

CROSS-CULTURAL ADOPTION IN CONSTITUTIONAL PERSPECTIVE

by

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“Soli Deo Gloria”

SUMMARY

Although a child's right to parental care and family life is constitutionally entrenched, many South African children are deprived of this right. Transcultural adoption could serve their need but historically this has been prohibited or discouraged by racist policies. Whether this is in keeping with the now non-racial South African society is questionable. In adoption the best interests of the child is paramount and in determining this, courts should balance children's constitutional rights to their culture of origin against their constitutional rights to non-discrimination.

After considering arguments for and against transcultural adoption and the position in the United States and the United Kingdom, the writer suggests that further interdisciplinary research into the question is necessary in South Africa; inter-country adoption should be considered and law reform and governmental policy should facilitate these.

... OF CHILDREN ...

Your children are not your children. They are the sons and daughters of life's longing for itself. They come through you but not from you, and though they are with you yet they belong not to you.

*Kahlil Gibran
The Prophet*

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INTRODUCTION

The battle between Selina Masango and Salome Stopford has received extensive media coverage.¹ In the middle of this battle for custody, is Sifiso Masango, a 10-year-old Zulu boy who is desperately loved by both his biological mother Selina and Salome, an Afrikaans woman with whom he lived for many years. With the consent of the biological parents, Salome took Sifiso with her to stay in London.

After Sifiso had been living with Salome in London for a few years, she requested the mother to consent to the adoption of Sifiso by herself. Selina refused to give her consent and Salome responded by issuing a formal application in the Family Division of the High Court of Justice in London, for an adoption and a residence order.

The judge ruled that Sifiso should return to South Africa to his biological mother, and further that there should be a gradual reintegration of Sifiso into his biological family over two years. Salome appealed against the judgment and Selina filed a cross-appeal asking for the immediate and permanent return of Sifiso. The two judges, Judge Neill and Judge Ward, upheld the cross-appeal. They both felt that it was in Sifiso's interest to return as "Sifiso's development must be Zulu development and not Afrikaans or English development"; the judges were persuaded by the "culture factor". After further appeals and an uneasy truce there was some reconciliation. According to recent reports Sifiso is back in London. Although the saga is not yet over, this case highlights two important aspects with regard to adoption, namely:

- i) the issue of whether the child should retain the culture of the biological parents and
- ii) the best interests of the child.

Until fairly recently, segregation was legally enforced. Mixing of the races by interracial marriage and transracial adoption was not common and has traditionally been met with hostility. However, in the light of the political and social changes interracial

1 See *Fair Lady* (29 May 1996) 32.

relationships can now be anticipated. The post-apartheid era has also seen many legal changes, more specifically the introduction of the new South African constitution.

Against the backdrop of these changes I will consider the question of transcultural adoption in South Africa and examine what effect the raising or alternatively the failure to raise the issue of race or culture could have in determining the best interests of the child. I will touch upon the possibility of cross-country adoptions and I will also be looking at transcultural adoption in other countries, more particularly in the United States of America and the United Kingdom, with a view to making recommendations for possible law reform in South Africa.

Historical view of adoption in South Africa / Pre-Constitution Period

It is important to consider the question in historical perspective. However before doing this the terms of reference with regard to adoption, custody and placement as used in this dissertation should be explained.

In the case of **adoption** parental power over a child is terminated and vested in another person or persons. This follows upon an adoption order which may be granted after application is made in terms of the prescribed procedure as laid down in the Child Care Act (as amended).²

Custody of the child means control over her/his day-to-day life.³ As in the case of adoption, the principle of the best interests of the child would be used to determine who should have custody.⁴

2 Ss 8, 9 of Act 70 of 1983.

3 Barnard/Cronjé/Olivier 358, 365. The question of custody is also regulated by the Child Care Act: Sec 11 relates to the removal of the child to a place of safety on order of court or on sworn information, sec 12 relates to the removal of the child to a place of safety, pending an inquiry. Sec 13 provides for bringing children before the children's court, sec 14 regulates the procedure to be followed at the inquiry, sec 15 relates to the powers of children's courts after the inquiry and section 15 determines the duration of orders under sec 15.

4 S v S 1993 2 SA 2 (W); B v S 1995 3 SA 571 (A).

The term **placement** is used merely to indicate the physical placing of a child either in an institution or with prospective parents, adoptive parents or any other person. It is used in the literature generally and in this dissertation, in a wide sense and may embrace both or either an adoption order or custody order. Thus a child may be placed in a place of safety or in a foster home prior to her/his adoption. Until the day that the adoption order is made, the prospective institution or foster or adoptive parent may have the custody of the child.

Despite the many political and social changes in South Africa in the last decade, child placement issues before the courts are complicated by the fact that South African precedents relating to the issue originate from legislation which promoted racial segregation.⁵ Various ambiguous legal provisions have been used to support the idea of race matching for parentless children.⁶ In fact, race matching as a factor to be considered in adoption applications, was already used in the days of the Dutch East India Company.⁷ In 1923, adoption was reintroduced into South African law under the Adoption of Children Act of that year.⁸ This Act did not contain any provisions forbidding transracial or transcultural adoptions. The reason for this is probably that the legislature did not see the need to prohibit this in the Act, as such adoptions would in any case have been contrary to the accepted social views of the times. According to Joubert this assumption is supported by the fact that no such adoptions are known.⁹ The Act was later incorporated in the Children's Act of 1937 which reflected the same basic policy as did its predecessor.

