIONAL LAW

Intercountry adoption (and thus the application of the principle of subsidiarity) has a relatively short history in South Africa. Prior to the decision in *Minister of Welfare v Fitzpatrick* in 2000, no legal intercountry adoption took place in South Africa as the legislation in operation at the time, the CCA, did not legally recognise intercountry adoption. Following the enactment of the interim Constitution in South Africa, a constitutional challenge was lodged in *Fitzpatrick v Minister of Social Development*.[1061] At the time of the challenge, South Africa had not yet ratified the Hague Convention. This ratification followed in 2003 and the Hague Convention was subsequently incorporated into South African law by the enactment of the CA in 2005. The three international instruments that make intercountry adoption a subject of international law, and which provide for the principle of subsidiarity, are the CRC,[1062] the ACRWC[1063] and the Hague Convention.[1064]

Article 21*(b)* of the CRC endorses the principle of subsidiarity with a view to protecting the child's best interests in the context of an adoption. It is clearly stated that intercountry adoption will only be considered where a child cannot be placed in a foster or adoptive family, or otherwise be suitably cared for in his or her country of origin.[1065] In recognition of the importance of a child's culture, article 20(3) provides that, when considering appropriate alternate care, "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background". Apparent is the endorsement by the CRC that intercountry adoption will be considered only if the child cannot be placed in "any suitable manner"

1061 *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).
1062 Art 21 of the CRC.
1063 Art 24(b) of the ACRWC.
1064 Preamble of the Hague Convention.
1065 It must be noted that the CRC was drafted at a time where no regulation of intercountry adoption existed. It is against this that the approach of the CRC must be considered in attempting to protect children against abuse and exploitation.

in the child's country of origin.[1066] Domestic adoption is clearly given preference over intercountry adoption. Article 21*(b)* also provides that intercountry adoption can only be considered when there is no "suitable manner" of caring for the child domestically. It is therefore of interest that the Committee on the Rights of the Child has noted that securing a family environment for an abandoned child is preferable to institutionalisation.[1067]

Of utmost importance is the consideration and understanding of what "alternative care" means, and what the *accepted hierarchy* of alternative care is, and why this hierarchy is accepted by the State concerned when considering intercountry adoption? States Parties that recognise and/or permit the system of adoption must ensure that the best interests of the child be the paramount consideration and they recognise that intercountry adoption may be considered as an alternative means of childcare if the child cannot be placed in a suitable substitute family, foster care or in any suitable caring environment in the child's country of origin.[1068] Thus the CRC addresses the instance where a child has been deprived of his or her family in broad terms. Intercountry adoption can be considered only as a potential solution where there is no domestic solution, temporary or permanent, available for the child concerned. In this respect, Mezmur refers to the fact that "the question of last resort is relative as it depends on *what options* are available as alternative care".[1069]

While the CRC prioritises the right of the child to family care, States Parties have a discretion to place a child in intercountry adoption "if the chid cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin". Domestic placements are preferred to a placement abroad, and

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1066 Art 21(b) of the CRC.

1067 As adopted by the Committee at its 64th Session September 2013; "Country Care Review" Better Care Network E54 http://tbinternetohchr.org/treatybodyexternal/Download.aspx (accessed 2016-02-03).

1068 Art 21(b) of the CRC.

1069 Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 92.

intercountry adoption is only considered where it has been established that the child concerned cannot be placed in his or her country of origin.[1070] The ACRWC likewise adopts the principle of subsidiarity, but the approach to the interpretation of the principle is more restrictive in two aspects. Firstly, the ACRWC expressly provides that intercountry adoption may only be considered as a measure of last resort and, secondly, intercountry adoption may only be considered as a potential form of placement where the receiving country has ratified both the CRC and the ACRWC.[1071] These provisions are discussed in greater detail in chapter 2. The Hague Convention favours family care and expressly states in its Preamble that the signatory parties "recognise 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." The Hague Convention refrains from referring to foster care as appropriate alternative care before intercountry adoption can be considered as an option.

Incorporation of the Hague Convention into the CA meant domestication of the subsidiarity principle in South African law. The different wording used in the various provisions relating to the principle of subsidiarity in international law has become a "battleground".[1072] Opponents and proponents of intercountry adoption rely equally on the principle to justify their views. Louw states that the current positon regarding subsidiarity in South Africa is as follows:

> [i]t is generally agreed that the basic purpose of the subsidiarity principle is to ensure that intercountry adoption only occur after possibilities for placing the child domestically have been investigated. The problem is whether intercountry

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1070 Pfund 1994 28 *Family Law Quarterly* 56 opines that the language of Art 21*(b)* of the CRC has been interpreted as placing intercountry adoption at the end of the list of possible methods of care for children without families – after adoption in its country of origin or foster care or other suitable care (deemed to include institutional care) in that country.

1071 Art 24 of the ACRWC; Couzens and Zaal "Intercountry Adoption and the Subsidiarity Principle: A Proposal for a *via* Media" 2009 30 *Obiter* 288.

1072 *Ibid*.

> adoption should be viewed as subsidiary to domestic care options and, if so, which domestic options.[1073]

Judicial precedent on the principle of subsidiarity in South Africa is scarce, and to date there are only two reported judgments that can be referred to. The application of the subsidiarity principle was considered contentious in both cases, and the interpretation and application of the principle has led to much debate. Louw refers to the principle of subsidiarity as "one of the key measures that ensure that intercountry adoption occurs in the best interests of the child".[1074] This approach is in accordance with the provisions of the Hague Convention, which provides that an adoption within the scope of the Convention shall take place only if the competent authorities of the state of origin (the DSD for South Africa) have determined, after due consideration to the possibilities for placement of the child within the state, that an intercountry adoption is in the child's best interests.

The ACRWC also enschrines the principle of subsidiarity within its provisions. Article 24(b) states as follows:

> State Parties which recognise the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall
>
> b. recognise that intercountry adoption in those States that have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.

The Hague Convention also recognises the principle of subsidiarity when deciding to place an OAC through intercountry adoption. Bartholet opines that the Hague Convention limits the preference for placement within the country of origin to domestic adoption and "other true family care", and does not provide that foster care should be

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1073 Louw in Boezaart *Child Law in South Africa* 500.
1074 Louw in Boezaart *Child Law in South Africa* 499.

considered as a form of family care. As such, it prefers intercountry adoption.[1075] Where no such option is available for the child, intercountry adoption may be considered where it is determined to be in the child's best interests. It is generally accepted that institutionalisation of the child, albeit in the country of origin, ought to be considered as an option of last resort.[1076]

5 7 2 JUDICIAL DECISIONS

The approach by the judiciary to the interpretation of the principle of subsidiarity is evident from the discussion of the cases that follow.

5 7 2 1 *MINISTER FOR WELFARE AND POPULATION DEVELOPMENT V FITZPATRICK*[1077]

In *Minister for Welfare and Population Development v Fitzpatrick*, the applicants, who were citizens of the United Kingdom (with intention to live in the United States of America), sought an order of sole custody and guardianship of the child concerned.[1078] The applicants were not South African citizens, and it was their intention to take the child concerned out of South Africa, with a view to adopting her when they were settled in America.

1075 Bartholet "The Hague Convention on Intercountry Adoption: Past, Present and Future" 2013 *Conference Paper at Pepperdine University* 12.

1076 The Convention mandates that the Contracting state designate a Central Authority to discharge the duties imposed such Convention. In terms of Art 6(2), the Central Authorities are expected to take all appropriate measures to ensure that all the laws of the state of origin concerning adoption are complied with. Any other relevant information, including inter alia statistics and standard forms are provided, keeping the parties involved informed about the operation of the Hague Convention, and wherever possible, eliminate any potential obstacles to the application of the Hague Convention must be within the scope of duty of the Central Authority. The Central Authorities have a number of responsibilities that include the accreditation of bodies involved in the process of intercountry adoption, monitoring of such bodies, ensuring their proper financial management and to facilitate, follow and expedite the proceedings of intercountry adoption.

1077 2000 (3) SA 139 (C).

1078 2000 (3) SA 139 (C) par A - B.

The legal effect of section 18(4)*(f)* of the CCA came under consideration by the court.[1079] Section 18(4)(*f*) presented an obstacle for the applicants to adopt the child concerned.[1080] The section concerned prohibiting foreign persons from adopting South African children.[1081] In the alternative, they applied to be appointed as joint guardians and custodians of the child concerned.[1082] The respondent in the matter contended that while the CCA must be amended to allow for intercountry adoptions, care must be had to place a child abroad only if no suitable adoptive parents or foster care placement could be found domestically.[1083]

Foxcroft J held that it would not strike down section 18(4)(f) of the CCA without affording Parliament an opportunity to render the section constitutionally acceptable.[1084] The High Court's judgment gives no consideration to the grounds upon which section 18(4)*(f)* could be considered inconsistent with the Constitution. Foxcroft J simply confirmed in his order that the impugned section was inconsistent with the Constitution and, therefore, invalid "to the extent that it constitutes an absolute proscription of the adoption of a child born of a South African citizen by persons who are not South African citizens".[1085] The High Court suspended the declaration of invalidity, giving Parliament two years to correct the defect.[1086] In the meantime, the

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1079 CCA 74 of 1983. S 18(4)*(f)* of the CCA reads as follows: "in the case of a child born of any person who is a South African citizen, that the applicant, except an applicant referred to in section 17*(c)*, or one of the applicants is a South African citizen resident in the Republic, or the applicant has or the applicants have otherwise the necessary residential qualifications for the grant to him or them under the South African Citizenship Act, 1949 (Act No. 44 of 1949), of a certificate or certificates of naturalisation as a South African citizen or South African citizens and has or have made application for such a certificate or certificates".

1080 *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C) 141 par B.

1081 Unless the applicant wishing to adopt was a spouse of the parent of the child, it was legally, impossible for a non-citizen to adopt a South African child.

1082 *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3).

1083 *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C) 143 par C.

1084 *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C) 143 par H-I.

1085 *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C) 144 par F.

1086 *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C) 144 par G.

Fitzpatricks were granted joint guardianship and custody of the child concerned, pending their adoption application, once that became possible.[1087]

The matter was referred to the Constitutional Court.[1088] The Minister of Welfare and Population approached the court in terms of sections 167(5) and 172(2)(a) and (d) to confirm the order of the High Court.[1089] One of the two main issues for the Constitutional Court to resolve was whether section 18(4)(f) of the CCA was in conflict with the Constitution.[1090] The Constitutional Court unanimously confirmed the order of invalidity and refused to suspend it, making it possible for the Fitzpatricks to adopt the child concerned.[1091] At the Constitutional Court hearing of *Fitzpatrick*,[1092] the Minister of Social Development requested a suspension of the invalidity order. It was argued on behalf of the Minister that, pending a legislative replacement for section 18(4)*(f)*, this order was "inadequate provision to give effect to the principle of subsidiarity".[1093] The contention was rejected by the Constitutional Court.[1094]

Goldstone J held that the suitability of the adoptive parents was not in question, the jurisdiction lay with the Children's Court to assess the application for the adoption of a

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1087 *Ibid.*

1088 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

1089 *Ibid.*

1090 *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C) 141 B-C.

1091 *Ibid.*

1092 *Minister of Welfare and Populations Development v Fitzpatrick* 2000 (3) SA 422 (CC) par E.

1093 *Minister of Welfare and Populations Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 23.

1094 The attack on the citizen requirement was based on the following arguments:
(a) The citizen requirement discriminates directly against prospective adoptive parents and indirectly against the children concerned and as such is inconsistent with the equality clause contained in section 9 of the Constitution;
(b) The fact that non-citizen prospective adoptive parents are denied the right to adopt a South African child is considered an infringement of their right to dignity as guaranteed in section 10 of the Constitution; and
(c) Where it is clearly in the best interests of the child to be adopted by a non-South citizen, as in this case, it is impossible to give paramountcy to the best interests of the child and as such the citizen requirement is inconsistent with the provisions of section 28(2) of the Constitution. In par 20 Goldstone J held that no attempt was made in either the High Court or the Constitutional Court to seek a justification of limitation of section 28(2) of the Constitution in terms of section 36 of the Constitution.

child.[1095] The court considered the fact that a strong bond had developed between the child and the Fitzpatricks and that the biological parents were not capable of looking after their child. There were no members of the family of the biological family who would be suitable foster parents of the child. Evidence was led indicating that unless adopted, the child concerned would most likely "spend his early years in foster care and his later years in an institution."[1096] The Court held that in the case under consideration, the best interests of the child were best served in placing such child in the care of the non-South African citizens.[1097] While conceding that section 18(4)(f) of the CCA was unconstitutional, both the Minister of Social Development and the *amicus curiae* argued in favour of the suspension of the order of invalidity. They submitted that striking down the provisions of section 18(4)(f) in the absence of any amending legislation would expose children to the threat of child trafficking.[1098]

Furthermore, adequate background investigations of the prospective adoptive parents could not be undertaken and the principle of subsidiarity would not be given effect to.[1099] The Court reasoned that the remaining provisions of the CCA were sufficient to enable a children's court to accommodate the concerns of the Minister and the *amicus curiae*. The Constitutional Court held that the provisions of section 40 of the CCA, in terms of which the Children's Court was obliged to "have regard to the religious and cultural background of the child and of his [or her] parents as against that of the adoptive parent or parents".[1100] The Court also pointed out that a Children's Court may, in addition, not grant an adoption order unless it is satisfied, *inter alia*, that:

1095 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) 425 par D-E.

1096 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) 426 par H.

1097 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par A-B.

1098 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) 430 par 25.

1099 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) 431 par 27.

1100 *Minister of Welfare and Populations Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 30.

(i) the applicants are possessed of adequate means to maintain and educate the child;[1101]

(ii) the applicant is or applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child;[1102]

(iii) the proposed adoption will serve the interests and conduce to the welfare of the child;[1103] and

(iv) subject to the exceptions contained in section 19, the consent to the adoption has been given voluntarily by the parents of the child.[1104]

The court importantly conceded that, although the principle of subsidiarity was not expressly provided for in South African law, it was applicable because of the obligation to consider international law in interpreting the Bill of Rights.[1105] Section 21*(b)* of the Hague Convention was of particular importance in this respect where it provides that intercountry adoption may be considered as a placement for a child where no suitable alternative care can be found in the country of origin.[1106]

Further, the Constitutional Court noted that section 40 of the CCA guaranteed consideration of the religious and cultural background of an adoptee and adopters. It concluded that the principle of subsidiarity was sufficiently satisfied by this, and the continuation of section 18(4)*(f)* was therefore not necessary to maintain the principle. Goldstone J, in whose judgment the Court concurred, held that the absolute prohibition of the adoption of a South African born child by non-South Africans is inconsistent with section 28 of the Constitution which requires that the best interests of a child are to be given paramountcy in every matter concerning the child.

1101 S 18(4)*(a)* of the CCA.

1102 S 18(4)*(b)*.

1103 This requirement corresponds to s 28(2) of the Constitution.

1104 S 18(4)*(d)* and *(e)*.

1105 The principle of subsidiarity was expressed in two treaties to which South Africa was a State Party, namely the CRC and the Hague Convention. Neither of the treatise had as yet been domesticated in South African national law.

1106 *Minister of Welfare and Populations Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 27.

Somewhat anomalously, it referred to obligations under the CRC, yet expressed a description of subsidiarity closer to that in the Hague Convention, which favours familial placements.[1107] It did not acknowledge the differences between these conventions and the ACRWC. In addition, the Constitutional Court referred to intercountry adoption as subsidiary only to national adoption.[1108] The court made no reference to the applicability of intercountry adoptions where foster care and institutionalisation were the only available domestic options.

The judgment of the Constitutional Court in *Fitzpatrick* took only limited cognisance of the implications of the principle of subsidiarity, and no reference was made to the implementation of relevant safeguards that have been recommended internationally. Instead, the Constitutional Court relied on the CCA, which made provision for the creation of Children's Courts and the establishment of overall guidelines to advance the welfare of the child. The court held that, where such provisions of the CCA were "appropriately and conscientiously applied" by Children's Courts, the main provisions of the CCA would meet the most serious of the concerns of the Minister and the *amicus curiae* regarding the safeguarding of children against child trafficking.[1109] Adoption in favour of the applicant was not considered by the court. The *Fitzpatrick* judgment is important in the South African legal sphere in two respects:

(a) The judgment increased the number of alternative care options by providing for intercountry adoptions in South African law.

(b) The court made it clear that the principle of subsidiarity applies to such adoptions.

Following *Fitzpatrick*, intercountry adoptions were dealt with on the same basis as domestic adoptions. As such, these adoptions were regulated exclusively by the

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1107 Louw refers to the fact that the Hague Convention specifically refers to suitable "family care" and not suitable "care", thereby indicating a preference to permanent care in lieu of temporary care, where such care is found to be in the child's best interests.

1108 *Minister of Welfare and Populations Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 27.

1109 *Minister of Welfare and Populations Development v Fitzpatrick* 2000 (3) SA 422 (CC) par 31.

provisions of chapter 4 of the CCA. It is submitted that the Constitutional Court in *Fitzpatrick* gave ready access to intercountry adoption without providing clarity on the requirements for assessment of national options before placement in intercountry adoption was deemed appropriate.[1110] Skelton opines in this regard "perhaps the Court was overly sanguine about how well the Children's Courts would cope with intercountry adoption in the absence of a comprehensive legal framework".[1111] This led to intercountry adoptions from South Africa being governed by national law and a childcare system insufficiently equipped to deal with the resultant complexities. Nonetheless, the court's taking cognisance of the principle of subsidiarity in *Fitzpatrick* was a significant development in the national law on intercountry adoption.

5 7 2 2 *AD V DW*[1112]

Consideration was also given to the principle of subsidiarity by the Constitutional Court in *AD v DW*.[1113] The meaning of the subsidiarity principle was of central importance. In that case, Sachs J considered the history of intercountry adoption to show how the approach to the subsidiarity principle has changed over time.[1114] Whatever the history of the subsidiarity principle, Sachs J held:

> It is now largely accepted that most countries from both the receiving and sending sides of the world earnestly seek only to provide good alternative family care for ill-fated children. The standardisation and universalisation of criteria and controls has produced a situation where embracing the institution of intercountry adoption is increasingly less seen as a sign of weakness or the acceptance of "international charity", or even a dereliction of a social welfare duty resting on a State. The emphasis has shifted to acknowledging that onerous duties are imposed on a

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1110 *Ibid.*

1111 Skelton 2009 9(2) *AHRLJ* 492.

1112 *AD v DW* 2007 (5) SA 184 (SCA).

1113 (CCT48/07) [2007] ZACC 27. This case was first heard in the Local Division reported as *De Gree v Webb* 2006 SA 51 (W). The appeal from the court *a quo* is reported as *De Gree v Webb* 2007 (5) SA 184 (SCA). At the time the case was heard, South Africa had ratified the Hague Convention.

1114 *AD v DW* (CCT48/07) [2007] ZACC 27 par 40.

> sending State to apply diligently its discretion on whether an intercountry adoption would serve the best interests of the particular child involved.[1115]

With reference to the Hague Convention, Sachs J held "Children's need for a permanent home and family can in certain circumstances be greater than the need to remain in their country of birth"[1116] Sachs J held that the principle of subsidiarity is in fact subordinate to the principle of a child's best interests.[1117] Like the Hague Convention, the CA does not encourage or promote intercountry adoptions.[1118] One of the main purposes of the CA is to give effect to the Hague Convention and to regulate intercountry adoptions.[1119]

5 7 3 TEMPORARY NATIONAL CARE *VERSUS* PERMANENT INTERNATIONAL CARE?

While parties to the Hague Convention take on a duty to preserve the family unit, preferably in the child's country or origin, the ranking (among the placement options available) to be afforded to the placement of a child in intercountry adoption is not specifically addressed. As Schäfer states "How high then is the threshold imposed by the subsidiarity principle?"[1120]

Doek is in agreement with Bartholet where she promotes the granting of preference to family placement.[1121] Bartholet also emphasises the importance of placing a child with a family at an early age and opines that "international adoption has been shown to overcome even very significant deficits caused by early deprivation, with the age of

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1115 *AD v DW* (CCT48/07) [2007] ZACC 27 par 33.
1116 *AD v DW* (CCT48/07) [2007] ZACC 27 par 48.
1117 *AD v DW* (CCT48/07) [2007] ZACC 27 par 55.
1118 Couzens 2009 *PER/PELJ* 58–59.
1119 Louw in Boezaart *Child Law in South Africa* 485.
1120 Schäfer *Child Law in South Africa: National and International Perspectives* 516.
1121 Doek, Van Loon and Vlaardingerbroek *Children on the Move: How to Implement their Right to Family Life* (1996) 5; Bartholet in Askeland (ed) *Children and Youth in Adoption, Orphanages, and Foster Care* 124.

placement overwhelmingly predictive of the chance for a normal life".[1122] She highlights the devastating effect that institutionalising a child can have on his or her well-being. Research has shown that even the better institutions fail to provide a child with the personal care that is needed to thrive physically and emotionally.[1123]

Bartholet further emphasises that street children today are often faced with a choice between life and death in orphanages or on the streets in their home country.[1124] The possibility of adoption in a child's country of origin is drastically limited in developing countries because of poverty, while intercountry adoption to wealthier countries offers the prospect of alleviating the hardships faced by children, especially in African countries.[1125] It is plausible that the absence of adoption subsidies together with cultural beliefs in South Africa which discourage termination of parental rights, lead to low adoption rates. Pretorius refers to the statement made by the Commissioner of Human Rights as follows:

> The Commissioner of Human Rights has stated that there are critics who contend that intercountry adoption is in fact a better solution than family-based foster care or other forms of traditional coping strategies.[1126]

This approach is in agreement with the Guide to Good Practice, which proposes that the application of the subsidiarity principle does not require that all local possibilities for care be exhausted before intercountry adoption is considered.[1127] The Guidelines state that such a requirement would place an unnecessary burden on authorities, and also potentially delay indefinitely the possibility of finding a permanent home abroad for a child concerned.[1128] While acknowledging the importance of prioritising

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1122 Bartholet in Askeland (ed) *Children and Youth in Adoption, Orphanages, and Foster Care* 124.
1123 *Ibid*.
1124 Bartholet refers to the need for law reform to expedite the process of identifying such children and placing them in permanent homes as soon as possible in order that such child can be cared for within a family environment.
1125 Pretorius *Intercountry Adoption and the Best Interests of the Child* 17.
1126 Pretorius *Intercountry Adoption and the Best Interests of the Child* 52.
1127 Pretorius *Intercountry Adoption and the Best Interests of the Child* 53.
1128 Pretorius *Intercountry Adoption and the Best Interests of the Child* 51.

placement in a family home, or in family care, in the country of origin for the child, it expounds the view that a permanent home in another country is preferable to a temporary home in the country of origin.

Without prescribing a rigid hierarchy of placement options, the Guide to Good Practice proposes the different care options to be considered in the following order of preference:

- Maintaining a child in his or her family of origin is important. However, where this is not an option because of abuse of such child by the parents, then permanent care by extended family may generally be preferable.
- However, where placement in kinship care is either wrongly motivated or unsuitable, placement of the child through national adoption is the next alternative.
- In the absence of suitable prospective national adoptive parents, intercountry adoption should be considered since institutionalisation is generally considered the "last resort".[1129]

As already observed, it is widely agreed that three principles should govern any decision regarding intercountry adoption: family-based solutions are generally preferred to institutional placements; permanent solutions are generally preferable to inherently temporary ones; and national solutions are generally preferable to those involving another country.

When taking into consideration these three principles, it is clear that intercountry adoptions fulfil the first two principles, but not the third. Supporters of intercountry adoption would support the approach that temporary informal care could not be considered as an appropriate alternative for an abandoned or orphaned child where permanent care through intercountry adoption is found to be a potential option for the

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1129 Permanent Bureau of the Hague Conference on Private International Law *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice No 1* 30.

particular child.[1130] Following this approach, intercountry adoption should only be considered subsidiary to domestic adoptions.[1131]

It is submitted that serious consideration needs be given to aligning the competing principles of best interests of the child and subsidiarity. It is submitted that a determination should be based on a consideration of both principles, in light of the circumstances and ability of the country of origin to satisfy the rights of the child. This of course makes it relevant to consider the actual circumstances of the child concerned and the solution that would best serve the interests of such child. Pretorius submits that States Parties are, at the same time, obliged to make sure that the child's best interests are not compromised where a permanent placement abroad is available and the authorities in the country of origin of the child are seeking a domestic placement for the child concerned.[1132]

As already noted, the possibilities for adoption for an abandoned or orphaned South African child are very limited.[1133] Intercountry adoption could serve as an appropriate solution for at least some of the millions of children facing hardships.[1134] While article 21 of the CRC requires that all measures must be taken to place a child nationally before placing a child abroad, it must be noted that the CRC was drafted in an era where intercountry adoption was unregulated. Regulation was provided for in the Hague Convention. The primary objective of the Hague Convention was the creation of a regulatory framework for intercountry adoptions.[1135] The reason for considering intercountry adoption as a measure of last resort can be understood in the unregulated climate at the time. Given the safeguards incorporated into the Hague Convention, it

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1130 Blackie *Sad, Bad and Mad* 26, refers to the low adoption statistics as opposed to the unusually high number of children accessing foster care grants.

1131 Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 86.

1132 Pretorius *Intercountry Adoption and the Best Interests of the Child* 53.

1133 Pretorius *Intercountry Adoption and the Best Interests of the Child* 55; Blackie *Sad, Bad and Mad* 24.

1134 Bartholet in Askeland (ed) *Children and Youth in Adoption, Orphanages, and Foster Care* 113.

1135 Schäfer *Child Law in South Africa: Domestic and International Perspectives* 515.

is reasonable to now relook at the exercise and purpose of intercountry adoption. Since there is no obligation to allow intercountry adoption as a means of alternative care, the implication, albeit remote, is that it is also possible to suspend the practice when the best interests of a child is compromised.

What are the potential meanings and implications of viewing intercountry adoption as a measure of last resort? Such an exploration, among other things, requires one to:

- weigh the value of other alternative care options to compare intercountry adoption with institutionalisation; and
- consider the system of alternative care available in the child's country of origin and weigh up all factors against the child's right to have his or her best interests a paramount consideration in reaching a decision.