In 1960, however, the legislature was more positivistic and attempted to cast in law the existing social norms and attitudes. The then Deputy Minister of Education, Arts,

5 Nöthling-Slabbert 19.

6 Heaton (1989) 713.

7 Zaal 373 374.

8 Zaal 373 374. Cf Joubert (1993) who states that adoption was *introduced* into South African law not *reintroduced* (emphasis supplied) 726.

9 Joubert (1993) 726.

Science and Social Welfare and Pensions, Mr BJ Vorster, published clause 1(x)(j) of the Children's Bill of 1960 in the *Government Gazette*. This clause was debated in the House of Assembly but for fear of international criticism it was withdrawn before it could become law.¹⁰ This clause, read together with clause 31(1) of the same Bill would have had the effect that a child could be permanently removed, with force if necessary, from his parents or guardians if there was a difference in race classification between them.

Although clause 1(x)(j) was never enacted, a provision based on the same principles of race segregation was enacted, namely section 35(2) of the Children's Act of 1960. Section 35(2) was inserted in the Act in 1965 and it set the pattern for future child-placement in South Africa. The concept of "culture" and "ethnology" matching in child placements was thus formally introduced for the first time in South African law. The relevant part of the section read:

In selecting any person in whose custody a child is to be placed or any children's home, ... *regard shall be had* to the religious and cultural background and ethnological grouping of the child ...

(emphasis supplied)

One wonders what criteria the social workers would have used to decide, after having regard to the concepts mentioned in section 35(2), to deny a placement. According to Zaal the implication was that differences in religion, culture or race would be treated as negative factors.¹¹ In 1965, two further sub-sections to section 35(2) were added. Sub-section 35(2)(c) laid down that a child was not to be placed in the custody of any person whose race classification in terms of the Population Registration Act of 1950, was not the same as that of the child except where such person was the parent or guardian of that child.

Although one could argue that the parental exception in this provision would have served the best interests of the child, other parts of the Act negate this. Section

10 *Hansard* 15 Jan - 20 May 1960; see GG 6347 of 8 January 1960; 4 Feb cols 968 973-975.

11 Zaal 374.

35(2)(b) referred to illegitimate children and provided that "only relatives of the mother of any such child shall be regarded as being related to such child". A hypothetical situation like the following could have arisen, namely:

If the mother of child A was black and the father of the child white, the parental exception would have applied, but the father would then be admitting guilt under section 16 of the so-called Immorality Act 55 of 1949 (which made it a crime to have sexual intercourse with a woman of colour). Fathers of illegitimate children seeking placements with themselves, would have been barred by section 35(2)(b).

Section 71(1)(b) of the Children's Act 33 of 1960 as amended in 1965 dealt with adoption requirements and once again the court adjudicating the matter was required to have "regard to the racial prohibition in sec 35(2)(c)".¹²

Noel Zaal is of the opinion that in practice the children's court commissioners and social work agencies in South Africa treated the racial bar as mandatory, because they realised that other provisions of the Act (as discussed above) rendered the parental exception largely meaningless.¹³

Spiro maintains that "having regard to" has been held to mean "bearing in mind" or "not overlooking". According to him this provision would not have been mandatory.¹⁴

In the case of *C & Another v Commissioner of Child Welfare, Wynberg*,¹⁵ a Jewish couple applied to court to have the decision of the Commissioner of Child Welfare in respect of an adoption application, reviewed and set aside. The applicants also asked the court to issue an order directing the respondent to grant the application for the

12 See the discussion in Joubert (1993) 727.

13 Zaal 376.

14 Spiro 63.

15 1970 2 (CPD) 76.

adoption of the child. The applicants based their claim for relief *inter alia* upon the fact that the Commissioner erred in rejecting the application "in that he was prompted by improper motives and failed to have proper regard to the terms of the Children's Act".¹⁶ They were of the opinion that the Commissioner had refused their application exclusively on the grounds that they were English-speaking Jews and that the infant's mother was Afrikaans-speaking and a member of the Dutch Reformed Church. The respondent contended that since the infant had the same racial classification in terms of the Population Registration Act as his mother had, the religious and cultural background of the mother was highly relevant upon a consideration of the guidelines afforded by section 71 read with section 35(2) of the Children's Act. Judge Steyn was of the opinion that in practice some children's courts might have interpreted the Children's Act in such a way that the applications for adoption were categorised into water-tight religious, linguistic and cultural compartments. However, he determined that the words "have regard to" in section 71(1)(b) were used as an emphasis that intended to convey overriding considerations in contrast to subsidiary considerations. Each application for adoption must be considered strictly on its own merits and in accordance with the overriding principle contained in section 71(2)(c) of the Act, namely that the proposed adoption should serve the interests and conduce to the welfare of the child. The decision of the Children's Court was set aside and the matter was referred back to it for hearing.