Maintaining a child in his or her family of origin is important, but it is not more important than protecting a child from harm or abuse. Permanent care by an extended family member may be preferable, but not if the carers are wrongly motivated, unsuitable, or unable to meet the needs (including the medical needs) of the particular child. To mention one example, it would be very difficult to sustain an argument that when a child deprived of a family environment has a chance of being placed with an aunt outside his or her own country, such a child should be institutionalised simply because intercountry adoption should be a measure of last resort. In other words, the principle of subsidiarity could be subject to the best interests of the child.

5 8 CONCLUSION

Intercountry adoption, as a form of alternative care in the wider sense, has been considered in this chapter. While it is accepted that the reunification of families is a priority, the reality is that such re-unification is fraught with its own challenges, including inadequate resources to carry out the reunification process and the impact of HIV/AIDS on the country, the services it provides, and the families concerned. For children left parentless by this disease, reunification is impossible. Notwithstanding the crisis experienced by so many vulnerable and orphaned children in South Africa, the

government evidently sadly remains hesitant to support intercountry adoption as a means to alleviate the situation, and to provide a solution for the current crisis.

Child protection experts point to the fact that although the government continues to over-regulate the system of adoption, making it problematic for potential adoptive parents to adopt a child, somewhere a child is affected as a result. Blackie expresses her concern that many abandoned children are not receiving the protection of the formal child protection system, and many of these children abandoned are absorbed into the communities concerned. While the communities assist in many ways, there is a risk that such children then become victim to child trafficking.

Given that intercountry adoption placements from South Africa are rare, it is submitted that authorities are not taking intercountry adoption into consideration as a viable option. This is despite the fact that it may be, in an instance under consideration, in the particular child's best interests. It is submitted that the authorities' refusal to consider intercountry adoption as potentially appropriate alternative care for a child, is based on fallible beliefs. Whilst caution must be exercised in placing a child abroad, such placements must be considered at the least to be a potentially viable alternative for an OAC.

The fundamental rights of children, which include the right to family and parental care, are guaranteed and protected in both the Constitution and national legislation.[1136] Where intercountry adoption is considered for a child, it is essential that relevant mechanisms be in place to allow for co-operation and collaboration between the relevant authorities in the countries concerned. Such authorities include, but are not limited to social and medical workers, as well as legal experts in the field of child law.

The argument raised in the CRC in the past against intercountry adoption was largely due to the dispersed and unregulated intercountry adoption system, and this concern

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[1136] *De Gree v Webb* [2007] SCA 87 (RSA) par 11.

has been addressed by the Hague Convention. The permanent placement of a child abroad has thus become more palatable. However, when certain legislative provisions are considered, the question must be raised whether further barriers have not been created by the legislature in relation to seeking placement for a child in a permanent family.

The CA established *who* was eligible to adopt, but these provisions were not supported by any policy document setting out norms and standards that could provide guidance to organisations on adoption criteria such as the age and size of the prospective adoptive family. Until recently, South African adoption organisations could establish their own policies and criteria regarding what they considered established a good adoption practice in line with their own requirements, as long as no law, constitutional or otherwise, was infringed thereby. Concerning the hierarchy of alternative placement of a child, the South African Central Agency and accredited organisations were operating in uncharted waters. These agencies noted, with concern, the need to have a uniform set of principles, regulations and guidelines that could be followed in making such determinations. No uniformity in the approach of the relevant stakeholders existed. The enactment of the CA and its incorporation of the provisions of the Hague Convention, addressed these concerns. Nonetheless, South Africa places only very few children for intercountry adoption annually.

Despite recognising the family to be the best home for any child, it is unfortunate that the CA makes no express provision for the protection of the biological family unit, or for family care and responsibility by enabling them to function optimally. The South African state officials and various stakeholders lack much-needed guidance in their engagement with families in addressing the plight of the children of the family, or alternatively, to raise the standard and quality of life of the family on a permanent and continuous basis. For instance, a social worker might abuse his or her right to remove a child from the family rather than prioritising support for the family to keep the child within the family unit.

The state is further challenged by its inability to support families in crisis financially owing to *inter alia* budgetary constraints, under-spending of the state budget and delays in the delivery of much-needed services. Although certain proponents argue that domestic foster care is preferable in principle to intercountry adoption, issues of the feasibility and permanency of placement have subordinated this alternative form of care in practice. What needs to be determined is whether the authorities are hesitant to place children abroad on the basis of a lack of guidelines in respect of the weight to be applied to intercountry adoption as a measure of last resort. ABBA,[1137] a nationally designated and accredited Child Protection Organisation that specialises in adoption and social services in all provinces in South Africa considers intercountry adoption as an exceptional measure where a specific child's situation necessarily demands it, to ensure permanency for a child deprived of a family environment.

The question arises whether intercountry adoption should be considered as a "placement of last resort" in all instances, notwithstanding that the best interests of the child are not always served in the domestic solution. Alternatively, does subsidiarity and appropriate alternative care in the child's country of origin essentially mean that, in all instances, culture, race, ethnicity and language dictate that a domestic solution (implying that these factors are taken into consideration) will always serve the child's best interests? Is "last resort" actually interpreted by the authorities to mean "no resort"? These concerns are addressed in chapter 7 where recommendations are made for placing a child according to his or her best interests.

The application of the principle of subsidiarity as well as the role played by the principle of the best interests of the child in two other countries – India and Kenya – is discussed and juxtaposed with the position in South Africa in chapter 6. Reference is made to the approach followed in India in an attempt to seek guidelines from a multi-cultural, multi-

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1137 See ABBA "Specialist Adoption and Social Services" https://www.abbaadoptions.co.za/about.html (accessed 2019-02-04).

linguistic nation such as South Africa. The position in Kenya as a developing African country is also considered.

CHAPTER 6

INTERCOUNTRY ADOPTION IN INDIA AND KENYA

6 1 INTRODUCTION

The previous chapter dealt with intercountry adoption in South Africa. The current chapter will refer to the practice of intercountry adoption in two different jurisdictions, namely India and Kenya. These two countries are both developing countries and, in several respects, face similar problems as South Africa, concerning the care of increasing numbers of OAC. Both India and Kenya are, like South Africa, signatories to the CRC and the Hague Convention.[1138] In addition, Kenya is, like South Africa, also a signatory to the ACRWC.

The aim of this chapter is to consider the lessons, to be learnt from a multi-racial, multi-religious and multi-cultural developing country, India, and a developing country on the African continent, Kenya, regarding alternative care and intercountry adoption. Kenya has a moratorium imposed by the Cabinet banning all placements of its abandoned or orphaned children in intercountry adoption. However, the independent judiciary in Kenya have asserted their independent role and have based the *ratio decidendi* for their judgments on a call for human conscience to prevail when considering what would best meet the best interests of an OAC in need of care in Kenya.

The reality of the impact on the child where an indefinite *moratorium* is placed on intercountry adoption is also considered in the chapter in the context of the resistance

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1138 On a national level, India has prepared a National Policy for Children under which the Ministry of Social Justice and Empowerment has the authority to enact laws regarding the welfare of children.

to intercountry adoption, which may be developing in sending countries, including South Africa and India. Alternative care both permanent and temporary in nature, in India, will be considered first. Thereafter the regulation of alternative care, as well as intercountry adoption in Kenya, will be explained and evaluated.

The following structure is adopted in regard to the consideration of each country: The contexts, as well as the necessity for alternative care, are highlighted. Thereafter the constitutional context, the applicable legislation and incorporation of international law are considered. A discussion of the temporary alternative care, adoption and intercountry adoption follows. The legal, as well as practical realities in each country, are stated and considered, and thereafter, since the countries and the legal and practical conditions are diverse, different lessons from each country will be emphasised and highlighted. The applicability of the best-interests-of-the-child principle and the subsidiarity principle are highlighted in respect of each country. In the conclusion to the chapter the lessons to be learnt from each country will be consolidated.

6 2 INDIA

With 430 million children, India has one of the largest children's populations in the world. In 2017, India had an estimated 31 million orphaned children[1139] of which 50 000 children were considered adoptable.[1140] Factors, including a population of 1 354 051 854 people and widespread poverty, contribute to the enormity of orphaned,

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1139 S 2(43) of the Juvenile Justice Care and Protection Act of 2015 defines "orphan" as a child – who is does not have biological, adoptive parents, or a legal guardian, or where he or she has such a guardian, the guardian concerned is not willing to take, or capable of taking care of the child.

1140 Adoption Statistics Central Adoption Resource Authority, Government of India referred to by Pogula Udayan Care is Redefining Family for Abandoned and Vulnerable Children in India Duke August 16, 2017. It is to be noted that statistics of orphaned children in India vary from source to source.

abandoned and surrendered children in India.[1141] Estimates predict that India will have 24 million orphans by 2020.[1142] Adoption would provide an OAC with the right to grow up in an environment that provides the stability and nurturing recognised in the international law as beneficial to those in need of care. However, adoption rates in India are on the decline with less than 6 500 children domestically adopted annually between 2010 and 2017. As few as 3 788 children were adopted from April 2016 to March 2017.[1143]

Factors contributing to the decline are long waiting periods associated with adopting a child, families being specific regarding their choice of the child they wish to adopt, the fact that many people who wish to adopt have a preference for a fair male child, and the rise of surrogacy and fertility treatment available.[1144] To cope with orphaned, abandoned and surrendered children, alternative care in residential care programmes, have played an important role in caring for OACs in India. Kalra reports with concern that in 2016 only 1 600 children were available for adoption notwithstanding that approximately 50 000 orphans were adoptable in India at the time.[1145] The potential for an OAC in India to grow up in a nurturing family environment appears bleak. A consideration of potential appropriate placements options for OACs in India follows.

1141 One factor relates to the introduction of the "cradle-baby-scheme" by the Government of Tamil Nadu in 1992. In terms of the scheme, child-welfare organisations and major Government hospitals placed a crib outside at the door of their premises for children to be "given up". The aim was an attempt to reduce the numbers of female infanticide. Sheelajayanthi Personal Communication December 12, 2008 reported that it appeared that the scheme was a factor in the increase of the number of female children "surrendered" and a reduction of female infanticide.

1142 *Ibid.*

1143 *Ibid.*

1144 Doval "Why is the Number of Adoptions in India Declining?" 2015 *LiveMINT*.

1145 Kalra "Why Only 3.2% of India's 50 000 Orphans Will Find Parents" (2016) (not paginated) *INDIASPEND* http://www.indiaspend.com/cover-story/why-only-3-2-of-indias-50000-orphans-will-find-parents-34599 (accessed 2018-08-24).

6 3 LEGISLATIVE PROVISIONS IN INDIA

Various forms of alternative care are recognised and practised in India, including care that is permanent or temporary in nature. Foster care, guardianship, kinship care, *kafalah*, the institutionalisation of a child all fall under the latter, while adoption provides permanent alternative care. Debate and controversy have arisen in regard to adoption, since not all religions accept the legal institution of adoption. The religious-based laws, applicable to communities which do not practice adoption, has been criticised as being unjust to children.[1146]

With respect to placing a child in appropriate alternative care, the Centre for Law and Policy Research in India[1147] states that there is significant evidence that indicates a shift in child-rights jurisprudence in India to family-based alternative care for children as opposed to institutional care.[1148] The right of every child to family care is recognised in the Indian Constitution[1149] and the jurisprudence of the Indian Supreme Court on child rights. In the event that a child is not able to be cared for by his or her family, the state is obligated to provide the alternative care to the OAC in need thereof, either by adoption or by other appropriate alternative care.[1150] The Indian Constitution also

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1146 Parashar "Religious Personal Laws as Non-state Laws: Implications for Gender Justice" 2013 45(1) *The Journal of Legal Pluralism and Unofficial Law* 5 23; Gottlieb and Frost "In India, Non-Hindu Parents Face Adoption Prejudice" (2012) *DAWN* https://www.dawn.com/news/738379/in-india-non-hindu-parents-face-adoption-prejudice (accessed 2018-08-21).

1147 The Centre for Law and Policy Research (CLPR) is a not-for-profit trust that was started in India in 2009. It is a legal research organisation.

1148 Kothari and Saikumar "Foster Care in India" (2014) http://fostercareindia.org/wp-content/uploads/2014/02/Policy-Brief-on-Foster-Care -in-India.pdf (accessed on 2018-06-04) 5.

1149 Centre for Law and Policy Research "Foster Care In India: Policy Brief" (2014) https://bettercarenetwork.org/sites/default/files/attachments/Foster%20Care%20in%20India%20Policy%20Brief.pdf (accessed 2018-08-24) 2.

1150 Bajpai "The Legislative and Institutional Framework for Protection of Children in India IHD" 2010 Working Paper No 5 UNICEF Working Paper Series Children of India: Rights and Opportunities.

ensures the protection of a child's rights by providing that "[t]he State shall make special provisions for women and children whenever necessary."[1151]

Following the ratification of relevant international instruments such as the CRC and the Hague Convention, India has undertaken to ensure that any determination regarding the placement of an OAC in appropriate alternative care, should be in the best interests of the child concerned.[1152] The increase in domestic adoption and decrease in intercountry adoption have been significant in the last two decades.[1153]

6 3 1 THE CONSTITUTION OF INDIA, 2015

The Constituent Assembly of India adopted the Constitution on 26 November 1949 and the provisions became operative on 26 January 1950.[1154] Since 1950, the Constitution of India has been amended one hundred and one times, which makes it one of the most frequently-amended constitutions in the world.[1155] The Constitution contains fundamental rights, directive principles of state policy and fundamental duties.[1156] The Constitution aims at creating legal norms, a social philosophy, and economic values, which are to be affected by means of harmonising and adjusting the diversity of individual rights and social interests in India, to achieve the desired

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1151 Art 15(3).

1152 Sengupta "Comparative Analysis of Implementation of the Child Protection Rights in Norway and India Oslo and Akershus" (2013) University College of Applied Sciences Oslo and Akershus University College of Applied Sciences 1 https://www.hioa.no/content/download/ 35716/.../Monimala%20Sengupta_2013.pdf (accessed 2018-08-27).

1153 Bajpai 2010 Working Paper No 5 UNICEF Working Paper Series Children of India: Rights and Opportunities.

1154 This is considered as the date of the commencement of the Indian Constitution. The development of constitutional rights in India was inspired *inter alia* by the Bill of Rights of the United Kingdom 1689, the Bill of Rights of the United States of America, and the French Declaration of the Rights of Man. Bajpai 2010 Working Paper No 5 UNICEF Working Paper Series Children of India: Rights and Opportunities.

1155 2015 saw a further amendment of the Constitution.

1156 These provisions prescribe the fundamental obligations of the state to its citizens, and the duties of the citizens to the state.

goals.[1157] The Preamble of the Constitution formulates the fundamental values and guiding principles on which the Constitution is based, notably those of justice, liberty, equality and fraternity. The Constitution specifically recognises the existence of the diverse personal laws in operation in India. At the time of the enactment of the Constitution, several uniform codes were in place regulating various aspects of legal interaction.[1158] Matters governed by personal laws are however excluded from these codes.

The Constitution of India makes provision for the recognition and protection of an individual's fundamental human rights. Included herein is the fundamental right to equality. At the same time, the Constitution provides that the state shall not discriminate against any citizen on grounds of religion, race, or caste. The articles in the Constitution ensure equality while at the same time providing that an individual will not be discriminated against on the basis *inter alia* of his or her religion, are problematic in that reliance on either of the principles might lead to a varying conclusion. The inconsistency in personal laws has been challenged on the touchstone of article 14, which ensures the right to equality.[1159] Following the enactment of the Constitution, and with specific reference to section 15(1), it is difficult to imagine a situation in which a violation of the law will not equate to the violation of the right to equality.

1157 The Hans India "The Philosophy of the Constitution" (2017) http://www.thehansindia.com/posts/index/Civil-Services/2017-09-01/The-Philosophy-of-the-Constitution/323487 (accessed 2018-08-27).

1158 Bhattacharjee *Hindu Law and the Constitution* (1994) 177 refers to *inter alia* The law of contract, Transfer of Property, Company Law, Criminal Procedure *etc*, are included here.

1159 *Githa Hariharan v RBI AIR* 1999 2 SCC 228. In its judgment, the court ushered in the principle of equality in matters of guardianship for Hindus, making the child's welfare the prime consideration. Anand *The Indian Express In fact: Equality, Freedom the Key Issues in Continuing Uniform Civil Code Debate* (2015) opines that the right to constitutional remedies empowers citizens to approach the Supreme Court to seek enforcement of, or protection against infringement of their legal rights.

Bajpai opines in this regard, that it could not have been the intention of the drafters of the Constitution to create any immunity in favour of one's personal law.[1160] Article 12(1) and (2) of the Constitution provides that where a custom or usage violates a fundamental right guaranteed in terms of the Constitution, such custom or usage is deemed null and void, and the Constitution imposes a prohibition on the state from making any law, which takes away or abridges the right conferred by Part III. The approach of certain personal laws to the institution of adoption may possibly be regarded as unconstitutional. Since South Africa does not experience similar problems in regard to adoption, this issue will not be canvassed in detail in this chapter.

6 3 2 THE GUARDIAN AND WARD ACT, 1890

The Guardians and Wards Act (GWA) is a general law of India and is applicable to all religious communities as far as the custody of a child through guardianship is concerned.[1161] Personal laws of Muslims, Christians, Parsi and Jews do not legally recognise adoption, and subsequently, the GWA provides for the placing of a child in guardianship.[1162] The Family Court[1163] is guided by the welfare of the child when determining an application for guardianship of such child.[1164] Unlike adoption, guardianship does not provide the child with the same status as a child born biologically to a family.[1165]

1160 Bajpai *Adoption of Children: Case for a Common Law of Adoption in the Cause of Justice to the Child* (Master of Philosophy dissertation, National Law School of India University, Bangalore 1995) 67.

1161 S 7(1) of the GWA provides as follows:
"(1) where the Court is satisfied that it is for the welfare of a minor that an order should be made.
a) appointing a guardian of his person or property, or both, or
b) declaring a person to be such a guardian, the court may make an order accordingly."

1162 Guardianship implies taking care of another's child, and as such, provides an acceptable alternative to adoption in accordance with the precincts of the listed faiths.

1163 S 7(10)*(b)*, Explanation *(g)*, Family Courts Act, 1984.

1164 S 7 of GWA.

1165 Directorate of Social Welfare: Child Adoption http://www.tn.gov.in/adoption/adoptionlaw.htm (accessed 2018-08-02).

Given the diversity and stigmas attached to adoption within the Indian society, domestic adoption is more complex. The original absence of a uniform law of adoption created a stumbling block to the potential placement for abandoned and surrendered children abroad.[1166] Consequently, reliance was placed on the provisions of the GWA to enable prospective adoptive parents to apply for the guardianship of an abandoned or surrendered child in terms of section 7 of the GWA.[1167] As such, when considered to be for the welfare of the child concerned, an opportunity was created for the permanent placement of such child through intercountry adoption.[1168] Foreigners, who seek to adopt an Indian child, do so under the GWA to assume legal guardianship of the child, after giving an assurance to the court that they would legally adopt the child as *per* the laws of their own country, within two years after the arrival of the child in such country.[1169] This Act, dating from 1890, has accordingly been used to effect adoptions by many adoptive parents, both in India and abroad, particularly in the non-Hindu community.

The GWA is the only non-religious universal law[1170] regarding the guardianship and custody of a child in India.[1171] In terms of its powers, the court is authorised to make such an appointment where it is satisfied that it is necessary for the welfare of the minor.[1172] In considering what will be the best determination when considering the

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1166 The ICCW records of all domestic adopted children indicate that from 2001 to 2009, 78 per cent were female children, and 22 per cent male children. This clearly indicates that female children are still being abandoned or surrendered more often than male children.

1167 *Ibid*.

1168 In this regard, see *Anokha (Smt)* v *State of Rajasthan* on 8 December 2003 Appeal (civil) Case no. 9631 of 2003 where the Supreme Court held that the application for the adoption of an Indian child by eligible foreign adoptive parents could be considered in terms of s 7 of the GWA.

1169 Shruti "Adoption Laws in India: Reviews and Recommendation Needed" (undated) 12 https://www.scribd.com/doc/89536206/Adoption-Law-in-India-Need-and-Recommendation-Needed (accessed 2018-08-27).

1170 With an exception for the States of Jammu and Kashmir.

1171 In terms of the provisions of the GWA, a child is defined as not older than 18 years of age.

1172 S 7 of the GWA.

welfare of the child, the court has regard to the factors as provided for in section 17(2).[1173] The interest of the child remains the primary consideration of the court.[1174]

However, under the GWA, parental authority supersedes the principle of the welfare of the child, meaning that the court's authority to intervene in furtherance of the welfare principle is subordinated to that of the father, as the natural guardian of the child.[1175]

In line with the obligation on the state to safeguard its children, no application should be entertained directly by any social or welfare agency in India, working in intercountry adoption, or by an institution, or centre, or home to which children are committed by juvenile courts.[1176] This provision aims to assist in the reduction of the possibility of profiteering and trafficking in children.

6 3 3 THE HINDU ADOPTION AND MAINTENANCE ACT, 1956

The Hindu Adoption and Maintenance Act (HAMA) was enacted following the Declaration of Independence of India, and as a result, a unification was achieved of the existing customary forms of adoption into a single form was achieved.[1177] Although the HAMA[1178] provides for the legal adoption of a Hindu child[1179] only by the adoptive parents who are also Hindu, the HAMA was nonetheless a progressive piece of legislation.[1180] The HAMA introduced the expression of a "child in need of care and

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1173 Agrawal and Vashistha "Guardianship under Hindu, Muslim, and Christian Laws" www.http://legal serviceindia.com (accessed on 2016-04-22).

1174 S 7 of the GWA.

1175 S 17(1) provides as follows: "In appointing or declaring the guardian of a minor, the court shall be guided by what, *consistently with the law to which the minor is subject*, appears in the circumstances to be for the welfare of the minor" (my own emphasis).

1176 *Lakshmi Kant Pandey vs Union of India* 1984 AIR 469, 1984 SCR (2) 797.

1177 The President of India assented to the HAMA on 21 December 1956. During the period of transition preceding the assent of the HAMA, courts applied both ancient laws and customs (which were religion-based), and the provisions contained in the Act. The HAMA came into effect from 21 December 1956.The HAMA was amended in 1960 and 1962.

1178 Part of the Hindu Code Bills.

1179 A child is defined in HAMA as not older than 15 years of age.

1180 In *Jalkaur v Pala Singh* AIR 1961 Punj. 391, the court stated that "all recent enactments which have as their fundamental purpose, the removal of Hindu Women's disabilities and conferment

protection".[1181] The provisions of the HAMA are more parent-, than child-oriented.[1182] However, the provisions of the HAMA exclude anyone who is a Muslim, Christian, Parsi or Jew by religion.[1183] The HAMA established certain requirements that must be met in order to affect an adoption under its provisions including who may adopt,[1184] and who is eligible for adoption.[1185] Section 6 sets out the requisites of a valid adoption. However, it must be noted that no provision is made in the HAMA that requires a court of law to scrutinise or grant permission for such adoption to take place.[1186] The HAMA also provides that adoption is final and irrevocable.[1187]

6 3 4 THE JUVENILE JUSTICE CARE AND PROTECTION ACT, 2015

The enactment of the Juvenile Justice Care and Protection Act, 2000 (JJCPA 2000)[1188] was a move by the legislature towards a uniform secular law, applicable to all persons

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on them of better rights may be legitimately and with advantage referred to and harmoniously construed for the purpose of ascertaining the real manifest intention and the underlying cardinal purpose of the Parliament in enacting the Hindu Adoption and Maintenance Act in response to the needs and demands of a progressive society. To conclude, the thrust of national policy of India for the welfare of children is to protect abandoned and destitute children with a goal to finding a family for as many orphan children as possible, and to safeguard their interests as visualised in the CRC and Hague Convention on Intercountry Adoption ratified by the Indian government. The 'Best Interest of the Child' is the guiding principle behind all adoption laws in India, and social awareness programs have helped to change the attitude of society and people towards adoption in India."

1181 S 2*(d)*.

1182 Bajpai *Adoption of Children: Case for a Common Law of Adoption in the Cause of Justice to the Child* 7.

1183 S 2*(c)*.

1184 Ss 7 and 8. Following the enactment of the Personal laws (Amendment) Act 2010, a female's right to adopt has been brought at par with the male's rights.

1185 S 10.

1186 S 9. The child to be adopted must be given and taken in adoption by the parents or guardians of such child who must have the necessary intention to transfer the child in adoption to the adoptive family (married man, widow, and widower, single or divorced or deserted women). Should these requirements be met, the adoption is considered legally effected. The lack of any judicial protection for the child, himself or herself, is noted with concern.

1187 The court illustrated this fact in its judgment in *Kartar Singh v Gurdial Singh* (2008) 151 PLR 395 par 10.

1188 Enacted on 30 December 2000.

in India, irrespective of their faith,[1189] with provisions that reflected those of the CRC.[1190] Several amendments to this Act have already followed and the most recent amendment took place in 2015.[1191] All orphaned, abandoned, neglected and abused children can be adopted in terms of the provisions of the Juvenile Justice Care and Protection Act, 2015 (JJCPA 2015).[1192] Section 1(4)*(ii)* expressly provides for adoption matters, and section 58 specifically makes provision for intercountry adoption.[1193]

One of the aims of the JJCPA 2015 is to streamline the procedure of adoptions.[1194] Timelines are provided for the processing of both domestic and intercountry adoptions.[1195] The Preamble further refers to the obligation placed on the state to ensure that all the needs of children are met and that their basic human rights are fully protected.[1196] Section 2(9) of the JJCPA 2015 provides that the "best interest of the child" means that the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.

1189 The religious communities' views concerning a uniform code regulating adoption has led to a great deal of dissent and debate within India.

1190 The Juvenile Justice Act of 1986 was enacted on 1 December 1986 and came into force on 2 October 1987. This Act made provision for the care, protection, treatment, development and rehabilitation of a neglected child, or alternatively a child deemed to be a juvenile delinquent, *ie*, one who had been found guilty of committing an offence as indicated in terms of s 2(e) of the Act. The Act made provision for various institutions that could be considered when placing a neglected child or a juvenile delinquent as follows: Juvenile Homes (s 9), Observation Homes (s 11), Special Homes (s 10) and After-care Organizations (s 12). The Act was repealed by the JJCPA 2000, following India's ratification of the CRC.

1191 The JJCPA 2000 was replaced on 7 May 2015 by the enactment of the JJCPA 2015.

1192 "Adoption" is defined in the JJCPA 2015 as the "the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child". Presently, there are two statutes in terms of which adoption of children can be undertaken in India, namely the HAMA) and the JJCPA 2015. The relevant Acts are discussed in this chapter.

1193 Art 2(2) defines "adoption" as the "process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child".

1194 The JJCPA makes express provision for *inter alia* the processing of adoptions and for the sanctions for non-compliance with the procedure.

1195 S 2(34) defines intercountry adoption as "adoption of a child from India by non-resident Indian or by a person of Indian origin or by a foreigner".

1196 Art 15(3); Art 39(e) and (f); and Art 47.

Where the Child Welfare Centre (CWC) has declared a child legally free for adoption[1197] Regulation 3 of the Adoption Regulations 2017 must be adhered to. Regulation 3 provides as follows:

(a) the best interests of the child shall be of paramount consideration in processing any adoption placement;

(b) adoption of a child by Indian citizens is preferred, with due regard to the principle of placement of the child within his or her own socio-cultural environment, as far as is possible must be considered;

(c) all adoptions must be registered on Child Adoption Resource Information and Guidance System.

The JJCPA 2015 is unique in that it has a separate chapter dealing with adoption,[1198] and its provisions mirror the international approach for non-institutional alternative care solutions for children, with the idea that it's every child's right to grow up in a traditional family-based setting.[1199] This is apparent where adoption and foster care are prioritised, while institutionalisation of children is viewed as an option of last resort.[1200] However, this principle is not adhered to. Instead in practice in India, whenever a child is brought to the CWC, he or she is generally placed in a state institution without consideration being had to any other potential alternative care option.

1197 S 38(4).

1198 In terms of S 2(2) "adoption "is defined as the "the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child".

1199 Devpura "Foster Care takes Root in India. How Does it Differ from Adoption?" 2014 *The Christian Science Monitor*.

1200 Meethal "Who is Afraid of Juvenile Justice Act?" 2016 *Deccan Chronicle*.

6 4 ALTERNATIVE TEMPORARY CARE IN INDIA

The National Policy for Children (NPC) adopted in 2013, recognises that all children have the right to grow in a family environment, in an atmosphere of happiness, love and understanding.[1201] The NPC expressly recognises that the family, alternatively a family environment, is most beneficial for the all-round development of any child. Where parental care is not an option within the child's biological family, appropriate alternative care that ensures the well-being and development of the child to his or her full potential, must be provided by the state. Bajpai states that traditionally, a vulnerable child in India received support from two means: Firstly, through the various charitable institutions, and secondly, through non-institutional activities such as adoption, guardianship and foster care.[1202] As stated before in this chapter, the diverse religious communities in India approach the alternative care of OACs differently. Personal laws are religion-based and include the GWA,[1203] which is generally applicable to Christians, Parsis and Jews, and, the HAMA, which is applicable to Hindus, Sikhs, Buddhists and Jains.[1204] The approach to what constitutes appropriate alternative care for an OAC and what is legally accepted as alternative care in these Acts differs significantly.

6 4 1 FOSTER CARE

While foster care is legally recognised in India, a definition as to the meaning thereof was only recently provided in the JJCPA 2015, which also introduced foster care an

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1201 Ministry of Women and Child Development *Model Guidelines for Foster Care* (2015) 5.

1202 As with many countries worldwide, humanitarian reasons prompted the legislature to come to the aid of the many children orphaned because of World War 1.

1203 Shaikh "Legal Framework Governing Adoption Laws in India" (2015) *Academike* (not paginated) https://www.lawctopus.com/academike/legal-framework-governing-adoption-laws-india/ (accessed 2018-08-27); Agrawal "Adoption: Under Hindu, Muslim, Christian and Parsi Laws" (undated) *Legal Service India* (not paginated) www.legalserviceindia.com/articles /hmcp_adopt.htm (accessed 2018-08-27); Mehrotra "Laws Governing Adoption in India" (2015) *Linkedin* (not paginated) https://www.linkedin.com/pulse/laws-governing-adoption-india-nishant-mehrotra (accessed 2018-08-27).

1204 GWA 1956.

alternative form of care in India. In accordance with the provisions of the JJCPA 2015, foster care occurs where children are placed by a competent authority, namely the CWC, in the domestic environment of a family other than the children's own family or kinship care.[1205] Families can now foster OAC in terms of the generally-recognised understanding of such care.[1206] Kinship foster care, as well as non-kinship foster care is recognised in India.[1207] Such families are monitored and receiving financial aid from the state.[1208] In the State of Karnataka, an extension and benefits of the use of foster care for children who cannot be placed in adoption, but who are in need of family care, was recognised by providing that foster care should be considered in preference to institutional care.[1209] Unlike adoption, a foster child remains the legal responsibility of the state and the biological parents.[1210] Depending on the circumstances, a court separates a child from his or her biological parents and the CWC places such child in

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1205 This use and understanding of the role of foster care as alternative care of OACs, differs significantly from its role in terms of the Juvenile Justice Care and Protection Act 2005 (JJCPA 2005), where foster care was only considered in s 42(1) follows: "Foster care may be used for temporary placement of those infants who are ultimately to be given for adoption." This restrictive approach was followed by the High Court in *R Arivazghagan v The Secretary to Government* (decided on 23 April 2009). The Petitioner in this case, the biological parent, challenged the order of the CWC directing that his child be placed in foster care with the Respondents. The Madras High Court considered the matter. In its judgment, the High Court considered s 42(1) of the JJCPA 2005 and held that in terms thereof, foster care can be considered only where the children in question are going to be placed for adoption. Since there was no intention for the child to be adopted, the order of foster care was set aside.
The above judgment is an example of how the lack of any definition for foster care under the JJCA 2005 has led to it being largely used only as a pre-adoptive method and not as a means of providing care independently.

1206 The Model Guidelines for Foster Care, 2015 were formulated by the Ministry of Women and Child Development, Government of India. These Guidelines provide for a definition of foster care which includes "Group foster care". The Guidelines are based on s 44 of the JJCPA 2015, Rule 23 of the Juvenile Justice Rules, 2016 and the provisions of the CRC.

1207 Foster Care India "Partners" (2018) http://fostercareindia.org/about-us/partners/ (accessed 2018-02-14).

1208 Broad "Kinship Care: Providing Positive and Safe Care for Children Living Away from Home 2007 *Save the Children UK*.

1209 Rule 37(1) of the Karnataka Rules of 2010.

1210 Kothari and Siakumar (2014) *Policy Brief, Centre for Law and Policy Research* 5 http://foster careindia.org/wp-content/uploads/2014/02/Policy-Brief-on-Foster-Care-in-India.pdf (accessed on 2018-06-04).

foster care, the understanding is that such care is temporary in nature with the aim of reuniting the child with the biological parents when possible.

Group foster care is also used as alternative care for children. Section 2(32) of the JJCPA 2015 defines group foster care as "a family like care facility for children in need of care and protection who are without parental care, aiming at providing personalised care and fostering a sense of belonging and identity, through the family like and community-based solutions". In this instance, children in need of care are placed in a family-type setting where a group of unrelated children are cared for by a set of parents. Group foster care is temporary care that is particularly used as a placement for a child who has been picked up from the streets of India. Following a period in group foster care, the child concerned is placed in individual foster care or in any other form of family-based care.[1211]

In 2016, the Ministry of Women and Child Development drafted Model Guidelines for Foster Care.[1212] These guidelines specifically deal with a revised procedure for group foster care. The concern is that while provision is made for foster care, this form of care is not being implemented effectively.[1213] Testimony hereto is the fact that very few state governments have developed foster care programs, and as such, foster care is not often considered as alternative care for an OAC but is rather limited to pre-adoption foster care. It seems that the provisions of the JJCPA 2015 concerning expanded foster care have not been implemented effectively in India.

1211 *R. Arivazghagan v The Secretary to Government* (decided on 23 April 2009). The Petitioner in this case, the biological parent, challenged the order of the CWC directing that his child be placed in foster care with the Respondents. The Madras High Court considered the matter. In its judgment, the High Court considered s 42(1) of the JJCPA 2005 and held that in terms thereof, foster care can be considered only where the children in question are going to be placed for adoption. Since there was no intention for the child to be adopted, the order of foster care was set aside. The judgment is an example of how the lack of any definition for foster care under the JJCA 2005 has led to it being largely used only as a pre-adoptive method and not as a means of providing care independently.

1212 Ministry of Women and Child Development *Model Guidelines for Foster Care* (2015).

1213 Nigudkar *Alternative Care for Children: Policy and Practice* (2017) 43.

6 4 2 KINSHIP CARE AND *KAFALAH*

Two further alternative forms of alternative care are considered when placing a child in alternative care in India. Kinship care is recognised as alternative care for a child who does not have adequate parental care. In such an instance, the extended family of the child generally provides the care of such child. Kinship care comprises the most common form of care in almost all regions, religions, castes and ethnic groups of India.[1214] However, there is no government policy or legislation to support such kinship carers,[1215] and as a consequence, there is no agency or monitoring mechanism in place. However Mehta and Mascarenhes observe that living with relatives could remain unsupervised and provides no guarantee of a child's ongoing protection while in care.[1216] This lack of support and monitoring raises concerns regarding the welfare of the children who are cared for in terms of kinship care.[1217] This is in contradiction with the obligation which falls on the state,[1218] community, and family of the child concerned to provide the child with optimal opportunities to facilitate his or her growth and development, and to ensure the fulfilment of child rights.[1219]

1214 Crin "Save The Children UK Kinship Care: Providing Safe and Positive Care for Children Living Away from Home" (2007) 3 https://www.crin.org/en/docs/kinship_care.pdf (accessed 2018-06-27). Save The Children note that certain ethnic groups in India, namely in the Andaman and Nicobar Islands, refrain from referring to children in such care as an "orphan" even where the child concerned has lost both his or her parents, as the extended family and community takes care of the child.

1215 Save the Children "Save the Children in India" (2007) 22.

1216 Mehta and Mascarenhes "The Family Strengthening and Non-Institutional Alternative Care Approach to Child Protection" (2015) *Mumbai: Family Service Centre* 7 http://www.fscmumbai.org/books/book_The_Family_Strengthening.pdf (accessed 2018-08-24).

1217 Save the Children UK 2007 5, reports that children placed in kinship care in India are not treated in a manner equal to the birth children of the kinship carers.

1218 S 39*(f)* of the Constitution of India.

1219 Nigudkar *Alternative Care for Children: Policy and Practice* (2017) 20.

Secondly, as Islam does not recognise adoption, and as such intercountry adoption, it is not practised in India within the Muslim community.[1220] In *Muhamed Allahdad Khan v Muhammad Ismail*[1221] the court remarked that "there is nothing in Mohammedan Law like adoption, as recognised in the Roman and Hindu system. The Mohammedan Law does not recognise adoption as a mode of filiation." Islam recognises *kafalah*, which comes from a word that means, "to feed".

6 4 3 CHILDREN'S HOMES

Confirming the international approach for a child should not to be institutionalised if possible, section 3*(xii)* of the JJCPA 2015 provides that a child shall only be placed in an institution as a measure of last resort. Even before the promulgation of the JJCPA 2015, the judiciary confirmed its recognition of prioritising family-based care over institutional care in 2011 in the Supreme Court judgment of *Bachpan Bachao Andolan v Union of India*.[1222]

There is global acknowledgement of the negative impact children experience when placed in institutional care[1223] and also acknowledgement of the psychological and behavioural development delays evident of the children concerned.[1224] The state of care in children's homes in India, and the lack of intervention by the government and relevant authorities to correct the current conditions, is a concern. A collaborative analysis of the conditions of state institutions in India was undertaken by the

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1220 Proof of the strong feelings against legislation that violates an Islamic religious principle was experienced when the Adoption of Children Bill, 1972 was proposed and consequently not approved as the Muslims opposed it.

1221 ILR (1888) 12 ALL 289.

1222 2011 SC 3361.

1223 Save The Children "Keeping Children Out of Harmful Institutions: Why We Should Be Investing in Family Based Care" 2009; Ainsworth "Deprivation of Maternal Care: A Reassessment of its Effects" 1962 14 *World Health Organisation, Public Health Papers*; Williamson and Greenberg "Families, Not Orphanages" 2010 *Better Care Network*.

1224 Csáky "Keeping Children Out of Harmful Institutions: Why We Should Be Investing in Family-based Care" 2009 *Save the Children* 6.

organisation referred to as the Concerned for Working Children, and the Asian Centre for Human Rights. The report following the analysis stated as follows:

> The situations in the homes are so atrocious that many of the children are in conflict with the law and those in need of care and protection committing suicide and/or attempted to commit suicide.[1225]

The analysis also concluded that the system further struggles to cope, given the lack of trained staff, inadequate facilitates, and a lack of accountability, which consequently results in poor implementation of children's rights at all levels in the system.[1226] The lack of facilities raises a further potential risk for OACs as OACs and children in conflict with the law are cared for in the same institutions. This places an additional burden on the authorities involved to see that the neglected children are not negatively influenced by juvenile offenders. Given the large scale of children currently placed in children's homes in India, it is submitted that OACs are not effectively protected and nurtured within the system.[1227]

6 5 PERMANENT-CARE OPTIONS IN INDIA

6 5 1 ADOPTION

Adoption constitutes the process through which the adopted child is permanently separated from his or her biological parents and becomes the lawful child of his adoptive parents.[1228] The benefits of permanence and stability that adoption provides

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1225 Concerned for Working Children and the Asian Centre for Human Rights Juvenile Justice in Karnataka: A Case for Systemic Change (2012) 4.

1226 Nigudkar *Alternative Care for Children: Policy and Practice* (2017) 15 refer to Research Foster Care India and Centre for Law and Policy (2014) where it is noted with concern the number of children placed in institutions in India, referring to the fact this form of alternative care inherently is characterised by the lack of one-on-one human contact, lack of play facilities, poor nutrition, overcrowding, and lack of access to medical care. This type of environment leads to physical, behavioural and cognitive problems of various kinds.

1227 Chaturvedi "Juvenile Justice System: India's Contributions" 2008 3 *VIDHIGYA – The Journal of Legal Awareness* 55.

1228 S 2(2) of the Juvenile Justice (Care & Protection of Children) Act, 2015 and s 12 of Hindu Adoption and Maintenance Act, 1956.

for an OAC were discussed in chapter 3. The same holds true for the many OAC in India, and adoption has been recognised as a positive alternative for a child in need of care.[1229] From a historical perspective, adoption is a long-recognised legal concept in India,[1230] but adoption laws were enacted for the first time in 1920.[1231]

The primary aim of the CA was to provide a legal framework, which required the protection of the rights of the adopted child. Before 1970, not many people in India were willing to adopt a child who was unrelated to them by blood. Those willing to adopt, often kept the adoption a secret in the community for reasons that include the stigma attached to between 2010 to 2017 the inability to either bear a child, or to be in a position of adopting a child of unknown parentage or born to a non-relative of the adopting parents.[1232]

In practice, the Hindu community has a preference to adopt a fair, good-looking male child.[1233] Consequently, agencies involved in adoption processes indicate that female children constitute 75 per cent of the waiting list of children to be adopted. Evidently, the female child who is eligible to be adopted is at a disadvantage. Statistics indicate that the domestic and intercountry adoption rate has declined. In 2013, the National Policy for Children in India confirmed recognition of adoption as a form of placement for a child and that all children abandoned and orphaned children in India have the right to grow in a family environment.[1234] Further, existing adoption legislation can be

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1229 Adoption Practices in India *Vis-A-Vis* "Best Interest of the Child" 203 http://shodhganga.inflibnet.ac.in/bitstream/10603/26001/16/16_chapter%208.pdf (accessed 2018-07-22).

1230 As indicated out in chapter 3, evidence shows that adoption in India has been practised for thousands of years. For Christians, the Old Testament of the Bible provides proof hereof, but when considering the position of Hindus, old scriptures of religious dictates indicate in this regard the utmost importance of having a son in a family. Reference to adoption is found in early Vedic scriptures. See ch 4 for a more detailed discussion hereof.

1231 This legislation gave the state the responsibility to care for destitute and neglected children.

1232 Mahtani "A Study of the 3-year-old Publicity Campaign implemented by the Indian Association for Promotion of Adoption and Child Welfare (Documentation and Assessment of Impact)" 1994.

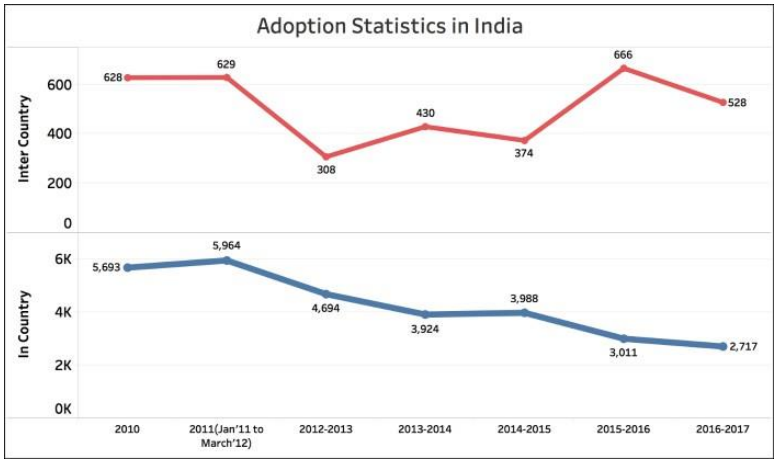
1233 Bajpai *Adoption of Children: Case for a Common Law of Adoption in the Cause of Justice to the Child* (1996) 8.

1234 Model Guidelines for Foster Care Ministry of Women and Child Development 2015 4.

sourced either through the HAMA or through a secular piece of legislation, the JJCPA 2015.

Table 5 below provides an indication of the statistics of adoptions and intercountry adoptions that were finalised in India from 2010 to 2017.

Table 5: Adoption statistics in India 2010-2017[1235]



6 5 2 INTERCOUNTRY ADOPTION

The judiciary has been active in highlighting the advantaged and disadvantages of intercountry adoption. Since 1995 to 2001 there have been a series of adoption scandals emanating from the South Indian State of Andhra Pradesh. The practice entailed orphanages sending out scouts to buy female infants from extremely poor families, "laundering" them as orphans and partnering with credulous adoption agencies from sending nations. There was also evidence of kidnapping and stealing of children, taking children placed in temporary care and sending them for adoption and misrepresentations to birth parents.[1236] In 1984, a landmark decision of the

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1235 Dubbudu "In Country Adoption on the Decline in India, Down 50% in 7 Years" (2017) (not paginated) *Factly* https://factly.in/country-adoption-decline-india-50-7-years/ed (accessed 2018-08-01).

1236 Smolin 2006 *The Wayne Law Review* 148.

Supreme Court in *Lakshmi Kant Pandey v Union of India* laid down certain guidelines for intercountry adoption.[1237] While subsequent rules concerning the recognition and the process of intercountry adoption were framed under the JJCPA 2000 (as amended), the judgment in *Lakshmi Kant Pandey* stands as the law.[1238]

In 1984 a petitioner, Lakshmi Kant Pandey wrote a letter to the Supreme Court in India, drawing its attention to the significant risks intercountry adoption placements may cause Indian children. The Supreme Court considered the letter to be a writ petition (which leads to the quick review of an issue) and formed the basis of public interest litigation.[1239] In this case, advocate Pandey filed the petition, under article 32 of the Constitution, the supreme law of India.[1240] The petitioner alleged that intercountry adoption placements led to young OACs being "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and Relief Houses, they in course of time become beggars or prostitutes for want of proper care from their alleged foster parents".[1241]

Lakshmi Kant Pandey sought relief restraining Indian-based private agencies "from carrying out the further activity of routing children for adoption abroad",[1242] and sought direction from the Government of India to fulfil the obligations placed on them in processing the adoption of Indian children through intercountry adoption.[1243] Despite the absence of statutory recognition of such, Bhagwati J found that a child has the potential right to intercountry adoption,[1244] recognising the right of a child to experience

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1237 This case is discussed in paragraph 6 5 3.

1238 The case is discussed in greater detail in this ch.

1239 The petition was filed based on a report in the foreign magazine, called "The Mail".

1240 As of September 2015, there have been 120 amendment bills presented in the Parliament, out of which 100 have been passed to become Amendment Acts.

1241 *Lakshmi Kant Pandey v Union of India on* 6 February 1984 AIR 469, 1984 SCR (2) 795.

1242 *Ibid.*

1243 This relief was sought through the Indian Council of Child Welfare, and the Indian Council of Social Welfare.

1244 (1984) 2 SCR 824 par G.

an environment where he or she is loved and can grow up in an atmosphere of love and material security. This is conceivable only if the child is brought up in a family environment.[1245]

The Court stated that allowing foreign adoption was consistent with India's National Policy on Children. The Court's primary *rationale* and focus of the court was on the welfare of the child concerned. This places an obligation on the court to exercise great care when making a decision to confirm the placement of a child abroad with foreign parents.[1246] Referring to the current conditions in state institutions in India, the court accepted that where a child was placed in an institution, such child would in fact not experience any form and benefit of being nurtured in a manner typically found in a family environment.

Lack of regulation of such adoptions apparently led to profiteering by those who were parties to child trafficking by using fraudulent and unethical practices. Groza and Bunkers refer to statistics on intercountry adoption in India indicating that from 1998 to 2001, the number of intercountry adoptions was greater than the number of domestic adoptions. However, since 2002, the reverse is true, and domestic adoptions superseded intercountry adoptions. In 2001, intercountry adoptions made up 58 per cent of all adoptions. By 2011, these numbers had drastically reduced and intercountry adoptions made up 9 per cent of all adoptions. The development of regulations will be discussed below.

6 5 3 LEGAL REGULATION OF INTERCOUNTRY ADOPTION: *LAKSHMI KANT PANDEY V UNION OF INDIA*[1247]

It is understandable that India, with vast numbers of OACs, it would be a sending country in intercountry adoption. Intercountry adoption was, in fact, a widespread

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1245 Par 217.
1246 1984 SCC (2) 244 253, 1984 AIR 469, 1984 SCR (2) 795.
1247 *Supra*.

practice, in India before the ratifying of the CRC. Adoption of India children was facilitated through social organisations and private adoption agencies. Intercountry adoption flourished in the absence of legal regulation. The concomitant evils of such a situation where the possibility and even likelihood that Indian children were exposed to abuses of trafficking and profiteering.

The practice entailed orphanages sending out scouts to buy female infants from extremely poor families, "laundering" them as orphans and partnering with credulous adoption agencies from sending nations. There was also evidence of kidnapping and stealing of children, taking children placed in temporary care and sending them for adoption and misrepresentations to birth parents.[1248]

In its judgment, the Court, following consultation with child welfare and social institutions, set out a comprehensive framework of procedural and normative safeguards for regulating intercountry adoption with a view to preventing abuse, maltreatment and exploitation of children, and to ensure placement of children in a healthy and decent family environment.[1249]

The Court referred to laws and policies relevant to the best interests of the child, alternative care and adoption, including articles 15(3), 24 and 39 of the Indian Constitution relating to the welfare of a child and the principle embodied in the United Nations Declaration on the Rights of the Child.[1250] The Court expressly directed that

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1248 Smolin 2006 *The Wayne Law Review* 148.

1249 In this case, the applicant had placed her children in care at an adoption agency. In 2010, the applicant asked that her daughters be returned to her care. She was informed that to remove her children from the agency would require her to pay the agency a large sum of money. She was in no position to do so. On later investigation, it transpired that the two girls were placed through intercountry adoption and resided in the United States of America. Documents had been falsified allowing the agencies involved to sell such child abroad.

1250 UN General Assembly, *Declaration of the Rights of the Child*, 20 November 1959, A/RES/1386(XIV). In line with placing a child in consideration of the best interests of such child, the Supreme Court held that it was important that such child be placed at an early age-at least before such child reaches the age of three years. As such, the child has a better chance of assimilating into the new environment and culture at an early age.

the Government of India creates a list of recognised agencies, and further directed that the court set a period of three months for the Government to fulfil this obligation.[1251] Important safeguards established by the court include

- the requirement that foreigners who wish to adopt need to be sponsored by a licenced agency in their own country;
- no adoption application of a foreigner may be considered directly by an adoption agency in India;
- that all Indian adoption agencies working with intercountry adoption need to be licenced by the Government of India;
- that such agencies meet specific criteria and undertake certain responsibilities with a view to ensuring the safety and well-being of the adopted children;
- that all intercountry adoption proceedings must be approved by the Indian Courts.

The Court held that any form of private adoption was banned.[1252] Upon a petition of social and welfare agencies, the court handed down a supplemental judgment on 27 September 1985 to clarify aspects of the original judgment. The guidelines established by the Supreme Court in *Lakshmi Kant Pandey* regulated adoption over many years, also after the ratification of the CRC.

The *Lakshmi Kant Pandey* judgment is a prime example of positive judicial activism in India. In the absence of state intervention of intercountry adoption, which is so necessary to provide a family environment for OACs but potentially so fraught with risk, the Supreme Court stepped in and provided normative and procedural regulatory standards. In its judgment, the Supreme Court acknowledged the contributions of the government, social government agencies and national as well as international social

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1251 The court found it "desirable" that only agencies, "engaged in the work of child care and welfare," be considered for recognition, stating, "intercountry adoption must be looked upon not as an independent activity by itself, but as part of child welfare programme."

1252 Lind and Johansson "Preservation of the Child's Background in In- and Intercountry Adoption" (2009) 17(2) *The International Journal of Children's Rights* 7 http://liu.diva-portal.org/smash/get/diva2: 240476/FULLTEXT01.pdf (accessed 2018-07-23).

welfare agencies, which filed affidavits and statements in the case concerned. The remarkable outcome of the case was the culmination of the concerned problem-solving by many role players which all held the best interests of the child dear.

In India, almost 255 foreign adoption agencies (of which 131 are government bodies) and the government has recognised 74 Indian placement-agencies for the purpose of placing children in intercountry adoption. However, a uniform code, encompassing the provisions of the conventions, has not been enacted in India, and the guidelines formulated in *Lakshmi Kant Pandey* remain instructive.

6 6 THE REGULATION OF INTERCOUNTRY ADOPTION IN INDIA

6 6 1 CENTRAL AUTHORITIES

Following the judgement in *Lakshmi Kant Pandey* the government of India set up a Central Adoption Resource Agency which had a number of regional branches. The objective of such agencies is the implementation and monitoring of the practice of intercountry adoption in India. The Court in *Laksmi Kant Pandey* recommended that all applications by foreigners to adopt an Indian child be forwarded by the social or child welfare agency in the foreign country concerned to such Central Adoption Resource Agency (CARA), and the latter can direct the application to one of the recognised social or child welfare agencies in the country.

The Indian Government gave effect to the recommendations and established the CARA with the aim to streamline, monitor and regulate the process of intercountry adoption.[1253] India is a signatory to the Hague Convention and in line with this; all adoptions from India are regulated through the CARA. The CARA operates as an

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[1253] Ananthalakshmi, Sampoorna, Mushtaq, Jayanthi and Charulatha "Child Adoption and Thereafter – A Psycho Analytical Study" 2001 *Chennai, India: ICCW* as referred to by Bhaskara, Hoksbergena, Van Baara, Mothiramb and Ter Laaka "Adoption in India – The Past, Present and the Future Trends" 2012 *ResearchGate* 6.

autonomous body in India under the Ministry of Women and Child Development. The CARA is an autonomous body and its functions are as follows:

(a) To prepare a list of recognised Indian and foreign agencies dealing with adoption.

(b) To maintain a liaison with all diplomatic missions outside India, seeking to safeguard the interests of children of Indian origin, who have been adopted by foreign parents, against any form of neglect, maltreatment, exploitation and/or abuse of such children.

(c) To receive and process all applications from prospective adoptive parents abroad. The CARA is likewise responsible for the monitoring, inspection and regulation of those agencies in India engaged in processing adoptions.

(d) To inspect Indian-social or child welfare agencies recognised by the CARA, and to report to the Central Government in this regard.

(e)To request annual audited statements of accounts from all agencies involved in adoption procedures.

(f) To obtain periodical progress reports of children adopted through intercountry adoption.

(g) To organise meetings with the Voluntary Coordinating Agencies involved in adoption.

In 2012, the practice of adoption entered into a new phase with the implementation of a new system overseen by the CARA. Guidelines were issued in 2011, and the agency started accepting applications for intercountry adoption in January 2012. In July 2015, the CARA issued new guidelines for adoption.[1254] The essence of the 2015 guidelines

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[1254] These guidelines came into effect on 1 August 2015.

is to provide for regulation that is more effective and to bring more transparency and efficiency in the adoption system, making the entire system more user-friendly.

6 6 2 ACCREDITED BODIES

The guidelines for intercountry adoption developed by the CARA have led to more transparency in the process. In compliance with the provisions of the Hague Convention, a scrutinising body was identified for every region of India.[1255] The role of this body is to assist a court considering an adoption matter, to determine whether "sufficient opportunity" has been given to every child to find a home within India. This has led to an association of placement-agencies in each region called the Voluntary Co-ordinating Agency (VCA).[1256] This has led to the self-regulation of the agencies which regulate intercountry adoption. Where intercountry adoption is considered for an Indian child, the application by foreign parents must be processed and forwarded by the recognised agency in the foreign country. The agency concerned must be listed by the CARA in India for intercountry adoptions.

6 7 SUBSIDIARITY

The meaning of "subsidiarity" has been discussed in detail in earlier chapters of the current research.[1257] In India the principle of subsidiarity was first recognised in the *Lakshmi Kant Pandey* case. In terms of this principle, it is peremptory to seek a placement for a child within its country of origin before consideration is given to placing an Indian child in adoption with a foreign couple abroad. In *Laksmi Kant Pandey*, the

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1255 Shenoy *Child Adoption Policies in India – A Review* (2007) refers to these agencies as follows: "To safeguard malpractices and deviations from prescribed guidelines for adoption notified by Government of India, Supreme Court of India has appointed an independent NGO with experience in child adoption 'The Indian Council of Social Welfare' with headquarters in Mumbai and branches in all states as Scrutiny Agency. This agency verifies all the relevant documents and authenticity before orders are issued by Judicial Courts for the formal adoption".

1256 The name has since then changed to Adoption Coordinating Agency.

1257 See ch 3 and 4 of this thesis.

Supreme Court created a series of preferred outcomes for placing children in alternative care as follows:

(1) The child remains with his or her biological family.

(2) The child be adopted domestically.

(3) The child be adopted abroad by Indian persons residing abroad.

(4) The child be adopted in terms of intercountry adoption by "adoptive couples where at least one parent is of Indian origin" and finally,

(5) That the child be adopted in terms of intercountry adoption.

The Court recognised the right of a child to love and be loved, and to grow up in an atmosphere of love and material security.[1258] This is only possible if the child is brought up within a family environment. Priority is that the child remains with his or her biological parents, and where this is not viable, the next best alternative would be to place the child with adoptive parents domestically. If it is not possible to find suitable adoptive parents for the child within the country of origin, it may become necessary to give the child in adoption to foreign parents through intercountry adoption, rather than allow the child to grow up in an institution.[1259]

It has been proved that, where a child will have *no family life and no love and affection*, such child will likely lead a life of hardship as a consequence of prevailing socio-economic conditions in India.[1260] In reaching its decision regarding this hierarchy of placement options, the court acknowledged the importance of a child's culture and ethnicity. This was also the approach to be adopted some years later when the CRC was drafted. Therefore, the Court's preference that Indian parents adopt Indian

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1258 *Lakshmi Kant Pandey v Union of India* on 6 February 1984 813 par E–F. This approach was confirmed in the judgment of *Sr Theresa's Tender Loving Care Home v State of Andra Pradesh* (2005) SC 6492 of 2005.

1259 *Lakshmi Kant Pandey v Union of India supra* 814 par B–D.

1260 Adoption Practices in India *Vis-A-Vis* "Best Interest of the Child" (2018) http://shodhganga.inflibnet.ac.in/bitstream/10603/26001/16/16_chapter%20.pdf (accessed 2018-08-27); *Lakshmi Kant Pandey v Union of India* 1984 (2) SCC 244 251–252.

children, whether residing in India or elsewhere, later found support in the provisions of the CRC.

Within the Hindu community, the practice of adoption was originally restricted to adoption within the child's natural family and was governed by social and religious practices. When considering the Indian approach to intercountry adoption, it is apparent that subsidiarity plays a significant role in deciding whether to place a child in intercountry adoption. Changing attitudes have broadened the exercise of adoption beyond the contour of family, resulting in the enactment of legislation which takes cognisance hereof.[1261] With increasing globalisation, one finds a blurring of the edges of one's racial, ethnic or national identity. This is particularly true in the case of intercountry adoption. It is noteworthy that the subsidiarity is applied within the context of adoption and other care options are not considered in the hierarchy of placements.

6 8 THE BEST INTERESTS OF THE CHILD

Core international human rights law proclaims that children's best interests should be the guiding principle in matters related to children and adoption.[1262] ndia has accepted the principle of a child's best interests. Section 3*(iv)* of the JJCPA 2015 further provides that in terms of the principle of the best interest of a child "[a]ll decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential". The indeterminacy of the principle of best interest provides judges with a discretion when making a determination to place an orphaned, abandoned or surrendered Indian child. As such one can expect that judges could be influenced by their background as well as their subjective understanding as to what is in fact in the best interest of the child. These

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1261 JJCPA 2000 and the Constitution.

1262 *Lakshmi Kant Pandey v Union of India* A.I.R. 1984 (S.C.) 469; *In Re: CJ A Female Infant of C/o P.O. Box 30871*, Chichiri, Blantyre 3 (Msca Adoption Appeal No. 28 of 2009) [2009] MWSC 1 (12 June 2009).

factors could play an important role in impacting on the final determination.[1263] Regarding intercountry adoption, the judiciary in India has held that a child's best interests are determinative.[1264] The court has relied on key international instruments in support of their decision. This fundamental human rights principle is recognised globally, and so too a country's moral and legal obligation of a state to ensure the enforcement of the right of a child to be liberated from the conditions characterising orphanages, street life, and even foster care.[1265]

Emphasising the right, a child has to a family environment, and, the right to parental care, makes intercountry adoption a potential consideration for the permanent placing of the child concerned, as opposed to an alternative temporary form of placement nationally. Due regard must be had to the principle that in all instances heed must be taken of the best interests of a child. The Commission concerned consider the realities of India – a developing country where poverty is rife – and opined that it could, therefore, be foreseen that instances would occur where a placement abroad would be in the best interests of the child. It further stated that such intercountry adoption should be seen as preferable to place such child in a state institution where the basic conditions are known to be poor. The Commission reiterated the paramount importance that the interests of the child dictate any determination of placement.

In Report No.257,[1266] the welfare of the child, when considered as a criterion in determination, is considered flexible, adaptable and reflective of contemporary attitudes regarding family within society. The CRC has provided additional guidance

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1263 Bajpai *The Legislative and Institutional Framework for Protection of Children in India* (2010) 50.

1264 Bartholet "International Adoption" 2010 1(1) *The Human Rights Position Global Policy* 94.

1265 *Ibid*. See also Carlson "Seeking the Better Interests of Children with a New International Law of Adoption" 2010/2011 55 *New York Law School Law Review* 738. Dillon "Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles" 2005 21(2) *Boston University International Law Journal* 220. Bajpai *The Legislative and Institutional Framework for Protection of Children in India* (2010) 53.

1266 Reforms in Guardianship and Custody Laws in India May 2015.

regarding the best interest standard in its General Comment.[1267] Some writers have suggested that articles 20 and 21 should be interpreted to mean that the CRC "accords first priority to national adoption and that intercountry adoption is rated as a second-best solution". It is submitted that in India the subsidiarity principle influences the best-interests of the child principle by widespread support for the hierarchy of permanent placement outcomes set out above.[1268]

6 9 KENYA

6 10 INTRODUCTION

The present chapter considers the current position of the OACs in Kenya, in need of alternative care**.** In 2016, the number of OACs in Kenya were estimated to be 2.8 million.[1269] These statistics indicate a steady increase in the number of OACs.[1270] Referring to statistics attained from SITAN,[1271] the National Plan of Action for Children[1272] indicates that the number of orphaned children or children classified as vulnerable in 2014 was an estimated 3, 6 million children.[1273] An estimated one million

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1267 UN CRC *General Comment No. 14* par 50.

1268 Alex *International Focus on Rights of Children and the Indian Context of Human Rights of Children-Emphasis on the Neglected and the Disabled* (Doctoral thesis, School of Indian Legal Thought Mahatma Gandhi University, Kerala, India 2011) 203 and 229.

1269 Waweru "State of Kenya Orphans, Vulnerable Children 'Worrying'" (5 May 2016) *CapitalNews* https://www.capitalfm.co.ke/news/2016/05/state-of-kenya-orphans-vulnerable-children-worrying/ (accessed 2018-05-01).

1270 National Plan of Action for Orphans and Vulnerable Children Kenya 2007-2010 Department of Children Services, Ministry of Gender, Children and Social Development (2008) 10; Afwai "The Plight of Orphans in Kenya: A Perspective of Hope Children's Home Light up Hope" (2013) (not paginated) https://lightuphope.org/the-plight-of-orphans-in-kenya/ (accessed 2018-08-01).

1271 Situation Analysis of Women and Children.

1272 The government of Kenya developed the National Plan of Action (NPA) 2008–2012, to promote and safeguard the rights of children in Kenya. The NPA was guided in its approach *inter alia* by the provisions of the Hague Convention, the ICESCR, the ICCPR, the CRC. A review of the NPA took place and was aimed at identifying the achievements, gaps, lessons learnt and challenges. Because of this review, the 2015–2022 NPA was affected. The NPA 2015–2022 has been aligned to the Constitution of Kenya 2010 and has also been informed by the provisions of the Children Act.

1273 National Plan of Action for Children in Kenya 2015–2022 31. Situation Analysis of Women and Children is part of a UNICEF programme in 190 countries around the world, including Kenya.

children were orphaned after the death of one or both of their parents as a consequence of HIV/AIDS.[1274] In addition to children who are orphaned, an even greater number of children are vulnerable due to factors such as poverty,[1275] disease, abandonment, natural disasters, HIV/AIDS and the breakdown of families.[1276] In 2017, an estimated 200 000 to 300 000 children were living and working on the streets in Kenya.[1277]

UNICEF warns that "[a]s staggering as the numbers already are, the orphan crisis in Sub-Saharan Africa is just starting to unfold".[1278] The ever-increasing number of OACs in Kenya has placed a substantial strain on available resources to care for such children, and it speaks for itself that providing care and support for them must be one of the biggest challenges facing the Kenyan authorities.[1279] While statistics are evidence of the dire position of OACs in Kenya, and while intercountry adoption is recognised in national legislation as a form of alternative care for OACs, a moratorium for an indefinite period has been placed on all intercountry adoptions in Kenya by the Cabinet.

The aim of SITAN is to save children's lives, to defend their rights, and to help them fulfil their potential, form early childhood through adolescence.

1274 *Ibid*.

1275 Ministry of Gender, Children, and Social Development Kenya National Social Protection Policy (2011) ii states "Poverty, disease, and ignorance were identified at the time of independence in 1963 as the critical challenges facing the new nation of Kenya. While an appreciable degree of success has been achieved in the area of education, progress in reducing poverty and providing healthcare has been more modest. Forty-eight years after independence, poverty and vulnerability remain major challenges, with almost one in every two Kenyans trapped in a long-term, chronic and intergenerational cycle of poverty".

1276 Kenya Children's Homes Adoption Society Every Child Deserves a Home (2017).

1277 VPPS "Step up Sensitization on the Plight of Street Children, Urges VP" (2007) (not paginated) https://streetchildrennews.wordpress.com/2007/10/01/step-up-sensitization-on-the-plight-of-street -children-urges-vp/ (accessed 2018-08-01).

1278 UNICEF Africa's Orphaned Generations.

1279 This number comprises a third of the entire child-population of Kenya. There are no country-level statistics on orphaned children in different forms of care available in Kenya.

Kenya has ratified numerous important international instruments that ensure and give effect to the rights of children. These include the CRC,[1280] the ACRWC,[1281] and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention).[1282] This entails that Kenya subscribes and accepts the ideals and principles established by these instruments.

6 11 LEGISLATIVE PROVISION REGARDING CHILDREN AND ALTERNATIVE CARE IN KENYA

6 11 1 THE CONSTITUTION OF KENYA, 2011

Prior to the coming into force of the current Constitution of Kenya in 2010, the Rights of the Child were found in national legislation laws in Kenya generally, including, the Children Act. The Constitution provides that the Constitution is the supreme law of Kenya and binds all persons and all state organs.[1283] The Constitution further states that any law that is inconsistent with the Constitution is invalid.[1284] The Constitutional requirement to protect the best interest of the child requires not only the establishment of relevant laws but also requires their proper enforcement by state agencies. Any

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1280 1990. The State Party submitted its initial report in 2000, eight years late. This has caused delays for all future reports. In compliance with the Convention on the Rights of the Child, the Children Act 1 defines a child as any human being under the age of eighteen years. Williams and Njoka *A Technical Assessment of the Legal Provisions and Practices of Guardianship, Foster Care and Adoption of Children in Kenya* (2008) iv. The draft National Policy on OACs of 2005 indicated that 6 million children required special care and protection. This number accounted for 40% of Kenya's child population.

1281 S 21 of the ACRW Child, provides for children to have rights and duties. Sloth-Nielsen and Van Heerden "New Child Care and Protection Legislation for South Africa? Lessons from Africa" 1997 *Stell LR* 262, submit that the Kenyan Children Act is probably the first to include these provisions.

1282 The CRC, ACRWC and the Hague Convention are discussed in greater detail in chapter 2.

1283 Art 2(1) of the Constitution of Kenya.

1284 Art 2 (4) of the Constitution of Kenya.

failure to implement laws aimed at protecting children amounts to infringement and/or violation of the Constitutional rights.[1285]

Article 19(2) provides as follows:

> The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

Article 53(2) specifically provides that the child's best interests be of paramount importance in every matter concerning such child. This approach correlates with the provision in section 4(2) of the Children Act. The enactment of the Children Act[1286] resulted in the domestication of the provisions of the CRC, ACRWC while taking cognisance of various other human rights instruments relevant to the recognition and protection of children's rights in Kenya. The promulgation of the Constitution in 2010 was a further step towards the realisation of children's human rights in Kenya.

6 11 2 THE CHILDREN ACT

The Children Act came into effect on the 1 March 2002.[1287] The provisions in the Children Act relating to adoption were influenced by the Hague Convention and the aim of the Children Act is to promote the well-being of children in Kenya, in compliance with the provisions of the CRC and the ACRWC. The Preamble of the Act states the aim of the Act as follows:

> [T]o make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention

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1285 Art 2 of the Constitution of Kenya; Odongo "Caught Between Progress, Stagnation and a Reversal of some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms" 2012 12(1) *AHRLJ* 117.

1286 The Children Act 2001.

1287 *Ibid*.

> of the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.[1288]

Kafalah,[1289] which is the Islamic-care arrangement, is also recognised in Kenya. Through *kafalah*, Muslim children are cared for where deprived of parental or family care.[1290] This form of care is referred to in chapters 1 and 3. It is critical to note that whereas the CRC expressly embraces *kafalah*, the Children Act is silent on its application.

The Children Act is the result of a merger of the repealed Guardianship of Infants Act, the Adoption Act and the Children and Young Person's Act.[1291] In 2010, the Government of Kenya embarked on a review of the Children Act, with the aim that the provisions of the Act reflect the provisions of the Constitution. The Children Act provides that the Government of Kenya shall maximise its available resources as far as is possible, to ensure the full realisation of the Rights of the Child of Kenya.[1292] Furthermore, the Children Act provides that

> [i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[1293]

1288 The Children Act was revised in 2017 available at http://www.kenyalaw.org/lex/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/C/Children%20Act%20Cap.%20141%20-%20 No.%208%20of%202001/docs/ChildrenAct8of2001.pdf (accessed 2018-06-15).

1289 ACPF (2012) 5 states that Africa home to 27% of the world's Muslim population.

1290 Under the arrangement, an individual or a family undertakes the duty of caring and protecting a child besides making provisions for the child's basic needs, thus essentially having both the custody and maintenance aspects relating to the child.

1291 Maroun and Grasso *Rights of the Child in Kenya: An alternative report to the UN Committee on the Rights of the Child on the Implementation of the Convention on the Rights of the Child in Kenya 44th session – Geneva* (2007) 11.

1292 S 3 of the CA.

1293 S 4(2) of the CA; Odongo "The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example" 2004 *IJCR* 419 421, emphasises that "[a]lthough the recognition of this principle [of the best interests of the child] takes a cue from the centrality of the principle in the CRC and the [ACRWC] … the application of the *best interest principle* finds support in the jurisprudence of the Kenyan Courts developed under the repealed Acts, albeit in a restricted sense; that of the application of the principle in

The Children Act elaborates on this point, by specifying that

> [a]ll judicial and administrative institutions, and all persons acting in the name of those institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –
> (a) safeguard and promote the rights and welfare of the child;
> (b) conserve and promote the welfare of the child;
> (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interests.[1294]

The inclusion of the best-interests-of-the-child standard is significant as the standard applies in all matters concerning children.[1295] As such, this includes a child's right to parental care where the principle of best interest is deemed to be a primary consideration.[1296] The wording of section 4 of the Children Act is imperative. This section emphasises that consideration of the best interest of the child shall be the guiding principle of all decisions and actions involving children. While the legal provisions for adhering to the best interests of the child have been strengthened with the enactment of the Children Act, the *de facto* implementation of this fundamental principle remains a challenge in Kenya.[1297] The Act makes no provision as to how one determines the best interests of the child, and is silent on which factors should be considered when making a decision to place a child in alternative care.[1298]

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private law issues concerning children [for example] … the Guardianship of Infants Act required that the best interests of the child was the relevant consideration in disputes regarding the custody of the child".

1294 S 4(3) of the Children Act.

1295 Odongo 2012 12(1) *AHRLJ* 114.

1296 S 4(2) of the Children Act.

1297 Amiri and Tostensen Kenya Country Case Study: Child Rights Norad and Sida UTV Working Paper 2011:4 11 and 50.

1298 A discussion of the application of the best-interests standard in Kenya follows in the current ch.

6 12 ALTERNATIVE CARE IN KENYA

Where a child cannot be cared for by his or her family of birth, the following forms of alternative care are recognised in Kenya, namely: kinship care, guardianship, foster care, charitable children's institutions (CCIs), and *kafalah*.[1299] The institutional framework for guardianship, foster care and placement of children in CCIs, is provided for by the Children Act and the regulations for CCIs, dated 2005.[1300] The institutional framework for alternative care in Kenya is further expounded in the Policy on Orphans National Plan of Action for Orphans and Vulnerable Children,[1301] and the revised National Plan of Action for Children in need of care.[1302] A National Children's Policy was finalised in 2010.[1303] Guidelines for the Alternative Family Care of Children in Kenya were published in 2014. The Children Act provides for the rights of children and creates the National Council for Children Services (NCCS) as the co-ordinating and unifying agency for children services in Kenya.

1299 Temporary safety care and care in child-headed households are excluded for the purpose of the current research. A temporary shelter is a safe family-like environment where children in distress are placed for a short time (from a couple of hours to a maximum of six months), while arrangements for family reunification or placement in alternative care are made. This form of care is excluded for the purpose of the current research. A child-headed household is one in which a child or children assumes the primary responsibility for the day-to-day running of the household, providing and caring for those within the household. The children in the household may or may not be related. Surveys have estimated that up to 0.05% of Kenyan households are child-headed at any given time. This form of care is excluded for the current research.

1300 Children Act 8 of 2001, and the Regulations for Adoption, 2005. As expressed in the Preamble of the Children Act and specified in Part II on Safeguards for the Rights and Welfare of the Child, domestic legislation in Kenya is founded on the principles of the CRC and the ACRWC.

1301 Department of Children Services, Ministry of Gender, Children and Social Development National Plan of Action for Children for Orphans and Vulnerable Children Kenya 2007–2010 (2008) 7.

1302 National Plan of Action for Children in Kenya 2015–2022 The National Council for Children's Services. The National Plan of Action 2015-2022 was based on the findings of the National Plan of Action 2008-2012. This National Plan of Action was drafted with the objective to promote and protect the rights of children in Kenya.

1303 The National Children Policy Kenya (2010) National Council for Children's Services http://www.childrenscouncil.go.ke/images/documents/Policy_Documents/National-Children-Policy.pdf (accessed 2018-05-20).

The National Plan of Action 2015-2022 (NPA) is aligned with the provisions of the Constitution of Kenya. The NPA recognises that where a child is nurtured within a family environment, such child "achieves holistic growth and development with values and ethos necessary for his/her ultimate adult life".[1304] It seems therefore that the Kenyan government is actively involved in the development of the frameworks of alternative care. In reality, however, the participation by the Kenyan government in actual service delivery and implementation will be shown to be minimal and fragmented.[1305] Ucembe refers to a country analysis in 2009 by the Boston University Centre for Global Health and Development in which it concludes that Kenyan civil society organisations provide an estimated 91 per cent of all services for orphans and vulnerable children, as opposed to only 9 per cent provided by the Kenyan government.[1306] An exposition of the various forms of alternative placement for OACs follows.[1307]

6 12 1 GUARDIANSHIP[1308]

The Children Act [1309] defines a "guardian" as

> a person appointed by the will or deed by a parent of the child or by an order of the court to assume parental responsibility for the child upon the death of the parent of the child either alone or in conjunction with the surviving parent of the child or the father of a child born out of wedlock who has acquired parental responsibility of the child in accordance with the provisions of this Act.[1310]

1304 National Plan of Action 16.

1305 Ucembe *Exploring the Nexus between Social Capital and Individual Biographics of "Care Leavers" in Nairobi, Kenya: A Life Course Perspective* (part of Master of Arts in Development Studies, Institute of Social Studies, The Hague, The Netherlands 2013) 9.

1306 Ucembe *Exploring the Nexus between Social Capital and Individual Biographics of "Care Leavers" in Nairobi, Kenya: A Life Course Perspective* 5.

1307 For a discussion on the forms of alternative care found in South Africa, see a detailed discussion in ch 3 of this thesis.

1308 Part VIII of the Children Act, ss 102–112.

1309 The Children Act 8 of 2001.

1310 S 102(1).

Section 102 of the Children Act provides that "one or both parents could through a will or deed assign a guardian for their child on their death if both parents appoint separate people they will act jointly when they both die".[1311] Guardianship care occurs where the parent of the child concerned has relinquished his or her parental responsibility, as a result of death or incapacity to the guardian until such a child reaches majority, namely 18 years.[1312] Under guardianship, the child retains his or her name and does not become a legal member of the guardian's family. A guardian is appointed by either the parent or the Children's Court.[1313] The Children's Court has indicated that the guardian of a child must perform his or her functions and act in the best interests of the child while taking the views of the child into account.[1314] The guidelines for Alternative Care for Children in Kenya note that appropriate provision for guardianship of a child is fundamental in ensuring the best interests of the child and is central when the need arises to establish appropriate alternative care for children needing such care.[1315]

1311 S 102.

1312 S 104 provides that either parent may by will or deed appoint any person to be the guardian of their child. The guardian is appointed to take responsibility for the care of the child concerned and/or the custody over such child's estate, or both. This guardianship comes into effect following the death of the parents of the child concerned. Guardianship in Kenya is used in three different senses, namely for conferring parental rights and responsibilities to adults who are not the biological parents of the child, alternatively it may be an informal relationship whereby one or more adults assume responsibility for the care of the child, and lastly, guardianship may also be a temporary arrangement whereby a child who is the subject of judicial proceedings is granted a guardian to look after his or her interests.

1313 According to the Children Act, in the event of the death of the parents of a child where no guardian has been appointed by his or her parents, the court may appoint a guardian.

1314 UNICEF and the government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 78.

1315 UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* 6.

6 12 2 FOSTER CARE[1316]

Section 101 of the Children Act defines foster care as "the placement of a child with a person who is not the child's parent, relative or guardian and who is willing to undertake the care and maintenance of that child". While the Children Act does not provide for informal foster care, such informal placement of a child in foster care is common in Kenya.[1317] This is found where community members informally care for children who have been orphaned, abandoned, lost or neglected, without undergoing any formal legal processes.[1318] No statistics are available for the number of children in this form of care. When a decision to place a child in formal foster care is made, the best interests of the child is considered. Formal foster care is based on the best interests of the child.[1319] Different forms of foster care are provided for in the Children Act. These are:

- *Foster family care*, which entails the placement of a child with a person who is not the child's parent, a relative or guardian and who is willing to voluntarily undertake the care and maintenance of that child for a period up to 12 months, subject to renewal.[1320]

1316 Part XI of the Children Act, ss 147–153.

1317 Williams and Njoka refer to the Draft National Policy on OACs, Republic of Kenya, November 2005 and the revised draft National Policy on OACs, 2008 and state that informal fostering to relatives and friends is a common occurrence and takes place for about 11% of Kenyan children even though they have a parent alive.

1318 Formal foster care arrangements are processed through the Sub-County Children's Office or Children's Court. Informal care widely used in Kenya, occurs where children are placed under kinship care or the care of family friends. Various factors contribute to children being cared for in this way, including migratory work, the location of a secondary school or better schooling, the inability of parents to provide for their children or due to family illnesses or becoming orphaned. However, it is not known precisely how many children are cared for informally, as many families do not register informal care, making it difficult to collect data.

1319 Bridging Refugee Youth and Children Services "Promising Practices Program" (2018) http://www.brycs.org/promisingpractices/promising-practices-program.cfm?docnum=0072 (accessed 2018-08-02).

1320 UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 55.

- *Emergency foster care* occurs where the child is placed with a pre-selected, vetted and qualified emergency foster parent for a few days, weeks or months.
- *Community-based foster homes* are established for the placement of a group of children, normally not more than six, who are orphaned or need specific support, in rented houses within the community and are cared for by a home mother or other caretaker who is recruited by an organisation supporting foster care.

Formal foster care[1321] is practised to a limited extent in Kenya.[1322] The registration certificate of a foster parent is only valid for 12 months and must be renewed by the Children's Officer. A criticism of formal foster care is the lack of supervision, understanding and awareness around foster care among Department of Children Services (DCS) staff, NGOs, CCIs, and community members.[1323] It was highlighted in chapter 3 that a child clearly benefits when nurtured within a family environment. With this in mind, one must consider the appropriateness of foster care for an OAC in Kenya. For foster care to be effective and to provide a child with adequate protection, the standard of care needs to be of a high standard, which is characterised by efficient foster care authorities, trained foster parents and effective monitoring and supervision mechanisms. These are not currently available in Kenya.

A further critical challenge to the use of formal foster care in Kenya is the requirement that a child can only be fostered *after* such a child had been placed in institutional care.[1324] This legal reality also contradicts the overall intention of ending the

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1321 Part XI of the Children Act provides for the procedures that apply when placing children in foster care. This part is supplemented by the provisions in the Fourth Schedule to the Act.

1322 The public perception of foster-care is that the process of foster-care placement is long and tedious.

1323 UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* 56.

1324 S 147. The wording and common current interpretation of the CA has led most Children's Officers to see a foster care placement as an arrangement made between themselves, the CCI, the child and the foster parent without any need to involve the court. The result of this interpretation is that foster care placements are not used as a way of providing a substitute family for a child before that child has been placed with a CCI but rather as a way of providing an exit strategy from a CCI.

institutionalisation of children in Kenya. The current approach of placing children first within a Charitable Children's Institute before they can be placed with foster parents undermines the concept of residential care as a "last resort".

Formal fostering, therefore, appears no longer to be a pro-active way of nurturing children within a family environment. This is further evidenced by the fact that the district offices of the DCS do not have a list of trained foster parents with whom children could be placed as an option before institutionalisation of such children. Williams and Njoka also point out that CCIs appear to place children in foster care without consulting first with the DCS.[1325]

6 12 3 CHILDREN'S HOMES

The Children Act defines a CCI as "a home or institution which has been established by a person, corporate, or un-incorporate, a religious organisation or a non-governmental organisation and has been granted approval by the council to manage a programme for the care, protection, rehabilitation or control of children".[1326] CCIs are private institutions and their existence has been formalised by the provisions of the Children Act.[1327] CCIs are the most widely utilised alternative care option for children who lacked parental care in Kenya.[1328] The number of CCIs is unknown as most CCIs are unregulated and unregistered.[1329] Consequently, both the number of CCIs, as well as the number of children in such institutions remains uncertain.[1330]

1325 18.

1326 S 58.

1327 Kenya The Children (Charitable Children's Institutions) Regulations (a supplement to the Children Act, 2001). 2005, Government of Kenya: Legislative Supplement No. 53. In terms of the provisions of the Children Act, all orphanages and other institutions serving orphans are called CCI's where 20 or more children can be accommodated.

1328 UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 103.

1329 This is contrary to the Regulations of 2005, which provide that no organisation should operate as an institution before it has been registered as such.

1330 UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 103.

However, the Children Act provides that any non-governmental organisation or a religious organisation, which establishes a charitable children's institution shall be required to show proof of the registration of such organisation under a recognised system of registration of private institutions.[1331] Such proof must be provided before the NGO or religious organisation can apply for approval to implement a child welfare programme.

In instances where it appears that a child in its area is in need of care and protection, the relevant appointed local authority or CCI will receive such child into its care and need not bring him or her before a court immediately. The Children Act provides that in such instances,

(a) the local authority or charitable children's institution shall notify the Director within seven days of receiving the child into its care; and

(b) the child shall be brought before a court within three months.[1332]

Monitoring the progress of any child admitted into a CCI is incumbent upon the Director of National Children Services until such date that the child is discharged therefrom or until the expiry of a care order made in respect of the child.[1333] The National Standards on Best Practice in Charitable Children Institutions were published in 2011. While admirable in its aim, it is acknowledged that the aims of such standards are seldom adhered to as a result of a lack of follow-up mechanisms to ensure that the standards are adhered to.[1334]

1331 S 60.
1332 S 121(12)*(a)* and *(b)*.
1333 S 65(1).
1334 Better Care Network "National Standards for Best Practices in Charitable Children's Institutions" (2013) https://bettercarenetwork.org/sites/default/files/National%20Standards%20for%20Best%20Practices%20in%20Charitable%20Children's%20Institutions.pdf (accessed 2018-06-06).

The number of OACs placed in CCIs in Kenya is extraordinarily high. This is indicative of a government that has failed to comply with the legal standards and principles incorporated from the CRC. The children placed in such institutions are not only orphaned and abandoned but also include children placed in CCIs as a consequence of poverty.[1335] In such instances, the parents intend to parent their child when they are able to do so because they are in a more stable position financially. These children are not eligible to be adopted. As pointed out the CCI's are also the first resort for placement of OACs in Kenya. It is submitted that this reality diminishes the incentive to find more suitable alternative care options.

In line with international instruments as domesticated in Kenyan legislation, Ucembe opines that the placement of a child in a CCI should be temporary in nature and only considered as a measure of last resort.[1336] His opinion is based on the recognised social, psychological and emotional effects associated with the institutionalisation of children.[1337] There is general agreement internationally that institutional care is particularly inappropriate for infants and young children.[1338] The basis, therefore, is that it is accepted that young children require at least one consistent caregiver with whom they can form a bond. This is practically not possible when such a child is placed in an institutional environment.[1339]

1335 Embleton, Ayuku, Kamanda, Atwoli, Ayaya, Vreeman, Nyandiko, Gisore, Koech and Braitstein "Models of Care for Orphaned and Separated Children and Upholding Children's Rights: Cross-sectional Evidence from Western Kenya" 2014 *BMC International Health and Human Rights* (not paginated) https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/1472-698X-14-9 (accessed 2018-01-09). Embleton *et al* opine that records reveal that over 90% of non-orphaned children living in CCI's were admitted due to maltreatment and many orphans were admitted due to extreme poverty.

1336 See ch 3 where the same approach is promoted. Institutionalisation is notorious globally for the negative long-term effect it has on any child placed within such institution.

1337 Ucembe *Research Findings on Alternative Care System in Kenya for Children without Parental Care* (2015) 9.

1338 UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 106.

1339 Save the Children (2006) 37.

CCIs in Kenya are understaffed. The Association of Charitable Children's Institutions of Kenya reports that in 2018 almost all CCIs are understaffed. Currently the CCI staff to children ratio remains way below the recognised optimum ratio of 1:10. This is further compounded by the challenges faced in running a CCI effectively where a high staff turnover is found frequently with a reported *ratio* of staff to children at 1:50.[1340] Under such circumstances, one must accept that individualised care is not an option for the children placed in such CCIs.

Furthermore, while the objective is to return the child placed in a CCI to his or her parent or parents or community as soon as is possible, this is not an option for those children who are orphaned and have not been placed within kinship care or been nationally adopted. Statistics reveal that children generally spend more than the recommended maximum of three years in such CCIs.[1341] The Children Act fails to specify the *ratio* of primary staff to children, and hence the CCIs have a disproportionately high number of children to staff.

Kenya has two categories of children's homes, namely those who receive children in need of care and protection as they are orphaned or abandoned, and secondly, those CCIs who receive children who have transgressed the law. The latter is beyond the scope of the current research. However, despite the provisions of the Children Act that provide that child offenders and children in need of care and protection should be kept separately, the vulnerable children and children in conflict with the law are often mixed.[1342] Consequently, many OACs are treated in the same manner as child offenders. Furthermore, CCIs are established in an informal and unregulated fashion in Kenya. Williams and Njoka provide an example below indicating the position in Kenya in 2008 regarding the establishment of a CCI.

1340 Association of Charitable Children's Institutions of Kenya Centre for Research and Innovations, East Africa (2018) 8.

1341 Muiru *Secretary for Children Affairs Preface for the National Standards for Best Practices in Charitable Children's Institutions* (2013) 5.

1342 S 119(2).

There is an urgent need for all unregistered CCIs to be inspected and decisions made as for whether it is appropriate to register them according to the guidelines provided or to defer such registration for a period until a standard of compliance is reached. Where this is done or achieved, such institutions should be closed.[1343] Below standard CCIs or CCIs in regard to which there is a suspicion of abuse, often remain open due to the need for care.[1344]

A further example of the consequences of non-compliance with the relevant guidelines is illustrated in the instance that came to the attention of the authorities in Kenya in 2002. "CRADLE", a Non-Government Organisation (NGO), considered a matter relating to the alleged sexual abuse of children who had been placed in a certain privately-run privately-run institution in Nairobi. The institution, operating under the name "Spring Chicken", was owned and run by a non-Kenyan national. The institution was not registered, but it operated with the consent of the Kenyan government.

Several parents reported allegations of sexual abuse by the owner of the institution of the children placed there. A case was initiated,[1345] but instead of arresting and prosecuting this alleged abuser, the children, who were potential witnesses in the

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1343 Williams and Njoka "A Technical Assessment of the Legal Provisions and Practices of Guardianship, Foster Care and Adoption of Children in Kenya" Department of Children's Services Ministry of Gender, Children and Social Development With the support of UNICEF, Kenya (2008) 34 https://resource centre.savethechildren.net/sites/default/files/documents/6399.pdf (accessed 2018-09-03).

1344 An example of such a sub-standard CCI, which exists only because there are no other alternatives available for the children in need of care is the CCI known as "Mama Hani's" According to the DCO in Garissa, the DCS would like to close the Mama Hani CCI as it is failing to meet many of the standards set down in the regulations. Nevertheless, with the very moralistic ideas in the area about children born out of wedlock being cursed and therefore abandoned there is no one else willing to take these babies. The same holds true for those children with a disability who are unable to graze the herds. Both these groups of children are received at Mama Hani Today the CCI has 79 children, of whom 28 are handicapped, 6 are babies, 8 are in nursery school, 52 are in primary school, and 13 are in secondary school. The children and young persons are aged 7 months and 22 years. The majority are aged between 5–7 and 12–13 years. Parents rarely come to see their children but often claim them when they complete their high school education. Many local people do not support it as it is housing illegitimate children who should be killed.

1345 *R v Hans Vriens* CMC criminal case No. 1380/2001.

investigation and case, were arrested and detained by the police on so-called "trumped up" charges.[1346] It was only after the intervention by CRADLE that the matter was followed up by the police.[1347] Owing to lack of police co-operation and absence of proper investigation regarding the allegations, the owner of the institution was acquitted.[1348]

The same man was later arrested by a different police unit when he was found to have a list in his possession of over 70 children, against whose names he had marked "virgin" or "not virgin", thereby prompting the police to believe that there was reason to suspect that he had indeed sexually abused certain girls who were placed in his institution. The case went to trial, but the alleged offender was acquitted. He proceeded to open another institution outside of Nairobi, with no rules, guidelines or supervision from the government.

While there was a directive that all CCIs had to be registered by December 2007, the majority remains unregistered.[1349] With the passing of this deadline, no further directive setting a final deadline has come from the government, so the pressure on CCIs has been removed and registering has slowed down. Furthermore, a query about CCIs

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1346 Trochu-Grasso, Varesano, Musoga, Mbugua, Ekesa, K'Owino, Omweri, Kimani, Nalyanya, Njogu, Nyamu and Munene *Situation of Violence against Women and Children in Kenya: Implementation of the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment: Alternative report to the UN Committee Against Torture* (2008)15.

1347 Nation Reporter "Cabinet: No more Foreign Adoptions" (27 November 2014) *Daily Nation* http://www. nation.co.ke/news/Cabinet-No-more-foreign-adoptions/-/1056/2537564/-/feyt4qz/-/index.html (accessed 2018-01-10).

1348 As an indication of the involvement of the police in the matter under consideration, on the hearing date of the case concerned, the witnesses, including a 10-year old orphaned child, were arrested. Therefore, these children concerned could not attend the trial.

1349 According to the CCI regulations 2005, "No organisation shall operate as an institution unless it has been registered under these regulations''. All such registration is through the AACs and then on to the Director, DCS, for approval. However, there are reports that some AACs meet irregularly or rarely meet as much depends on the DCO having the funds to facilitate these meetings. Consequently, the undertaking of their tasks including inspections can be haphazard. In addition, some CCIs are trying to avoid the minimum standards set by trying to become registered through the NGO Council, the Department of Social Services, as church's charitable services or some other body. Others are simply not bothering to register.

arises when one considers that most of the CCIs limit admission to children to those below the age of 12 years. Therefore, all orphaned or abandoned adolescents lack official care options when no extended family can care for the child concerned. Failure to provide such care is in violation of the child's right to care and is also discrimination against the child based on his or her age.

CCIs clearly have a place in alternative care options, but it is submitted, that given the current position of the running and regulating of CCIs, such institutions serve an important role as a placement of last resort only. It is submitted that the guiding principle of the draft National Policy on OACs will only be realised when the government has obtained control over the current position in Kenya. This includes *inter alia* the mushrooming number of unregistered CCIs. The guiding principle of the draft National Policy on OACs states that: "Institutional care shall be the last resort, when all other social safety nets are not available or are not the best option for the child's care, support and protection" will not be realised where no other alternative care options are considered.

Instances such as the above make one question the extent to which the executive adhere to the principle of the best interests of the child. Children currently placed in CCIs do not have had their best interests considered properly.

6 12 4 KINSHIP CARE

Kinship care is recognised as a means of alternative care in Kenya,[1350] and is defined as "family-based care within the child's extended family or with close friends of the

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1350 The ACPF (2012) 4 notes that Kenya recognises and practices kinship care. Stuckenbruck and Roby refer to the fact that while kinship care has long been recognised and practiced in Kenya, formal adoption of a child is a relatively new phenomena Stuckenbruck and Roby "Navigating Uncharted Terrain: Domestic Adoptions" 2017 22(4) *Kenya Child and Family Social Work* 1.

extended family, whether formal or informal in nature".[1351] Informal kinship care occurs through a private arrangement within the family concerned, whereby the child is looked after on a temporary or long-term basis by his or her extended family, without an order in this respect from either an administrative or judicial authority. Formal kinship care occurs where there is an arrangement that is ordered by either an external administrative or judicial authority, whereby the child is looked after on a temporary or long-term basis by his or her extended family. Kenyan society places great value on the role and responsibility of the extended family in caring for these children,[1352] and where the biological parent or parents of the child are unable or unwilling to care for the child concerned, kinship care is considered to be the next best option. It allows the child to maintain cultural, religious and linguistic links with his or her family and community and this enables continuity, stability and a sense of identity and self-esteem for the child concerned. A child cared for within his or her own family environment generally experiences fewer placements and avoids the risks associated with institutional care.[1353]

No provision is made for kinship care in the Children Act, and it remains unregulated and limited data exist on its utility. This creates a potential risk for children in such care. Regulating kinship care would ensure the safeguarding and promotion of the child's rights. However, caution must be had that such regulation does not interfere with the positive aspects of the informal nature of kinship care, as well as the role played by existing community-care mechanisms in regulating this traditional approach to a traditional system.[1354]

1351 Stuckenbruck *Advancing the Rights of Children Deprived of Parental Care: Domestic Adoption of Children in Kenya* (Master of Advanced Studies in Children's Rights *Institut Universitaire* Kurt Bosch, University of Fribourg 2013) xvii.

1352 According to the Government of Kenya Cash Transfer Programme, of those orphans who do not reside with any parent, some 40% live with grandparents and 34% with other relatives.

1353 This form of care in South Africa is discussed in ch 3.

1354 Stuckenbruck *Perceptions, Beliefs and Experiences Concerning Domestic Adoption of Children in Kenya* (Master of Advanced Studies in Children's Rights (2011–2012) *Institut Universitaire* Kurt Bosch, University of Fribourg 2013) 85.

It is estimated that over 2 million children in Kenya are cared for in kinship care.[1355] Most children in need of care in Kenya are cared for on an informal basis. However, the impact of certain realities of the current situation in Sub-Saharan Africa cannot be ignored. With growing numbers of orphans requiring care and support together with the impact of high levels of poverty, rapid urbanisation, and dissolution of households, extended families are struggling to carry out care-taking expectations and responsibilities.[1356] In the 1970s and 1980s, an estimated 35–40 per cent of Kenyan households provided informal alternative care arrangements. This percentage has however reduced in 2011 by more than 10 per cent due to increasingly difficult economic conditions, rapid urbanisation and the high number of women taking up formal employment.[1357] The growing orphan crisis has overwhelmed many communities and has weakened the ability of extended families to meet traditional care-taking expectations.[1358] UNICEF refers to Nyambedha, Otieno, Wandibba and Aagaard-Hansen where they quote the words of an anonymous Kenyan woman in her fifties as follows:

> In the past, people used to care for the orphans and loved them, but these days they are so many, and many people have died who could have assisted them, and therefore orphan hood is a common phenomenon, not strange. The few who are alive cannot support them.[1359]

1355 Stuckenbruck and Roby 2017 22(4) *Kenya Child and Family Social Work*. Within most Kenyan communities, kinship care is the most culturally appropriate and understood form of alternative care as it is based on community mechanisms and processes.

1356 See ch 3 for a discussion hereof with reference to the situation in South Africa.

1357 The National Council for Children's Services "National Plan of Action for Children in Kenya 2015–2022" http://www.childrenscouncil.go.ke/images/documents/Policy_Documents/National-Plan-of-Action-for-Children-in-Kenya-2015.pdf 31.

1358 Embleton *et al* 2014 *BMC International Health and Human Rights* https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/1472-698X-14-9 (accessed 2018-01-09) (not paginated); Stuckenbruck and Roby 2017 22(4) *Kenya Child and Family Social Work* 1.

1359 UNICEF Africa's Orphaned Generations Nyambedha, Otieno, Wandibba and Aagaard-Hansen, "Changing Patterns of Orphan Care Due to the HIV Epidemic in Western Kenya' July 2003 57(2) *Social Science & Medicine* 301–311.

While it is preferred that children be cared for in the community by extended family, the reality is that in communities where the AIDS epidemic has advanced, there may be fewer available caregivers and an increasing number of overwhelmed and dissolving households, and families.[1360] Since kinship care is unregulated and not formally supported by the Government or external agencies there are potential risks associated with this form of care.

1360 UNICEF: Africa's Orphaned and Vulnerable Generations: Children Affected by HIV/AIDS. 2006, Geneva, CH; Washington, DC: UNICEF, UNAIDS, PEPFAR, 16; Bhargava, Biome: Public policies and the orphans of AIDS in Africa. BMJ. 2003, 326 (7403): 1387–1389. 10.1136/bmj.326.7403.1387; Smart Policies for Orphans and Vulnerable Children: A Framework for Moving Ahead. (2003) Futures Group International PP; UNICEF, UNAIDS, USAID: Children on the Brink 2004: A Joint Report of New Orphan Estimates and a Framework for Action. 2004, New York: Population, Health and Nutrition Information Project. The reasons for this inability are *inter alia* mostly due to poverty, old age of potential relatives, unemployment, and large household size.

Children placed in formal care Kenya 2012

KENYA	Girls	Boys	Total
1. Number of children living in residential care (state)	2,430	5,746	8,176
2. Number of children living in residential care (non-state)	16,150	24,080	40,230
3. Number of children living in formal foster care	541	179	720
4. Total children living in formal care (sum of 1, 2 and 3 above)	19,121	30,005	**49,126**
5. Number of residential care facilities including small group homes (state)			13 remand homes, 9 rehabilitation centres, and 4 rescue centres **Total 26 centres**
6. Number of residential care facilities including small group homes (non-state)			**700** charitable children institutions. Out of these, only 591 are legally registered by government while the rest are not **registered**
Source: Department of Children Services in Ministry of Gender, Children and Social Development, October 2012 NB. The figures on children in non-state residential care are from the 591 registered institutions. Data for children in 109 non-state residential care is not available.			

The above shows some significant statistics in this regard. However, it is important to keep in mind that data on alternative care in Kenya are fragmented, scarce and unreliable.

6 13 PERMANENT ALTERNATIVE CARE

6 13 1 ADOPTION[1361]

The current research has highlighted the benefits associated with the stability and nurturing provided within a permanent environment.[1362] The Adoption Regulations of 2005 provide that adoption is an instituted legal process that gives parental rights to a person or a couple to a child who is not their biological child.[1363] Under international instruments ratified and domesticated by Kenya, national adoption is considered as an option to be promoted and regulated to ensure a child's right to family care.[1364] However, statistics show that the adoption rate in Kenya remains low and under-utilised.[1365] The reasons for this are varied, but the extraordinarily high number of children placed in CCIs in Kenya are high and indicative of the need to promote adoption in Kenya.[1366] Various forms of adoption are legally recognised, namely:

1361 Part XII of the Children Act, ss 154–183, and the Children (Adoption) Regulations, 2005.

1362 See ch 4, 5 and 7 in this regard.

1363 Within the Government, there is an Adoption Committee that is established by the Cabinet Minister; it is in-charge of "formulating the governing policy in matters of adoption" (Adoption Regulations 2005 s 155).

1364 Stuckenbruck and Roby 2017 22(4) *Kenya Child and Family Social Work* 1.

1365 There are many reasons therefore. These concerns include *inter alia,* the process of adoption is long, complex and expensive. Furthermore, adoption is stigmatised by the community as a form of "buying a child", resulting in many concerns for potential adoptive parents such as fears that the immediate and extended family of the adoptive parents will accept such child, and furthermore, and related hereto, is the concerns that these family members harbour in relation to the inheritance rights of an adopted child.

1366 Some of the reasons are the following: In terms of the beliefs of some cultures, a child who is not from their bloodline is considered a bad omen, often resulting in the stigmatisation of the adopted child and the adoptive parent or parents. Some cultures relate adoption to infertility. Another factor affecting the chances of an OAC being adopted domestically, is the age and gender of the child concerned. Young children are more likely to be adopted, and girls also stand more of a chance of being adopted. S 158 of the Children Act provides that only in certain instances may a single man adopt a girl-child, and a single woman adopt a boy-child. On gender-culture *nexus*, culturally boys are entitled to inheritance. This has the consequence that adoptive parents may not wish to bequeath anything to the adopted child, leading to a preference to adopt girls.

(i) Domestic adoption: adoption, which is initiated through a duly registered local adoption society.[1367]

(ii) Foreign resident adoption: adoption by adoptive parents who are not Kenyan nationals, but who have lived in Kenya for over three years, and who adopt a child who is Kenyan by birth, and[1368]

(iii) Intercountry adoption: adoption of a Kenyan child by adoptive parents who are not Kenyan and reside outside Kenya.[1369]

The Children Act created the National Adoption Committee, which it is tasked with the regulation of adoption in Kenya. The Children Act sets certain requirements as to who is eligible to adopt a child.[1370] Only the High Court of Kenya has jurisdiction to make an adoption order.

Williams and Njoka express their concern at adoption statistics, suggesting that adoption figures "do not appear to come directly from the court to the RG's office but from lawyers, whose forms are not recorded. There is, therefore, no way of knowing if these numbers accurately represent the number of court adoption orders made in the year. Further, there is no way of being sure of whether an order was a local, resident or intercountry adoption as that is not recorded".[1371]

1367 Adoption Laws and Requirements for Adoption of a Child in Kenya (not paginated) unstats.un.org/unsd/vitalstatkb/ Attachment798.aspx?AttachmentType=1 (accessed 2018-08-21).

1368 Otuoma "To Link International Adoptions in Kenya to Trafficking is Ignorance" (2015) *The Star* https://www.the-star.co.ke/news/2015/09/14/to-link-international-adoptions-in-kenya-to-trafficking-is-ignorance_c1204213 (accessed 2018-09-13).

1369 Erambo "The Law of Adoption in Kenya (2015) *Sherialaw* (not paginated) https://sherialaw.wordpress.com/2015/04/17/the-law-of-adoption-in-kenya/ (accessed 2018-08-27).

1370 The law stipulates that a couple or an individual who intends to adopt a child must be between 25–65 years of age, and that there must be a 21-year age difference between the applicant and the child concerned. Married couples must have been married for at least three years before applying to adopt. Regarding adoption by single males and females it is a condition that the child's gender must be the same as that of the applicant unless under special circumstances exist. Homosexuals are prohibited from adopting.

1371 For the period 2006–2008 there is a variance in the statistics recorded by the RG's Children Adoption Register where there were 360 adoptions recorded, and the 246 adoptions recorded

A concern is noted in instances were a foreign national has been resident in Kenya for a minimum of three years and has adopted a Kenyan child. Few rules have been passed regulating such resident adoptions making it a challenge to vet the adoptive parents' home situation in their country of origin. While such adoptive parents may have property in Kenya, and the general understanding is that that they will stay in Kenya, this may not be the case. If such adoptees return to their country of origin there seems to be no arrangement for a foreign adoption society which will automatically supervise the adoptive parents and adopted Kenyan child, as is the case with intercountry adoptions from Kenya.[1372]

6 13 2 INTERCOUNTRY ADOPTION

The process of intercountry adoption is strictly regulated in terms of the provisions of the Hague Convention as domesticated into the Children Act.[1373] As a party to the Hague Convention, Kenya accepted the obligation to follow a specific process designed to meet the Hague Convention's requirements.[1374]

The High Court in Kenya is the only court that has jurisdiction to hear adoption cases and make adoption orders. While the High Court sitting in the provinces has jurisdiction

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with the DCS. This can potentially be attributed to the fact that the DCS has only recorded those cases where they have done reports.

1372 Department of Children's Services Ministry of Gender, Children and Social Development *A Technical Assessment of the Legal Provisions and Practices of Guardianship, Foster Care and Adoption of Children in Kenya* (2008) 20.

1373 Intercountry adoptions should be facilitated within the frame of an established working agreement between two partner organisations, one in the receiving country and one in the country of origin of the child concerned. These agreements are also approved by both the Kenyan Central Authority (National Adoptions Committee) and the Central Authority of the receiving country. Non-Kenyan citizens residing in Kenya, qualify to adopt an adoptable Kenyan child if they have been living in the country for a minimum period of three years. As the practice in Kenya shows, a brief fostering period could achieve the goals envisaged for a residency requirement. Art 157(1) provides that requires a 3-month fostering period before an adoption order is granted. At present three local adoption societies have been registered by the AC to undertake both intercountry and domestic adoptions. These are the Children's Welfare Society of Kenya (CWSK), Little Angels Network (LAN) and Kenya Christian Homes Society (KCHS).

1374 The process is discussed in more detail in ch 2.

to consider local adoption cases, only the High Court in Nairobi can decide on cases of intercountry adoption. Following a successful application for adoption, the relevant High Court is responsible for forwarding the information on every adoption order made to the Registrar General for entry into the Adopted Children Register. This is not currently taking place.[1375]

In November 2014, the Government of Kenya placed a moratorium on all intercountry adoptions.[1376] The decision was informed by Kenya's current ranking by the Global Report on Trafficking in Persons 2014, United Nations Office on Drugs and Crime, which cited Kenya as a source, transit and destination country in human trafficking.[1377] At the time the Government raised its concern over the prevalence of alleged illegal intercountry adoptions from CCIs. One such concern included the high rate of placements abroad, especially given that Kenya is a signatory to the Hague Convention, which supports the subsidiarity principle in terms of which priority is placed on domestic adoptions.[1378] As such, Ucembe refers to the report by the International

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1375 S 170 of the Children Act.

1376 Mboya "Move by Cabinet Contravenes the Law on Adoption of Kenyan Children" 14 February 2015 *Daily Nation*, reported that with the announcement of the moratorium on intercountry adoptions, the Cabinet also revoked all licenses to conduct intercountry adoptions in Kenya with immediate effect.

1377 Mathenge and Otieno "Kenyan Government Bans Adoption of Children by Foreigners" (29 November 2014) *Standard Digital* https://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners (accessed 2018-01-09). UNODC was established to assist the UN in better addressing a coordinated, comprehensive response to the interrelated issues of illicit trafficking in and abuse of drugs, crime prevention and criminal justice, international terrorism and political corruption. Blue Heart Campaign Against Human Trafficking: The Blue Heart Campaign, an awareness raising initiative to fight human trafficking and its impact on society, seeks to encourage involvement and action to help stop trafficking in persons. The campaign also allows people to show solidarity with the victims of human trafficking by wearing the Blue Heart. The use of the blue UN colour demonstrates the commitment of the United Nations to combat this crime. The Blue Heart Campaign seeks to encourage involvement and inspire action to help stop this crime. The Blue Heart Campaign against Human Trafficking works to raise awareness of the plight of victims and to build political support to fight the criminals behind trafficking. The Blue Heart Campaign, adopted by several countries all over the world, seeks to encourage involvement and inspire action to combat human trafficking.

1378 International Social Service 2007: 1.

Social Service of 2007,[1379] stating that in line with the principle of subsidiarity, intercountry adoptions ought to be significantly less in number than domestic adoptions.[1380] The government raised these concerns before the moratorium was announced. In 2008 Williams and Njoka stated that placements for children in terms of intercountry adoption stood at 30 per cent of all placements for OACs in Kenya.[1381] The *moratorium* followed concerns about increased cases of child trafficking through abuse of Kenya's adoption processes by foreigners.[1382] Noting that Kenyan laws do not define child sale, child procuring, child trade and child laundering as part of child trafficking, the Cabinet issued a statement which read in part as follows:

> This has in effect put Kenyan children at high risk as it creates a loophole for fraudulent, vested interests, masquerading through ownership of children homes, adoption agencies and legal firms representing children, and adopters, to engage in the unscrupulous business of human trafficking under the guise of charity.[1383]

Following the indefinite *moratorium* placed on intercountry adoption in Kenya by the Kenyan government, the judiciary intervened in several important cases. The Law Society in Kenya approached the High Court of Kenya, challenging the legality of the Kenyan Government's banning of any adoption of a Kenyan child by non-Kenyan

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1379 Ucembe "Institutionalization of Children in Kenya: A Child Rights Perspective: Does Institutionalization of Children in Kenya Neglect a Child Rights based Approach?" 2015 *International Institute of Social Studies* 6; Ucembe "Institutional Care for Children in Kenya" in Islam and Fulcher (eds) *Residential Child and Youth Care in a Developing World – Global Perspectives* (2016) 189.

1380 Ucembe "Institutionalization of Children in Kenya: A Child Rights Perspective: Does Institutionalization of Children in Kenya Neglect a Child Rights based Approach?" 2015 *International Institute of Social Studies* 6.

1381 Williams and Njoka "A Technical Assessment of the Legal Provisions and Practices of Guardianship, Foster Care and Adoption of Children in Kenya" (2008) available at http://resourcecentre.savethechildren.se/sites/default/files/documents/6399.pdf (accessed 2019-01-20).

1382 Mathenge and Otieno (29 November 2014) *Standard Digital* https://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners (accessed 2018-01-09).

1383 Matata "Cabinet Approves Indefinite Ban on Adoption of Kenyan Children by Foreigners (2018) *The Star* (not paginated) https://www.the-star.co.ke/news/2014/11/28/cabinet-approves-indefinite-ban-on-adoption-of-kenyan-children-by_c1045401 (accessed 2018-08-21).

citizens.[1384] The Law Society contended that the moratorium decision arrived at by the Cabinet was in contradiction to both national and international law concerning the recognition, promotion and safeguarding of the rights of children, as well as the obligation on Kenya to adhere to its obligations in terms of international instruments concerning the rights of children. The Law Society made special reference to the large number of children living in CCIs following the moratorium.

In response to the reason for the ban, namely that there were concerns over increasing cases of child trafficking through abuse of the adoption processes in Kenya by foreigners, the Law Society argued that the stringent rules governing adoption processes locally and abroad would prevent such abuse. In *Re Baby HJTH* the court ordered the County Children Office to prepare and issue a report on an application for adoption of a child by a married American couple residing in Kenya.[1385] The Child Office refused on the basis that all intercountry adoptions had been suspended as a result of the moratorium. The applicants had been approved as adoptive parents in terms of the relevant law, and the child had been in their care for a period before the moratorium was declared. The court considered the best interest of the child in terms of article 53(2) of the Constitution read with sections 4(2) and (3) of the Children Act, and in terms of section 154 of the Children Act that empowers the High Court to make an adoption order, ordered the adoption in the absence of the County Children Officer report which, in any event, had not been an absolute requirement preceding an adoption order.

1384 *In re of P M (Baby)* [2017] eKLR par 28, Amin J held as follows:
It cannot go without comment that Gazette Notice No 17 of February 2015 makes a personal threat toward judges dealing with these issues who are in effect the Judges of the Family Division notwithstanding that their jurisdiction to adjudicate these matters comes from *Article 162* of the Constitution and the *Children Act 2001*, that is "jurisdiction provided and defined by Statute". There seems to be no limitation expressed in the *Constitution* that such jurisdiction once given can be taken away by Executive Order.

1385 *In re Baby H J T H* [2015] eKLR.

In the case *In Re Adoption of Baby KR*,[1386] the court also held that the Cabinet moratorium was subordinate to the provisions of the Children Act, and in *In Re (Baby) PM*[1387] the court ordered the adoption of an abandoned child by Indian nationals, in spite of the moratorium. Of concern to the court was the fact that there was no indication of the duration of the moratorium. Moreover, no amendments to the Children Act were promulgated. Although the court had to be mindful of the risks of human trafficking, the existing legislation had to be applied and the constitutional imperatives of the best interests of the child had to be given effect to.[1388]

The court also restated the fact that the CRC and the ACRWC had been infused into the Children Act, in particular sections 4(2) and (3). The Court noted with concern the difference in the wording of the moratorium contained in different sources and the fact that the moratorium was not published in the Government Gazette. Professionals involved in child protection had also not been consulted prior to the moratorium. Finally, and most importantly, the Court pointed out that the application of the Constitution *via* a ministerially-announced moratorium of unlimited duration imposed by the Cabinet could not limit the Supreme Law of Kenya. The moratorium was accordingly held to be void.

Unfortunately, the granting of an intercountry adoption order by a Kenyan court in the absence of a certificate of conformity required by article 23 of the Hague Convention, may lead to the relevant court in the receiving country not recognising the adoption order in Kenya. In two Dutch cases the courts in the Netherlands did not automatically recognise the Kenyan adoption order for this reason.[1389] It was apparent that the

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1386 *In Re of Baby KR* [2015] eKLR 2015.

1387 *In Re Baby P. M. alias P. M. K.* (Child) [2014] eKLR.

1388 *In Re Baby P. M. alias P. M. K* par 7.

1389 See the judgment in Rechtbank Zeeland-West-Brabant 17-05-2016/C/02/312434/FA RK 16-1311, and in Rechtbank Midden-Nederland 2-3-2017 C/16/420604/FORK 16–14 https://www.recht.nl/ rechtspraak/uitsprak/?ecli=ECLI:NL:RBZWB:2016:4429 (accessed 2018-09-02) and https://uit spraken.rechtspraak.nl/in ziendocument?id=ECLI:NL:RBMNE: 2017:386 (accessed 2018-09-02).

conformity certificate was not granted because of the policy reflected in the ministerial moratorium. However, notwithstanding the lack of the certificate of conformity, the courts granted adoption orders based on the Dutch Civil Code.[1390]

6 14 REGULATION OF ALTERNATIVE CARE IN KENYA

UNICEF and the government of Kenya published the guidelines for the Alternative Family Care of Children in Kenya in 2014. In the foreword by the then Cabinet Secretary, Ministry of Labour, Social Security and Services, special reference was made to the fact that the guidelines are informed by the Government of Kenya's international commitments to the CRC, the ACRWC, and the Hague Convention. This is in theory only as the adherence to these principles are not reflected in the approach of the government and relevant authorities in Kenya when making a determination regarding the placement of a child in need of alternative care in Kenya. The guidelines reflect as follows:

(1) All decisions made regarding the alternative care of children should be made *via* a judicial or administrative procedure, complying with those legal safeguards provided for in the Constitution of Kenya, 2010 and The Children Act, 2001.

(2) It is mandatory for the Government of Kenya to ensure that a comprehensive regulatory framework is in place to guarantee authorisation, registration, monitoring and the accountability of all alternative care providers.

(3) It is incumbent on all alternative care providers to implement a multi-disciplinary approach to decision-making. These include the full participation of children, families and legal guardians.

[1390] Book 10, Title 6 S3 of the Civil Code 1992.

(4) The relevant authorities and alternative care providers must at all times maintain comprehensive records of the child concerned. These records are to assist those involved when making a decision concerning care planning.

(5) All decision-making should be carried out on a case-by-case basis and based on a thorough, carefully organised assessment. A qualified, multi-disciplinary team of professionals should carry out the assessment. The assessment should take into account the child's general well-being and safety as well as his/her ethnic, religious, family and community background, medical history, education and other personal and development characteristics. The child and the family should be fully consulted throughout the process.

(6) Authorities and alternative care providers should minimise frequent changes in care placements.

(7) *Care planning* will be initiated at the earliest possible time and within one month of care placement. It should be based on the child's emotional, physical and mental development needs; the family's the child's desire to stay close to his/her family or community; and the child's cultural and religious background. The care plan objectives and timeline should be clearly stated and shared with all responsible members of the decision-making process, including the child and his or her family.

(8) If the child is placed in alternative care *via* a court or administrative body, the child's family or legal guardian shall be informed of the decision and discuss the ruling with the respective authorities.

(9) The child, depending on his/her age and evolving capacity, should be informed and prepared throughout the process.

(10) Alternative care providers and authorities should conduct periodic reviews of the care placement, taking into consideration the child's well-being and personal

development as well as his/her views. It is recommended that at a minimum the reviews be conducted every three months.

(11) The paramount consideration during all decision-making is to ensure that decisions are based on the individual needs of the particular child and that care placement promotes stability and permanency through family reunification or provision of a stable alternative care placement.

(12) Every child in care should be supported with aftercare services once he/she leaves an alternative care placement.

(13) The best interests' determination process should be promoted for all care arrangements.[1391]

A best interests determination is defined in the guidelines as "A formal process with specific procedural safeguards and documentation requirements conducted for certain children of concern to UNHCR, whereby a decision-maker is required to weigh and balance all the relevant factors of a particular case, giving appropriate weight to the rights and obligations recognised in the UNCRC and other human rights instruments, so that a comprehensive decision can be made that best protects the rights of children".[1392]

Little evidence is found with regard to the adherence to an application of the guidelines in Kenya. While it is well accepted globally that the institutionalisation of a child should be a matter of last resort when placing a child, Kenya appears to consider institutionalisation as a matter of first resort. Scant regard is had to the interests of the child in placing such child in the CCIs in Kenya. The rights and obligations as provided

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1391 UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 20 21.

1392 Better Care Network "Guideleines for Alternative Family Care of Children in Kenya" https://www.bettercarenetwork.org/sites/default/files/Guidelines%20for%20the%20Alternative%20Family%20Care%20of%20Children%20in%20Kenya.pdf (accessed 2018-05-21).

in the CRC and other human rights instruments are in no way followed when placing such child.

Interestingly, the principle of subsidiarity is not referred to by the courts as the overriding principle. The best-interests-of-the-child-principle is the principle which the courts apply without referring to a hierarchy of possible placements required when the subsidiarity principle is considered. What might appear as a hierarchy of alternative care and adoption placement practice in Kenya is, in fact, the application of the best-interests-of-the-child principle. Children have a fundamental right to grow up in a nurturing family, unless there is an option for a Kenyan OAC to be placed in domestic adoption, a nurturing family in a foreign country may very well be in the best interests of the child when alternative Kenyan care means indefinite institutionalisation.

6 15 BEST INTERESTS

There is no specific definition to the question as to what constitutes a child's "best interest" in Kenya, and the Children Act provides no definition of the principle. However, the principle that a child's best interests is of paramount importance is incorporated in domestic law in Kenya through its Constitution.

In the cases handed down before the moratorium was placed on intercountry adoption by the Cabinet, the consideration of the best interests of the child was clearly of primary importance. In the cased *In Re IWN*, the High Court in Nairobi held that it would be in the best interests of an abandoned baby to be adopted by an Australian couple who lived in Kenya at the time but intended to return to Australia.[1393]

In *A.O.G v S.A.J*[1394] the Appeal court noted that the best interests of the child was a guiding principle to safeguard, conserve and promote the rights and welfare of the child. Following the announcement of the moratorium placed by the Cabinet on

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1393 *In Re IWN* [2007] eKLR.
1394 *A.O.G. v S.A.J*. [2011] eKLR.

intercountry adoption, the courts did not alter their approach, and continued to order intercountry adoption orders despite the moratorium.[1395] The guiding principle remained the constitutional imperative of the best interest of the child.

6 16 CONCLUSION

In both India and Kenya, like South Africa, the need for alternative care for orphans and abandoned children is undeniable. As indicated at the outset, these countries were chosen as comparators in the present research, because of the fact that both are developing countries and, like South Africa, a sending country in the context of intercountry adoption.

The scale of OACs in India is enormous, which is understandable as a result of the population of India, and the increasing need for care of such children in Kenya, particularly in the face of HIV/AIDS, like in South Africa, is disconcerting.

In this conclusion, I propose to compare and discuss the lessons, positive and negative, to be learnt from Indian and Kenya in terms of:

1. The adequacy of alternative care in the three countries.
2. The activist and important role of the judiciary in the two countries to provide for the permanent alternative care despite significant opposition.
3. The role of the judiciary in creating measures and guidelines to combat child trafficking and profiteering.
4. The application of the subsidiarity principle and the principle of best interests of the child principle.

6 16 1 THE ADEQUACY OF ALTERNATIVE CARE

The adequacy of alternative care in the three countries considered is a great concern. The reason is apparent and universal in all the countries, namely abject poverty. What

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[1395] *A.O.G. v S.A.J.* par 33.

is of particularly great concern in Kenya is the fact that as a result of the dire need for alternative care, it appears that institutionalised care is often of an acceptably-low standard. Moreover, as a result of the lack of adequate monitoring and the large scale of unregistered CCHs, child abuse cannot always be prevented. In India the negative effects of institutionalisation are recognised and such care should only be used as a matter of last resort.

Family-based care is therefore prioritised in India. But the reality remains that because of the number of OACs, excessively large numbers of children remain in institutionalised care, and even more have no care at all and live on the streets or provide virtually slave labour in rural areas. Accordingly, the scale of children in need of alternative scale is unfortunately so immense that the preferred family-based care cannot cope with the demand, and, like in Kenya, many children's homes in India d

In Kenya there is a further disturbing reality: children's homes are the first resort for a child who cannot remain with his or her family, or in kinship care. Other alternative care options may follow whilst the child is in an institution. This reality causes great concern and has dire consequences. The Indian approach is clearly to be preferred. The position in South Africa. There is uncertainty as to the interpretation of the meaning of "last resort". While intercountry adoption is recognised and practiced, members of the DSD appear reluctant to place a child abroad, and would rather keep the OACs in South Africa, notwithstanding that such child has little chance of placement in a family locally. This inevitably leads to the placement of children in CYCCs.

What is apparent from the consideration of alternative care on both countries is that the most viable alternative care options are adoption, including intercountry adoption. Following adoption, the child is (mostly) given the opportunity to grow and develop in a permanent family environment, which is not the position with other alternative care options. The importance of growing up in a nurturing family environment is undeniable. Since domestic adoption in both countries does not provide a complete solution, intercountry adoption is an alternative that should be considered. Domestic adoption in a developing country where poverty is rife will clearly not provide a complete

solution. There are, in reality, not enough parents wanting to adopt when compared with the number of children in need of (permanent) alternative care.

In addition, cultural and religious reasons, beliefs and practices do not support domestic adoption in many instances, particularly in India. Furthermore, the clear preference of adopting a male child in India leaves the girl-child at high risk of facing the only national alternative placement, namely in a state institution. The clear lesson and reality is that in both India and Kenya, intercountry adoption must be considered as an option of permanent alternative care. This is also the case in South Africa.

6 16 2 THE ROLE OF THE JUDICIARY

In Kenya the activist role of the judiciary (who disregarded the unconstitutional moratorium on intercountry adoption placed by the Cabinet) is noteworthy and commendable. As highlighted above, the Supreme Court has taken officials acting in accordance with the moratorium to task and has unequivocally declared the moratorium contrary to the Constitution and not enforceable. The Courts have steadfastly continued to highlight the constitutional imperative of the best interests of the child. This is also an important lesson for South Africa from the Kenyan courts. With increasing reluctance by state officials to process intercountry adoption applications, the need for judicial intervention is also becoming necessary in South Africa. Our courts have been rigorous in upholding constitutional principles, including the paramountcy of the best interests of the child imperative. Access to the courts may be a significant hurdle to overcome. In this regard human-rights advocacy resources should not be hesitant to support such cases.

A lesson from India regarding judicial activism is apparent from the *Laksmi Kant Pandey* case where the court stepped in to provide guidelines for intercountry adoption with a view to preventing child trafficking, without retarding intercountry adoption. The lesson for South Africa in this regard is that the courts need to remain vigilant to ensure that constitutional imperatives like the paramountcy of the best-interests-of-the-child – principle remains the standard to apply in intercountry adoption decisions. In addition,

training of decision makers and presiding officers and the development of a deeper understanding of how to apply the measure in the context of intercountry adoption is important.

6 16 3 THE CREATION OF MEASURES TO ENSURE SAFE INTERCOUNTRY ADOPTION

India is a noteworthy example of a country where measures and guidelines were set in place and are developed on an ongoing basis to combat child trafficking. The government established the CARA. The CARA provides certain lessons that can be learnt regarding the pre-and post-adoption of a child in India. Whilst certain age requirements must be met when applying to adopt an OAC in India, this age limit of the prospective adoptive parent is relaxed where the child is older. It is submitted that such relaxation might provide an older child the opportunity to experience growing up in a home environment, where, given the fact of his or her age, the chances of being selected for adoption by younger adoptive parents is minimal.

The CARA has rigid time limits which are strictly adhered to. It is submitted that following a thorough investigation that such placement is indeed in the best interests of a child, it is beneficial for the child concerned to be placed in such care within a designated and regulated time frame. Illustration hereof is found as follows in the provisions of the CARA:

- Upon receipt of a completed application form to adopt a child, it is incumbent on the relevant agency to confirm receipt of such application and provide the potential adoptive parents with a registration number which will enable such prospective adoptive parents to follow the progress of the application.
- A Home Study must be undertaken of the home environment of the prospective adoptive parents within a stipulated time frame. Where the Specialised Adoption Agency is not in a position to undertake such Home Study, assistance is attained from a social worker from a panel of which is maintained by the State Adoption Resource Agency or alternatively, from a District Child Protection Unit.

- The Home Study Report is to be completed within 30 days from the date of the submission of the required documentation. Such report is immediately shared with the eligible adoptive parents.
- An appeal is allowed against such finding and must be disposed of within 15 days from whence the decision by the authority was made.
- Upon selecting a particular child in terms of the provision of the CARA, the matching of a parent-to-child must occur within 20 days of such prospective adoptive parent reserving a particular child.
- The child concerned is placed in pre-adoption foster-adoptive care within 10 days of such matching of parent-to child.
- The Specialised Adoption Agency must apply to the relevant court within 10 days of such matching of the parent-to-child, and where the child is to be placed in intercountry adoption, the application must be made to the relevant court upon receipt of the required No Objection Certificate from the authority concerned.
- Post adoption follow-up reports are required, and the Specialised Adoption Agency shall prepare such report on a 6-monthly basis for a period of two years from the date of the pre-adoption foster-care placement with the eligible adoptive parents.

6 16 4 SUBSIDIARITY AND THE BEST INTERESTS OF A CHILD

From Kenya the approach of the court regarding the best-interests-of-the-child is instructive for South Africa. In the cases considered the courts did not emphasize the principle of subsidiarity, but rather applied the best-interest-of-the-child principle of the Constitution without qualification. Bearing in mind the only real alternative is institutional care in Kenya, it is not surprising. This type of alternative care is no alternative and factors like culture, religion and language which would be lost in an intercountry placement, can in cases, especially when reference is had to the age of the child concerned, outweigh the detrimental effect of such care on the child when the best interests' principle is applied.

Kenya provides a lesson to South Africa in that the subsidiarity principle cannot realistically be applied in countries where the domestic alternative care is, due to the

scarcity of resources and poverty, not a reasonable alternative. Against this background, the importance of guarding against child trafficking and profiteering in the context of intercountry adoption is of utmost importance. This lesson is learnt from India. The Indian Government accepted the guidelines and recommendations of *Laksmi Kant Pandey* and established the CARA to regulate and monitor adoptions and intercountry adoptions, thereby guarding against child trafficking and profiteering under the guise of intercountry adoption. Finally, like South Africa, both India and Kenya grapple with serious issues impacting on alternative care and intercountry adoption, which were highlighted in this chapter.

CHAPTER 7

CONCLUSION AND RECOMMENDED MODEL

7 1 INTRODUCTION

As mentioned in chapter 1, it is generally accepted that the family forms the foundation of a society. The importance of the family unit is recognised in both international law and the national law of South Africa. Whilst family reunification is prioritised in all instances, where this is not an option, an obligation falls on the state to provide a child with appropriate alternative care. Developments that include *inter alia* the global economic crisis, the consequences on the HIV/AID's pandemic on numbers of children currently in need of alternative care, urbanisation and an increase in migration have impacted negatively on the current position of children in South Africa. Statistics indicate high numbers of children in need of alternative care in South Africa. As a developing "sending "country with a multi-racial and multi-cultural population, placing a South African OAC in care that meets the best interests of the child concerned, is a challenge to those charged with making a decision regarding what form of care is appropriate for the child concerned. This determination becomes even more challenging because South Africa has the highest rate of deaths in the world because of AIDS.[1396] The child welfare system is already overburdened, and the fact that the grant system could potentially be used by care givers as a means of poverty alleviation rather than the desire to care for the child concerned, cannot be ignored. However, in a system that is overburdened, serious questions have been raised as to how to overcome this concern in light of the rights of the child.

[1396] Avert "HIV and AIDS in South Africa" (2017) https://www.avert.org (accessed 2018-27-06).

Throughout this thesis answers were sought to the research questions posed in chapter 1. The role played by adoption (both national and intercountry) as a form of alternative care in South Africa was described and considered in chapters 4 and 5. In these chapters it was concluded that adoption, as a form of alternative care, is not utilised to its full extent in South Africa for several reasons.

In this chapter concluding remarks regarding the following questions are made before a model or framework to determine the best interests of a child is proposed.

1. To what extent is the South African legal framework consistent with international standards with respect to placing a child in alternative care?
2. To what extent is South African legislation compliant with the application of the principle of a child's best interest; which is a constitutional imperative?
3. To what extent does the principle of subsidiarity impact on a decision to place a South African child in national alternative care instead of intercountry adoption?
4. What lessons can be learnt from the approach in India, a multi-cultural "sending" country, and Kenya, a developing African country, concerning choices of alternative care for an OAC.

The other research questions were addressed throughout the thesis.

7 2 INTERNATIONAL STANDARDS AND CONVENTIONS

During recent decades there has been a significant shift in the approach to the rights of children. Internationally children are not regarded as "objects" any longer but as bearers of subjective rights. In accordance to the interest theory of rights,[1397] where an individual has a right if his or her interest is enough to require others a *duty* to protect such right. This duty on the state is acknowledged in the South African constitution.[1398]

1397 Buck *International Child Law* 2005 13.
1398 S7(2).

To fulfil its duty, it is submitted that the state must consider the evolution of children's rights as ongoing, and therefore take cognisance of the ongoing progressive development of fundamental human rights. This realisation is particularly important in respect of vulnerable children.

Present international standards contained in the CRC, ACRWC and the Hague Convention should accordingly be considered in light hereof. The CRC, the first comprehensive rights-based international treaty, was drafted in an era where intercountry adoption was not regulated, leaving the child placed in such care at risk to the abuses including child trafficking and profiteering. The *travaux preparatoires* reveal that intercountry adoption will be considered as a subsidiary means of alternative care when all other possibilities are exhausted.[1399] The drafters of the Hague Convention were mindful of the concerns associated with placing a child in intercountry adoption. Consequently, the focus of the convention was on the need to define substantive safeguards and procedures to assist all authorities involved in placing a child in intercountry adoption. Article 29 of the Convention is testimony hereto. Para–Aranguren opines as follows in this regard:

> Article 29 substantially reproduces the text of the draft (article 4), with some amendments to specify the prohibition of contacts between the parties to the intercountry adoption, aiming to prevent trafficking and any other kind of practices that may be contrary to the purposes of the Convention, in particular, to avoid that the consents required for the granting of the adoption are induced by payment or compensation, as is expressly forbidden by Article 4, sub-paragraph c(3). paragraph c (3).[1400]

The Hague Convention has provided for stringent standards and regulations aimed at protecting the child placed in intercountry adoption.[1401] The exercise, standards and

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1399 Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 1999 351.

1400 Para- Aranguren *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* 1993 par 495.

1401 Some commentators argue that they standards are too strict. See Bartholet "Intergenerational Justice for Children: Restructuring Adoption, Reproduction and Child Welfare Policy" 2014 8 *Law & Ethics Hum. Rts.* 103, 120 122.

practice of placement that occurred before the Hague Convention, are very different from the standards that currently regulate the placement of an OAC abroad. It is accordingly submitted that the CRC should be interpreted in light of the progressive safeguards of the Hague Convention.

As highlighted in chapter 2, the CRC, the ACRWC and the Hague Convention all recognise the best-interests-of-a-child principle. However, there are discrepancies evident in the international standards contained in the three conventions relating to their approach to the principle. The CRC provides that the best-interest principle is *a* primary consideration and elevates this standard to the status of *paramount* interest in respect to the adoption of the child. Detrick[1402] notes the persistent criticism lodged against the best-interest principle in that the principle "will enable cultural considerations to be smuggled in by states into their implementation of the rights recognised in the CRC". It is submitted that the model proposed considers this factor. The provisions of the ACRWC differ from those of the CRC in respect of the best-interest principle in that it provides that the best interests of the child is *the* primary consideration in any decision affecting the child. It is apparent that the ACRWC applies a higher standard in respect of the principle of the best interest of the child when compared to the CRC.

The primary aim of the Hague Convention is to place a child in a permanent family in terms of national or international adoption. The Hague Convention emphasises the importance of the principle of the child's best interest when placing a child in intercountry adoption. To give effect to the Hague Convention, provision is made for specific procedural requirements that aim to protect and safeguard the child when placed in intercountry adoption. Buck opines that the family has been structurally weakened in certain countries.[1403] The research submits that South Africa is one such

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1402 Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 89.
1403 Buck *International Child Law* (2005) 64.

country where the family unit has been affected by factors mentioned earlier. It is submitted that the rights of a child must be considered in light of the integrity of the rights relating to the family unit as well as the approach of the state to support families and to provide appropriate alternative care to the vulnerable child where the family environment is not functioning properly.

With respect to the principle of subsidiarity, the CRC provides that intercountry adoption should be considered as a form of alternative care, when no appropriate alternative care is available in the country of origin of the child concerned. Fenton-Glynn opines that one of the main arguments in favour of placing a child in intercountry adoption is the assertion that such OACs would otherwise be placed in CYCCs.[1404] She notes that while the CRC acknowledges various forms of alternative care,[1405] the Preamble of the CRC expresses a preference for *family* care. Fenton-Glynn's discussion in this regard is focussed on the consideration if institutional care could ever be deemed appropriate for a child who is adoptable.[1406] It is however submitted that the importance of placing an adoptable child in a family environment is as important when *all other* domestic solutions are considered. In all instances where a child is found to be adoptable, the importance of the placement of a child in a family environment cannot be over emphasised. Para-Aranguren confirms this position.[1407] As discussed in chapter 2, the ACRWC, expressly provides for the placement of the child as a measure of *last resort* only i.e. when no other suitable care is available in the child's country or origin. The ACRWC also recognises that it is a primary consideration that the child grows up in a *family* environment where such environment is found, nationally or internationally. The Hague Convention recognises that it is of primary importance that a child grows up in a family environment, and that this is

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1404 Fenton-Glynn *Children's Rights in Intercountry Adoption; A European Perspective* 35.

1405 Art 20.

1406 Fenton-Glynn *Children's Rights in Intercountry Adoption; A European Perspective* 35.

1407 Para-Aranguren *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993) 46.

essential for the happiness and healthy development of the child. At the same time, the Hague Convention states that intercountry adoption may offer a child the advantage of a permanent family in the instancewhere a suitable family cannot be found in the country of origin.[1408] Where a child is found to be adoptable, it is submitted that in recognition of the important role a family plays in nurturing a child and allowing such child to develop to his or her full potential, placing such child in a *family* environment is of utmost importance for the future of the child. Such care must meet the best interests of the child.

7 3 NATIONAL LEGISLATION

In recent years the legislature of South Africa has increasingly recognised children's rights, promoting and protecting these rights, and ensuring the safeguarding of its children. The provisions of the CA, the Constitution and the SAA[1409] recognise the well-established principle that the best interests of a child are of paramount importance in any matter involving a child. South Africa is a multi-cultural society where customary law and common law co-exist.[1410] There are thus two legal systems that run parallel under the supremacy of the Constitution.[1411] Notwithstanding any challenges that exist as a consequence of the two systems co-existing,[1412] the crucial role that a family plays in a child's life is recognised and accepted by both systems. Unless factors mitigate against it being in a child's best interests, for example where there is evidence of

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1408 Vité and Boechat in Alen *et al A Commentary on the United Nations Convention on the Rights of the Child* 16, note that a distinction must be drawn in national law between simple adoption (filial ties not broken with the family of origin, and adoption is revocable) and full adoption (full integration of the child into the adoptive family and all legal ties with the family of origin are severed). In terms of Art 27 of the Hague Convention 'where an adoption granted in the state of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may, in the receiving state which recognises the adoption under the Convention, be converted into an adoption having such an effect if in law of the receiving state so permits and if the consents have been given or are or are given for the purpose of the adoption'.

1409 See ch 3, 4 and 5 in this regard.

1410 *Gumede v The President of the Republic of South Africa* 2009 (3) SA 152 (CC) par 21-22.

1411 S 8 of the Constitution of South Africa.

1412 Boezaart *Building Bridges: African Customary Family Law and Children's Rights* (2013) 395.

abuse, family reunification must be prioritised. It is submitted that this is an important factor that cannot be overlooked when considering which form of alternative care is deemed most appropriate for the child concerned.

Moreover, the South African state has shown its commitment to recognising, promoting, protecting and safeguarding children's rights, both through the enactment of the CA that incorporated the Hague Convention and by implication the CRC, as well as through ratification of the ACRWC. The Constitution further ensured protection of children through providing that a child's best interests are of paramount importance when making a determination to place a child in adoption, be it national or intercountry adoption. Accordingly, only where it can be said to be in the particular child's best interests will adoption, in South Africa or abroad, be considered a potential solution. International standards are subject to the provisions of the Constitution, and any decision to place a child must be taken in light of section 28.[1413]

Following ratification of the Hague Convention by South Africa, all South African courts, tribunals and forums must comply with its provisions (if not also its practices, procedures and guidelines). Section 39(1)*(b)* of the Constitution states that a court, tribunal or forum must consider international law and may consider foreign law in deliberations. It is accordingly evident that international instruments play a very important role in the interpretation of the Constitution. Section 28(2) of the Constitution is evidence that South Africa's constitutional values are in keeping with international standards. By ratifying conventions such as the CRC and the ACRWC, South Africa has confirmed its commitment to international human rights".[1414] The phrase "*must* consider international law" (my emphasis) in section 39(1)(*b*) imposes and obliges the

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1413 *C vs Minister of Health and Welfare* 2012 (2) SA 208 (CC) 30.

1414 Claiming Human Rights Guide to International Procedures available in Cases of Human Rights Violations in Africa "Claiming Human Rights - South Africa" (not paginated) http://www.claiminghumanrights.org/southafrica.html (accessed 2018-08-30); Pretorius *Inter-country Adoptions and the Best Interests of the Child* 34–35.

courts to refer to and utilise all legal principles under the Hague Convention when performing their interpretive task.

7 4 ALTERNATIVE CARE

Chapter 3 considered the status of alternative care options in South Africa. South Africa is compliant with international standards with respect to determining alternative care for a child in need thereof. However, cognisance must be taken of the concerns raised in chapter 3 with respect to the practicalities encountered and the realities facing a child in impermanent alternative care currently in South Africa. Concerns were raised with respect to the fact that national adoption rates are low, the foster care system is overburdened, social workers involved in the process of foster care have high caseloads, and as a consequence, concerns have been raised whether a child's best interests have been met when placed in a form of care that experiences the difficulties mentioned. For example, although placement of a child in CYCC might meet the physical needs of the child, it is clear that "care" of a child goes far beyond physical needs. Such needs include *inter alia* emotional and psychological care. Referring to the negative impact placement in an institution has on any child, Ucembe opines that

> [t]here seems to be a laxity in regulating, monitoring, and supervising the institutions to ensure proper care and protection. Within institutions, the way these children are portrayed in fundraising practises is exploitative and disrespectful and hence negates the rights-based values.Furthermore, most institutions seem inundated with abuse neglect and exploitation.[1415]

It is submitted that the needs of an OAC are met when the OAC is placed in a permanent and stable family environment. However, in South Africa, it is apparent that the family unit frequently faces a fundamental crisis. The impact of HIV/AIDS has devastated families and communities, leaving an ever-increasing number of OACs in its wake. Traditional methods of caring for a child through kinship care are no longer

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[1415] Ucembe *Institutionalization of children in Kenya: A Child Rights Perspective International Institute of Social Studies* (2015) 8.

necessarily readily available for children in need of care. When making a decision to place an OAC in appropriate alternative care, it is of utmost importance that attention is paid to the current status of the child welfare system within a particular country, before any determination can be made regarding such placement. The decision made concerning such placement, must be appropriate for the child concerned, and must meet the best interests of such child.

7 5 THE PRINCIPLE OF BEST INTERESTS OF THE CHILD

Viable solutions that fulfil the standard of a child's best interest must be sought and effected.[1416] The flexibility of the criterion of the best interests of a child is accordingly necessarily indeterminate and not rigid, since current factors need to be considered at the time the decision is made, and factors relevant to the particular child need to be weighed up and balanced to ensure compliance with the standard of paramountcy of the child's best interests. Several factors reflected above have led to the current position that many children in South Africa find themselves in. In several respects, OACs in India and Kenya are in a similar position. The position of such children in India and in Kenya was also considered and lessons from these countries were highlighted. Specific attention was paid to the approach of the legislature and judiciary in both countries regarding the placement of a child in need of care in a permanent family environment. In all instances, decisions were based on what form of care best met the interests of the child concerned. It was highlighted that the principle of a child's best interests is well established in both national and international law. However, concerns have been raised as to the indeterminacy of the principle and with respect to which forum is best placed to ensure that these interests are met. OACs in these countries are in a vulnerable position.

[1416] Davel in Sloth-Nielsen (ed) *Children's Rights in Africa – A Legal Perspective* (2000) 264.

Placing a child in an institution is generally considered to be detrimental to a child, but it is accepted that in certain instances the circumstances may be such that a particular child's best interests are served when placed in such care.[1417] The nature of institutional care in South Africa, India and Kenya is representative and illustrative of the fact that this form of care does not provide a nurturing, caring environment in which a child can develop to his or her full potential. While state institutions might have a certain role to play in caring for children, evidence of the negative long-term impact of growing up in such care is well documented by different disciplines. All reach the same conclusion - where absolutely necessarily, placement of a child in care in an institution, must at all times be considered as a measure of last resort.

Given the globalisation of the placement of children in intercountry adoption, the Hague Convention recognises the practice as an international phenomenon. Provision is made in the convention allowing for the creation of a system of co-operation between states, to ensure the safeguarding of children's rights and granting children protection against exploitation of their rights, and providing a permanent solution for a child in need of alternative care.[1418] While the potential for such atrocities is there, it is submitted that following the enactment of the Hague Convention, strict rules, regulations, safeguards and procedures have been put in place to guard against any attempt to exploit children.[1419] The strict regulation of intercountry adoption in light of the provisions of the Hague Convention is considered in chapter 5.

Where, following a weighing and balancing of all relevant factors, the authorities concerned agree that adoption meets the child's best interests, such adoption will be processed and monitored in terms of the provisions of the Hague Convention. These

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1417 Dozier, Zeanah, Wallin, Shauffer "Institutional Care for Young Children" 2012 *Review of Literature and Policy Implications Social Issues and Policy Review* 19.

1418 Louw in Boezaart *Child Law in South Africa* 485; Davel in Sloth-Nielsen (ed) *Children's Rights in Africa – A Legal Perspective* 262; Stuck *In The Pipeline: An Analysis of the Hague Convention and its Effects on those in the Process of International Adoption* 2012 3(1) *Journal on International and Comparative Law* 129.

1419 Louw in Boezaart *Child Law in South Africa* 507.

provisions, when properly regulated and monitored, should serve to allay the fears and concerns that might arise when considering the placement of a child abroad. The banning of intercountry adoptions by placing a moratorium on such placements where it becomes apparent that irregularities have occurred in the process, can serve to protect children from trafficking where it is clear that the process has not been effected in terms of the provisions of the Hague Convention protections. However, as is the instance in Kenya, placing an indefinite moratorium on intercountry adoptions, should not be used as a pretence for protecting children's interests where it is evident that registered and unregistered institutions are mushrooming to accommodate the children left without any other form of care. The relevant authorities must guard against the same occurring in South Africa.

This is clearly in contradiction to the recognition, development and protection of children's rights in international law. In light hereof, it is evident that the South African legislature and judiciary, and all other relevant authorities, are obliged to ensure that all steps must be taken to ensure that the best interests of a child standard are met. In doing so it is submitted that a model of best-interest-determination will be an aid in ensuring and protecting children when placed abroad. It is submitted that the recommendations that follow in the form of a model, are based on a strictly regulated system, with accredited bodies that are subject to monitoring. Furthermore, where the placement is in terms of intercountry adoption, the provisions of the Hague Convention sets a minimum standard that must be adhered to before-during-and-after the placement of a child abroad.

The state is well aware of the failings of the system of child welfare in South Africa, little has been done to provide a solution for the problem. It is also well-established that adoption is on the decline in South Africa.[1420] The CA has done little to clarify the

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[1420] Statistics revealed by the National Adoption Coalition indicate that only 1 699 adoptions took place in 2013, from 2 840 in 2004. In November 2013, a review of the Registry of Adoptable Children and Parents indicated that there were a mere 297 unmatched parents for the 428

position of intercountry adoption as a form of alternative care.[1421] Like the relevant conventions on alternative care and the Hague Convention, little effort has been made to clarify and resolve the ambiguity of the place of intercountry adoption with respect to national alternatives of care.

Throughout this research, the best interests of the child have been uppermost in the discussions. The flexibility of the concept has been highlighted, and how the best interests of the child are to be determined have been discussed. It is apt to return to the question in the final chapter of this work.

7 6 LESSONS FROM INDIA AND KENYA

An aspect of this thesis concerned an investigation of alternative care and in particular, intercountry adoption in India and Kenya. Both countries experienced significant difficulties in providing effective alternative care for OACs, and therefore understandably, neither country can be cited as an example of providing an appropriate alternative care, adoption and intercountry adoption system.

Both countries face similar problems as South Africa. The scale of OACs in India is massive and Kenya, like South Africa, faces the typical difficulties of a developing African country. But there are lessons for South Africa from both India and Kenya.

In Kenya the importance of the voice of the judiciary became apparent. In that country the approach of the judiciary in applying the best–interests-of-the child test despite opposing state policy, is instructive. In South Africa the paramountcy of this principle in the face of adoption and intercountry adoption state policy and DSD practice can only be upheld by the judiciary. In Kenya this has happened.

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unmatched children available for adoption. Customary beliefs that reject adoption of a child keeps adoption statistics low in South Africa.

1421 38 of 2005.

In India guarding against child trafficking and profiteering in the context of intercountry adoption is of great importance. The guidelines and recommendations of the *Laksmi Kant Pandey* case and the establishment of CARA to regulate and monitor intercountry adoption is of significant importance.

Much of what is contained in CARA is reflected in the model or framework below. The model/framework that follows specifically reflects the consideration of the best interests' principle in the South African context.

The next section provides recommendations in the form of a model.

7 7 PROPOSED MODEL TO DETERMINE THE BEST INTEREST OF A CHILD IN SOUTH AFRICA IN THE CONTEXT OF PLACING SUCH CHILD IN ALTERNATIVE CARE

In this penultimate paragraph, the model or framework referred to above is presented. This framework embraces a holistic approach to the best-interests-of-the-child principle and incorporates lessons learnt from the current position in South Africa, and the approach in India and Kenya to alternative care. The South African courts and legislature have rightly endorsed the notion that the fact that the best interests of the child are paramount, does not mean that it is not subject to reasonable limitations.[1422] In light hereof, it is submitted that an adequate theory of family law in South Africa is one that simultaneously views an individual as a distinct individual, as well as a person fundamentally involved in relationships of dependence, care and responsibility with other family members. It is the weight and importance attached to the factors in the case under consideration, which will determine the outcome in any particular case.

A worldwide lack of parental care is a common occurrence of the twenty-first century, especially in developing countries. It cannot be disputed that the future of vulnerable

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[1422] Moyo 2012 *AHRLJ* 142.

children worldwide, and for the purpose of this study, South Africa, hangs in the balance. The devastating impact of the HIV pandemic has led to a dramatic rise in the numbers of vulnerable children, with developing nations showing the highest statistics of children left without parental care.[1423] Unprecedented numbers of children in South Africa are orphaned or abandoned as a consequence of AIDS, leaving the relevant authorities struggling to find appropriate alternative placements of care which serves the concerned children's best interests.[1424] Chirwa clearly highlights the fact that "[a]s more and more children become orphans or lack parental care, states have not established sufficient alternative care options to accommodate the needs of these children".[1425]

Despite efforts in the international and domestic arena to enact legal means of ensuring that the best interests of the child are served in all actions concerning a child who is the subject of placement in alternative care, not all placement of South Africa's OACs are meeting the needs of such children. The crux of the present thesis centres on the application of the criterion of a child's best interest when considering placement of children in alternative care in light of the current state of alternative care available domestically.

A model or framework is proposed as a means of assessing the placement of an OAC which best serves such child's interests. It is submitted that the model will provide guidelines when considering placement in intercountry adoption in light of alternative care options. Against this background, it is important to examine whether the present-day interpretation of subsidiarity, in fact, serves a child's best interests. When properly regulated and executed, intercountry adoption can provide the only appropriate alternative to institutionalisation in circumstances where domestic country adoption is

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1423 South Africa reports the highest death rate in the world from AIDS.

1424 All alternative care options in terms of the CA are discussed in ch 2, and the advantages and challenges of these potential placements are unpacked.

1425 Chirwa "Children's Rights, Domestic Alternative Care Frameworks and Judicial Responses to Restrictions on Intercountry Adoption: A Case Study of Malawi and Uganda" 2016 *AHRLJ* 119.

not feasible. However, emphasising the abuses rather than the benefits of intercountry adoption amounts to scapegoating the process for lack of effort on the regulatory plane. The propriety and integrity of adoption should be the ultimate guide in all legislative efforts. But a total ban or suspension of intercountry adoptions amounts to an abdication that would negatively impact the best interests of otherwise adoptable children in many instances in reality adoptable children who have no real chance of being adopted in their own country due to their age and/or medical conditions, will remain in CYCCs.

A model or framework will assist all those involved in making a decision to place an OAC in appropriate alternative care, and those involved in the processing of such placement. It is accepted that all decisions are based on the determination as to what constitutes the best interests of a particular child, given all circumstances relevant to such child. The model distinguishes between substantive factors and procedural factors and safeguards.

7 7 1 SUBSTANTIVE FACTORS

The best-interest principle forms a foundation in establishing the right of any child in South Africa (and elsewhere in terms of international law).[1426] Both the South African Constitution and CA are in line with the international law provisions regarding the importance of guaranteeing that the best interest principle will be applied whenever a decision is to be taken concerning a child. Ratification of relevant international instruments, as discussed in the research, placed an obligation to incorporate the international provisions into national law, something which South Africa adhered to with the enactment of the CA, as amended, and the Constitution. In terms hereof, an obligation arose to put in place mechanisms that will facilitate consideration of the best

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1426 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007 pars 12 and 14; Liebenberg Human Development Report 2000 Background Paper Human Development and Human Rights South African Country Study http://hdr.undp.org/ sites/default/files/sandra_liebenberg.pdf (accessed 2018-08-11).

interests of the child and must provide legislative measures to ensure that those with the authority to make decisions regarding children must consider the "best interests" rule as a matter of procedure. However, much has been written on the indeterminacy of the principle itself with some seeing the flexibility of the principle as its strength, and others criticising the potential and inherent dangers when the principle is left to the subjective determination of the authority concerned.

The CA made provision for a list of factors to be taken into consideration. In order to ensure that all children in need of care are placed in alternative care after careful consideration is indeed given to relevant factors by the authorities involved, the following is proposed:

Approach to determining the best interests of a child:

- Each case must be considered on an *ad hoc* basis, taking into consideration all the factors and circumstances of that particular case.[1427]

- Children are bearers of rights, and as such their rights must be respected, promoted, safeguarded and ensured.[1428]

1427 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007) par 24; Guidelines for the Alternative Family Care of Children in Kenya 16.

1428 Sloth-Nielsen (1994) *SAJHR* 405; Robinson "The Relevance of a Contextualisation of the State-Individual" 2012 15(2) *PER/PELJ* 150; Relationship for Child Victims of Armed Conflict Consortium for Street Children, Aviva and UNICEF United Nations Human Rights Protection and promotion of the rights of children working and/or living on the street (undated) 7 https://www.ohchr. org/Documents/Issues/Children/Study/OHCHRBrochureStreetChildren.pdf (accessed 2018-08-11); Bekink "Child Divorce: A Break from Parental Responsibilities and Rights Due to the Traditional Socio-Cultural Practices and Beliefs of the Parents" 2012 15(1) *PER/PELJ* 178; Louw *Acquisition of Parental Responsibilities and Rights* (LLD thesis, University of Pretoria 2009) 15; Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 88; Zermatten *The Best Interests of the Child: Literal Analysis, Function and Implementation Working Report* (2010) 2.

- The child's best interests are considered to be of paramount importance in any matter concerning a child.[1429]

Measures to ensure that the best interests are met:

- Legislative, judicial and administrative measures must be put into place to ensure that the best interests of a child are met.[1430]

- Consideration must be given to national legislative guidelines which list factors that must be considered when making a determination.[1431]

1429 *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007) par 25; *MS v S* 2008 3 SA 232 CC par 42; Moyo 2012 *AHRLJ* 164–165; Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 92.

1430 Moyo 2012 *AHRLJ* 153.

1431 S 7 of the CA provides as follows:

(a) the nature of the personal relationship between –
  (i) the child and the parents, or any specific parent; and
  (ii) the child and any other care-giver or person relevant in those circumstances;
(b) the attitude of the parents, or any specific parent, towards –
  (i) the child; and
  (ii) the exercise of parental responsibilities and rights in respect of the child;
(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
  (i) both or either of the parents; or
  (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(e) the practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(f) the need for the child –
  (i) to remain in the care of his or her parent, family and extended family; and
  (ii) to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child's –
  (i) age, maturity and stage of development;
  (ii) gender;
  (ii) background; and
  (iv) any other relevant characteristics of the child;
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(i) any disability that a child may have;
(j) any chronic illness from which a child may suffer in making a determination in the best interests of a child –

- In all determinations regarding placing a child in alternative care, it is the principle of a child's best interests that must be considered first and foremost.[1432]

- A holistic, all-inclusive approach must be adopted to determine what is in the particular child's best interests.

The role that the child and state play in the determination:

- The child has the right to be heard, when appropriate. As the child matures, his or her capacities develop, and consideration of such child's personal wishes, views and preferences must be taken into consideration.[1433]

- Every child has the right to family and parental care, and where such care is not an option, the state must ensure that the child is placed in appropriate alternative care.[1434]

- Steps must be taken to ensure that the determination of what constitutes appropriate alternative care is made timeously.

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(l) the need to protect the child from any physical or psychological harm that may be caused by –
  (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
  (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
(m) any family violence involving the child or a family member of the child; and
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

1432 Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 86.

1433 Perumal and Kasiram "Children's Homes and Foster Care: Challenging Dominant Discourses in South African Social Work Practice" 2008 44(2) *Social Work/Maatskaplike Werk* 163; Moyo 2012 *AHRLJ* 165.

1433 Moyo 2012 *AHRLJ* 165 and 172; UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 30.

1434 Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 84.

- All rules, policy and the system for determining a child's best interests, must be child-centred and family-focused.[1435]

The importance of a family environment:

- The importance of family integrity and preference for avoiding removal of the child from his or her home must be supported.[1436]

- The importance of being raised in a family environment must be considered.[1437]

- Where it is in the child's best interest, the OAC should be placed within the extended family environment.[1438]

- Determine whether the extended family played any role in the OACs life before his or her need of placement and, as such, would such extended family provide be in a position to ensure that the child is nurtured in a secure family-like environment to which such child has a constitutional right?[1439]

1435 Reyneke "Realising the Child's Best Interests: Lessons from the *Child Justice Act* to Improve the *South African Schools Act*" 2016 19 *PER/PELJ* 3–4; Department of Social Development South Africa's Child Care and Protection Policy (2017) 23; Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* 26; Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 98.

1436 Determining the Best Interests of the Child, Child Welfare Information Gateway (2016) 2 https://www.childwelfare.gov/pubPDFs/best_interest.pdf (accessed 2018-08-11); Moyo 2012 *AHRLJ* 159; Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 86.

1437 Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* 5.

1438 Perumal and Kasiram "Children's Homes and Foster Care: Challenging Dominant Discourses in South African Social Work Practice" 2008 44(2) *Social Work/Maatskaplike Werk* 162; Moyo 2012 *AHRLJ* 170; Myers "Preserving the Best Interests of the World's Children: Implementing the Hague Treaty on Intercountry Adoption through Public-Private Partnerships" 2009 6(3) *Spring Rutgers Journal of Law and Public Policy* 783–784; Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* 24; Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 97.

1439 Mthombeni *Factors in the family system causing children to live in the streets: a comparative study of parents' and children's perspectives* (MSW, University of Pretoria) 2010 38; Family care Working with Children, Young People and their Family: A practice philosophy guide (2013) 5; Lim *Legally recognising child-headed households through a rights-based approach: The case of South Africa* (LLD dissertation, University of Pretoria) 2009 128; UNICEF South Africa 'Orphans and vulnerable children' (undated) https://www.unicef.org/southafrica/protection_6631.html (accessed 2018-08-11) (not paginated); Kidman and Heymann "Caregiver supportive

- An environment in which the child can feel consistently loved, safe, a sense of belonging and self-worth, must be sought for the child.[1440]

- A long-term family environment must be prioritised where possible and where such placement meets the needs of the child concerned, based on his or her own circumstances.[1441]

Weight attached to factors varies according to particular circumstances:

- Consideration must be taken of to the weight ascribed to factors such as race, culture, ethnicity and language when determining the optimal placement of a child.[1442]

- Recognition must be given to the fact that continuity is a factor to be considered when determining the placement of a child in alternative care. Due regard must be given to the child's ethnic, religious or linguistic background.[1443]

- Section 9 of the Constitution with respect to the principle of non-discrimination and the right to equality. As a child is granted the same rights and protection of such rights, section 9 is of particular importance as a factor when considering the race

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policies to improve child outcomes in the wake of the HIV/AIDS epidemic: an analysis of the gap between what is needed and what is available in 25 high prevalence countries" AIDS care (2016) (not paginated) https://www.tandfonline.com/doi/full/10.1080/09540121.2016.117 6685 (accessed 2018-08-11); Motaung *The Difficulties Experienced By Caregivers Of Aids Orphans* (Magister Educationis, North-West University 2007) 4.

1440 Berry and Malek "Caring for Children: Relationships Matter" in Jamieson, Berry and Lake (eds) *South African Child Gauge 2017* (2017) Children's Institute, University of Cape Town 51.

1441 Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* 3 and 22; Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 86.

1442 Moyo 2012 *AHRLJ* 153; Pretorius *Inter-country Adoptions and the Best Interests of the Child* 40: Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 88 and 92.

1443 Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* 22.

and culture of the child as a factor that reflects the best interests of the child himself or herself.[1444]

- Diverse factors and competing interests must be balanced to determine the child's best interests.[1445]

- The age of the child plays a pivotal role in determining what is in the best interests of that particular child.[1446] Considering the same factors for two different children might well result in a different conclusion being reached for each child, on the basis that what is in the best interests of for example a very young child, might not be at all appropriate for an older child.[1447]

- Assurance must be given that a child removed from his or her home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult.[1448]

1444 S 9 of the Constitution provides as follows:
"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

1445 Pretorius *Inter-country Adoptions and the Best Interests of the Child* 42.

1446 Moyo 2012 *AHRLJ* 165 and 172.

1447 Schwartz "Religious Matching for Adoption: Unraveling the Interests Behind the "Best Interests" Standard" 1991 25(2) *Family Law Quarterly* 184; Pretorius *Inter-country Adoptions and the Best Interests of the Child* 69.

1448 Moyo 2012 *AHRLJ* 152; Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 217.

The principle of subsidiarity as a factor in determining a child's best interests:

- The meaning of the principle of subsidiarity must be considered. The principle of subsidiarity should be subordinate to the principle of a child's best interests and must be seen as a factor to be considered when determining a child's best interests in a given circumstance.[1449]

- The following are generally recognised as serving the best interests of a child:

  (i) family-based solutions are generally preferred to institutional placements;[1450]

  (ii) permanent solutions are generally preferable to inherently temporary ones;[1451] and

  (iii) national solutions are generally preferable to those involving another country.[1452]

- Temporary care should only be considered when permanent care is not an option.[1453]

- Where placement in intercountry adoption is considered, the age of the child is a factor in determining whether such placement is in the child's best interests.

1449 Pretorius *Inter-country Adoptions and the Best Interests of the Child* 10–11; Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 92.

1450 Pretorius *Inter-country Adoptions and the Best Interests of the Child* 64. It must be noted that this cannot be said to be a hard-and-fast rule applicable in all instances.

1451 Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 87.

1452 Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 86–87 and 98.

1453 OVCSupport.Org "Alternative Care for Children" (2016) not paginated https://ovcsupport.org/resource/alternative-care-for-children/ (accessed 2018-12-26).

- Any placement of an OAC in a CYCC must be considered in light of the best interets principle.[1454]

- When assessing domestic placements other than adoption, in South Africa, consideration should be had to the best interests of the child in light of the current status of such systems.

Evaluation of appropriate care:

- Consideration must be given to the impact of the HIV/AIDS pandemic on the home environment of the potential caregivers:[1455]

  (i) Are the caregivers infected?

  (ii) What impact will this have on their ability to provide nurturing care and stability?

- Continuity of the relationship between caregiver and the child must be sought and promoted.[1456] The potential of the child to have secure attachments with a person or persons in the placement decided upon.[1457] Permanency planning must include:

1454 Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* 28; Mezmur 2009 *Sur. Revista Internacional de Direitos Humanos* 95.

1455 Motaung *The Difficulties Experienced by Caregivers of AIDS Orphans* 45.

1456 Myers "Preserving the Best Interests of the World's Children: Implementing the Hague Treaty on Intercountry Adoption through Public-Private Partnerships" 2009 6(3) *Spring Rutgers Journal of Law and Public Policy* 816.

1457 Marais and Van der Merwe "Relationship Building During the Initial Phase of Social Work Intention with Child Clients in a Rural Area" 2015 52(2) *Social Work/Maatskaplike Werk* 147; Berry and Malek "Caring for Children: Relationships Matter" in Jamieson, Berry and Lake (eds) *South African Child Gauge 2017* (2017) Children's Institute, University of Cape Town 51 and 53; Assim *In the Best Interest of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option* 18; UNICEF and the Government of Kenya Guidelines for the Alternative Family Care of Children in Kenya (2014) 20.

(a) The facilitation of opportunities for the child concerned to develop positive attachments to the caregiver.[1458]

(b) The maintenance of positive connections and social support systems that the child can rely on throughout his or her life.

(c) The maintenance and strengthening of the cultural and racial identity of the child-dependant on the age of the child concerned.

(d) The facilitation of those relational, physical or legal arrangements that may be needed for children who are being prepared for independent living

- Consideration must be given as to the serious and earnest intention of the proposed caregivers to care for such child, *versus* the intention to use such caring role as a pretence to access social assistance to assist in poverty alleviation for the caregiver.[1459]

- The determination to ensure that a particular decision is in fact in such child's best interests, must be taken with a multi-disciplinary approach. A continuum of differentiated combinations of effective integrated care and support services must be in place and available to a child in need thereof.

Right of access to health care, safety and education:

- The child concerned has the right to health care, safety, and/or protection. These rights include but are not limited to:

  (i) The mental and physical health needs of the child.[1460]

1458 Berry and Malek Berry and Malek "Caring for Children: Relationships Matter" in Jamieson, Berry and Lake (eds) *South African Child Gauge 2017* (2017) Children's Institute, University of Cape Town 55.

1459 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 217.

1460 *Ibid*.

(ii) The mental and physical health of the parents.

- Vulnerabilities caused by different underlying risks need to be determined before a decision is reached as each child, dependant on his or her level of vulnerability will require different levels or intensity of support and services to mitigate the risks, and every attempt must be made by the multi-disciplinary task team to mitigate their impact on the child concerned.

- The child must have access to social security.[1461]

- The determination must recognise the child's right to access to education.[1462]

The need for an effective child welfare system:

- A child care system must offer effective and trained[1463] care and support services, which must be readily available to a child who requires such support in light of the specific risks, age and developmental stage of each child. This includes but is not restricted to the following:

(a) sufficient social workers employed by the DSD;[1464]

(b) regular past-placement calls to allow the social worker concerned to properly assess the success or not of the placement;

1461 UNICEF and the Government of Kenya *Guidelines for the Alternative Family Care of Children in Kenya* (2014) 30.

1462 Sarumi *The Protection of the Rights of Children Affected by HIV/AIDS in South Africa and Botswana: A Critical Analysis of the Legal and Policy Responses* 13 and 20; Pretorius *Inter-country Adoptions and the Best Interests of the Child* 65; Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 217.

1463 Cantwell *The Principle of Best Interests of the Child in Intercountry Adoption* UNICEF 23; National Adoption Coalition Submission to the Parliamentary Portfolio Committee Children's Second Amendment Bill: B 14–2015 (2015) 5.

1464 Dhludhlu and Lombard "Challenges of Statutory Social Workers In Linking Foster Care Services With Socio-Economic Development Programmes" 2017 53(2) *Social Work/Maatskaplike Werk* 165; Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 210.

(c) continuity of staff as far as is reasonable to allow for a relationship-building potential between the social worker and the foster child and the foster caregiver;

(d) ability and capacity to assess foster caregivers;[1465]

(e) a full assessment of the foster caregivers as prospective foster care parents to a specific child;[1466] and

(f) given the ever-increasing numbers of children placed in foster care, assessment and placement of children in foster care have become an important aspect of a social workers function. To be effective, such social workers requires a concrete understanding of foster care, assessment of parties concerned, and post-placement assessment. As such the training of social workers on a tertiary level must be of a standard to ensure social workers are fully equipped professionally to enter a career where assessments for foster care placements will play such a large role. This will enable the social workers to:

(i) accurately select foster parents;[1467]

(ii) provide appropriate support to foster parents and foster children; and

(iii) train foster parents to fulfil the important role they play in the foster children's lives, including but not limited to emotional support.[1468]

- Where a child is to be placed in foster care, the foster caregivers and the child concerned must be properly prepared before such placement takes place.

1465 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 210.
1466 *Ibid.*
1467 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 218.
1468 Carter and Van Breda 2016 52(2) *Social Work/Maatskaplike Werk* 216–217.

- Role-players from different professional sectors must be accessible to the child concerned, in order to ensure a co-ordinated and holistic response to a child who requires these services.[1469]

- Determining appropriate alternative care must be made timeously.[1470]

7 7 2 PROCEDURE

Whenever a decision is to be taken that will affect a specific child needing care, the process itself must carefully consider the possible impacts (positive and negative) of the decision on the child concerned and must give this impact primary consideration when weighing the different interests at stake. However, this is simply a procedural rule. Article 3(1) imposes the introduction of this step in the decision-making process, but does not impose a particular outcome. It is incumbent on the legislature to provide measures to ensure that all those involved who have authority to make decisions regarding the placement of a child must consider the best interests rule as part of the peremptory procedure and also that these persons are sufficiently trained to apply this nuanced principle in exercising a discretion or recommendation or decision.

The procedure must be transparent and verifiable:

- The process of determining a child's best interests to place him or her in alternative care must at all times of the procedure be transparent.

- All determinations made must be verifiable.

- The determination to ensure that a particular decision is in fact in such child's best interests, must be taken with a multi-disciplinary approach.

1469 Marais and Van der Merwe 2016 52(2) *Social Work/Maatskaplike Werk* 155.

1470 Berry and Malek "Caring for Children: Relationships Matter" in Jamieson, Berry and Lake (eds) *South African Child Gauge 2017* (2017) Children's Institute, University of Cape Town 52.

- Where the father of the child concerned is an unmarried father who is deemed "fit and proper" to adopt his child, or, alternatively where other family members are deemed fit to adopt the child, notification must be given that he or they have thirty days from the date of serving of such notification, to apply to adopt the child concerned.

- The various authorities must all be quite clear on the role they play in ensuring that the best interests of the child is in no way compromised during the determination and process of the placement of the child.

The procedure must ensure that the provisions of the CA are met with respect to determining that the child is adoptable, that informed consent of parent or parents is acquired, and that standard as determined by the CA are met:

- A procedure must be in place for identification of children who lack parental care.

- Where a child is to be adopted, it is incumbent on the authorities to determine if the parent or parents have voluntarily consented to the adoption of their child.

A Register on Adoptable Children and Prospective Adoptive Parents:

- A register must be opened at the DSD, in terms of the provisions of the Hague Convention as incorporated into the CA, which records the following:

(a) A record of any child that has been considered to be adoptable in terms of the CA.

(b) A record of prospective adoptive parents who meet the requirements of the CA as "fit and proper" adoptive parents.

(c) When the child concerned has been adopted, his or her name must be removed from the Register.

(d) The Register must be maintained with due diligence by the Director-General of Social Welfare.

7 8 INTERCOUNTRY ADOPTION AND THE BEST INTERESTS OF THE CHILD

The model above provides a recommended framework to be considered when any determination is made regarding the placement of an OAC in alternative care. The current status of the child – welfare system in South Africa has been discussed in detail in chapter 3. Following the exposition of the dire circumstances that OACs are exposed to, it would be remiss not to consider the solution that intercountry adoption has to offer to a child in need of care. Domestic adoptions are low and on the decline, and the conditions in alternative care of a temporary nature, do not, on the whole, comply with a child's best interests. While the debate continues concerning the role that intercountry adoption has to play in ensuring that the best interests of an OAC are met, it is submitted that consideration must be had to the current capacity and facilities available in the country of origin of the child concerned, before reaching a conclusion as to whether intercountry adoption ought to be considered as an option of placement or not. Such a decision cannot be made theoretically. The reality of the current conditions in the country of origin play a major factor to be considered when determining what decision meets the child's best interests. It is submitted that South Africa, like India and Kenya would be failing its children by not considering intercountry adoption as a viable option for alternative care. However, private intercountry adoptions are not recommended. It is contended further that the real and serious concerns regarding the abuse, child trafficking and profiteering can be allayed when the substantive and procedural provisions of the model above and below are strictly adhered to. The stringent regulation in terms of the provision of placements abroad by the provisions of the Hague Convention, create the potential that safe placements for children in need can be met when placed internationally.

The Role of the Central Authority:

The Central Authority is South Africa is the Director-General of the Department of Social Welfare. The functions of the Central Authority are based on the provisions of the Hague Convention as incorporated nationally in the CA and its Regulations. The core obligations of the Central Authority include communication, co-operation and sharing of information with other relevant the Central Authorities. In doing so, certain standards must be met to ensure the protection and promotion of a child's best interests. The following safeguards and principles must be adhered to:

- The Central Authority is the designated supervising body tasked with ensuring that all possible measures to protect the rights and best interests of a child, who is to be placed abroad, are taken.

- Where either state is a non-Hague Convention country, the regulatory provisions and standards of the Hague Convention must be adhered to.

- Adoption must be finalised in the sending country where a child is to be placed abroad in intercountry adoption.

- The process of placing the child in alternative care must take place timeously.[1471]

- The authority must also take into consideration the express wishes and opinions of the child, where applicable.

- Where placement in intercountry adoption takes place, all such placements must be done in accordance with the strict regulatory provisions of the Hague Convention. No concessions should be considered.[1472]

1471 Myers "Preserving the Best Interests of the World's Children: Implementing the Hague Treaty on Intercountry Adoption through Public-Private Partnerships" 2009 6(3) *Rutgers Journal of Law & Public Policy* 803.

1472 Bojorge 2002 *QUTLJJ* 269.

- The Central Authority of both the sending and the receiving state must:

(a) collect, preserve and exchange information pertaining to a child and prospective adoptive parents;

(b) determining who is a fit and proper adoptive parent for an adoptable child;

(c) promote the development of adoption counselling; and

(d) put efficient procedures for the management of adoption, including but not limited to:

(i) providing for the recognition of certain foreign adoptions; and

(ii) generally regulating intercountry adoption.

(e) provide evaluation reports regarding experiences with intercountry adoptions.

- Where the state is not a Hague Convention State Party, it is incumbent on the Central Authority of the Hague Convention State Party to ensure that steps are taken to ensure the safety and protection of the child in the form of bi-lateral or multil-ateral treaties and agreed follow-up procedures. All procedures, standards and safeguards of the Hague Convention must be adhered to.

- The Central Authority must maintain and promote relationships and co-operation and communication between the competent authorities with regard to intercountry adoptions within the state, to protect children and to achieve the objectives of the Hague Convention.[1473]

- Internal monitoring, requiring that the competent authority within each state is obliged to notify the Central Authority if it is concerned that an aspect of the Hague

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[1473] Pretorius *Inter-country Adoptions and the Best Interests of the Child* 7.

Convention has not been adhered to, or, alternatively, where there is a potential that an aspect of the Hague Convention will not be adhered to.

- Certified copies of all adoption working agreements concluded must be submitted to the central authority for approval.

- Submission of an annual audited financial statement to the central authority, reflecting fees received and payments made in respect of intercountry adoptions.

- Prior to submitting the report, the central authority must determine whether intercountry adoption is in the best interests of the minor child concerned. In addition, the court must be able to conclude that:

(a) the central authorities of the receiving state and South Africa have agreed to the adoption;[1474]

(b) the child is not prevented from leaving South Africa;[1475]

(c) that the child's name has been listed in the RACAP for at least 60 days; and[1476]

(d) that a fit and proper adoptive parent is not available in South Africa.[1477]

Thereafter, the court may grant the adoption order, or not.[1478]

The correct forum must determine if the placement in intercountry adoption is in the best interests of the child:

- The Children's Court which has jurisdiction in to hear adoption applications in South Africa, must consider and balance all factors and information obtained in making a

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1474 S 261(4) of the CA.
1475 S 261(5)*(c)*.
1476 S 261(5)*(g)*.
1477 *Ibid.*
1478 S 261(5).

determination on how best to secure stability in a child's life by means of adoption or placement in alternative care.

- The authority governing the process of intercountry adoption must be dispersed thereby allowing for checks and balances to be put in place to protect against exploitation and fraudulent activities when placing a child abroad.[1479]

7 9 CONSIDERATIONS

When considering alternative care for an OAC in present-day South Africa, the discussion of the existing child care system in South Africa in the preceding chapters cannot be ignored. With this in mind, careful regard must be had to the present-day interpretation of the meaning of subsidiarity. One cannot ignore the large numbers of children placed in crowded state institutions, nor the ever-increasing numbers of OACs in temporary foster care in South Africa. This thesis recognises a background of conflicting views about the desirability of intercountry adoptions as well as the serious challenges faced by childcare services in developing countries. The problem identified herein is the concern that serving an OAC's best interests risks being thwarted by the importance given to the principle of subsidiarity in international instruments, national legislation, and prevailing debate and the practical administration of alternative care decisions. With this in mind, it is submitted that it is impossible to overemphasise the role and impact that the current political, economic, and social climate in South Africa has on any debate concerning the role that intercountry adoption could have in providing a secure and stable environment for a child in need thereof. Following research on the relationship between the two sometimes competing principles of subsidiarity and the best interests of the child, it is apparent that in current day South Africa, enforcing a local hierarchical placement on the basis of an interpretation of subsidiarity, before considering intercountry adoption as a viable option, can in no way

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[1479] Myers *Preserving the Best Interests of the World's Children* (2009) 814 and 817.

be said to meet the universally-accepted standard that a child's best interests are paramount. To place undue emphasis on keeping a child in South Africa at all costs, especially at a cost to the welfare of the child concerned, is, it is submitted, ideological. A South African court cannot simply disregard or give "lip service" to the Hague Convention but should refer to, analyse and assess the principles of the Hague Convention when dealing with cases resembling or directly related to intercountry adoption. Moreover, its principles should be used to inform the development of the common law to interpret the involvement of High Courts with regards to prospective intercountry adopters acting in contravention of the international law to which South Africa is bound. Given the flexibility of the interpretation of the meaning of what in fact constitutes a child's best interests, a model is proposed as a means of assessing the placement of an OAC which best serves such child's interests. The model proposes to submit guidelines to assist those involved in making a decision to place a child whilst ensuring that his or her best interests are met.

It is recommended that placing an orphaned and/or abandoned child in a permanent, stable family environment would be beneficial to the nurturing of such child and would at the same time create an opportunity for the child concerned to reach his or her full potential. Following a consideration of the current status of available alternative care in South Africa, one can only conclude-that a prevention or discouragement of the permanent placement of a child, locally or in intercountry adoption, amounts to have failing to secure care for the child concerned which meets his or her best interests.

The CA and its amendments and regulations have incorporated and made provision for the strict regulation of alternative care of children in South Africa. Reference to the three main conventions regulating alternative care have been considered and the system of alternative care in South Africa has been considered in terms of the current status of alternative care. It is evident that the authorities in South Africa are struggling to place the ever-increasing numbers of OACs, especially as result of the HIV/AIDS pandemic and consequent high death rate of persons. One particular form of alternative care appears to remain contentious and receives little attention when making a determination to place children in need of care – namely, intercountry

adoption. It is submitted in this research that intercountry adoption must be considered as part of a potential solution that serves the best interests of a vulnerable child, on the following grounds:

1. International conventions and covenants recognise a child as a bearer of rights and provide that the best interests must be a priority when a decision is made to place a child in alternative care that is found to be most appropriate for such child concerned. Alternatively, to what extent could the rights and culture of the community as a whole be considered relevant when such a determination is made? Opponents of intercountry adoption often consider themselves as defenders of children's human rights.

2. The question whether such alternative care is deemed appropriate or not for a given child in the long term, must be considered against the backdrop of existing and prevailing conditions of the South African alternative care system and in light of concerns of child trafficking and profiteering raised when considering placing a child abroad. It is generally accepted that when it has been determined that there is no hope of family reunification for a child under consideration, it is the duty of the relevant authorities to make a determination in the child's long-term best interests. The authorities who are involved with processing applications to adopt a child abroad have a very important role to play in determining and ensuring the promotion, protection and safeguarding of the fundamental rights of an OAC both pre-and post-placement of the child abroad.

3. It is incumbent upon the state through its appointed authorities to be vigilant and ensure that all safeguards, substantively and procedurally, against child trafficking and profiteering are met. There can be no room for error, and where any irregularity is found, stringent sanctions must be considered, and where the body concerned responsible for such violation is an accredited body, the accreditation of such body must be carefully revised and potentially revoked. The important role played by authorities does not come to an end once the placement has been made. Following the finalisation of an adoption, be it

domestic or intercountry, regular follow-up visits by the relevant authorities to the adoptive family and child are imperative and in the child's interests. Consistency is of utmost importance.

4. No placement should be considered until the authorities have determined what requirements must be met to ensure compliance of the safe processing of a placement abroad, and what measures must be put in place to ensure the safeguarding of the child concerned which needs to include post placements assurances. The procedures have a substantive function, and, if followed carefully, negate some of the most significant criticism against intercountry adoption.

The thesis finally submits that when interpreting the meaning of "last resort", reference must be had to the model and *all the factors* that must be considered when making a decision to place an OAC. What is *de facto* "last resort", must also be considered relatively in the context of the application of the best interests of the child principle.

This research has considered the distressing position that an OAC in the current climate in South Africa, finds himself or herself in. Similar circumstances were identified for a child in the same position in India and Kenya. The thesis concludes that it is of fundamental importance that OACs who are struggling emotionally, economically, physically and psychologically, are protected. Opponents of intercountry adoption risk failing the child who otherwise finds himself or herself in an environment that is not capable of providing the care that the child needs and has a right to. As such, when considering the right of the child to parental and family care in a developing country which is unable to cope with current conditions, it cannot be said that intercountry adoption must be discouraged and seen as a measure of last resort. The decision maker is charged with making a determination that meets the best interests of the child principle.

To repeat the words of late ex-President of South Africa, Mr Nelson Hohlihlahla Mandela:

> There can be no keener revelation of a society's soul than the way in which it *treats* its children.

In the context of alternative care for OAC in South Africa, the substantive and procedural guidelines proposed need to be followed using a multi stakeholder approach in order to determine the best interests of a child on a case-by-case basis.

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