Implicit in this judgment is that the prohibition is not absolute. One may applaud the liberal approach taken by the court in this case. However, in my opinion and for the purposes of this paper it does not matter whether this provision was mandatory, or whether the legislature merely urged the court to take cognizance of this racial bar as Joubert and Boberg suggest.¹⁷ The main point is that racial discrimination **was** a factor in determining the child's best interests.

Section 35(2)(c) came under scrutiny in 1979 in the case of *Ex Parte Kommissaris van*

16 At page 77 of the case.

17 Joubert (1983) 140 ; Boberg 354.

Kindersorg: in re NL in an adoption dispute.¹⁸ Here the Supreme Court determined per Esselen J that the restriction embodied in section 35(2)(c) did not in any way detract from the clear discretion given to the Children's Court to have regard to all the factors set out in section 71(1)(b) of the Act. Briefly the facts of the case were as follows. A Coloured woman gave birth to an illegitimate child and consented to its adoption by a Black woman W and her Coloured spouse. The child was placed with the couple but before the order for adoption was made, the husband died. Some months later the Commissioner of Child Welfare at Boksburg signed the order for adoption of the child by W. According to the social worker's report, Mrs W had associated herself with the Coloured community, she spoke their language and belonged to their church. However, later the Commissioner was of the opinion that the adoption was invalid, as article 35(2) of Act 33 of 1960, prohibited the adoption of a child by a person of a different race. The matter was referred to the Supreme Court as being upper guardian of minors. The court ruled that the order for adoption should stand.¹⁹ According to the judgment this provision did not mean that there was a total ban on all kinds of transracial adoptions. Nonetheless, the judgment did not pave the way for a greater acceptance of transracial adoptions. From the facts it seems clear that in effect the judgment amounted to what was merely a technical application of the provision of race re-classification.

In Zaal's words:

"As a precedent the NL decision now put it beyond doubt that forms of transracial placement other than adoption were unlawful; and transracial adoption might only be permissible in a situation most unusual in a racially-compartmentalized society, namely, where the prospective adoptive parent had committed cultural suicide and thus effectively belonged to a population group appropriate for the child."²⁰

In fact he states that race matching remained the norm in child placements throughout the 1980s. Where a child could not be given to a prospective care-giver because of

18 1979 2 SA 432 (T).

19 At page 435 of the case.

20 Zaal 376.

race classification, welfare agencies resorted to the drastic measure of an application for the reclassification of one of the parties. This of course was not a desirable solution. The Department of Home Affairs often refused such application when the appearance of the applicant did not justify the reclassification sought. A child often suffered severe prejudice because the department took years to process an application. If the application for the reclassification of a party was successful it could have had severe other consequences, for example the prospective new adult care-giver, once reclassified, might have been forced to give up his residential rights in the neighbourhood where he had his home (in terms of the Group Areas Act 36 of 1966) or if the child was reclassified she might be forced to attend a school in a different area and give up important relationships that she had built up with her peers.

The Children's Act was replaced by the Child Care Act 74 of 1983. Although the Act required that the adoption would serve the best interests of the child²¹ and be conducive to her/his welfare, the status quo concerning transracial placements was preserved. Although the children's court had to have regard to many factors when determining the best interests of the child in respect of child placement, the Act only mentioned the religious and cultural background and the racial classification of the child as specific factors to which attention should be paid.²²

Section 35(2)(c) of the Children's Act 33 of 1960 was replaced by section 40(b) of the Child Care Act 74 of 1983 which continued to lay down that:

... a child shall not be placed in or transferred to the custody of any person whose classification in terms of the Population Registration Act ... is not the same as that of the child, except where such person is the parent or guardian of the child.

Once again, the parental exception contained in the above section was meaningless since section 17 of the same act in any case prohibited the adoption of a child by his

21 Sec 18(4)(c) of the Child Care Act 74 of 1983.

22 See too the discussion in Zaal 377; Heaton (1989) 713; Heaton (1988) 97.

natural parent.²³ Fortunately, section 17 was amended by the Child Care Amendment Act 86 of 1991, and since 19 June 1991 adoption of a child by his natural parent is possible.

As to the interpretation of section 40, that is whether this provision was mandatory or not, different scholars have reached different conclusions. On the one hand Joubert held the opinion that the court merely had to take note that it was the legislature's policy that a child should not be placed in the custody of a person of a different racial classification.²⁴ On the other hand Heaton²⁵ maintained that this section contained a prohibition and that it therefore was mandatory and prohibited interracial adoptions. She explained furthermore that, as was said earlier a parent could not adopt his own child and that the exception therefore might only be applicable to a child's guardian. For example a person who belonged to a different population group to that of a child, was not his guardian and who wanted to adopt that child, would have to lodge an application for an appointment as the child's guardian. If his application for guardianship was successful, he could apply for adoption and it seems as if this was the only instance where interracial adoption could have been ordered. However his chances of being appointed as a guardian were not very high, as the court would probably have been guided by the legislature's policy as described by Joubert above. This then would be another example of the enforcement of the government policy of racial separation.

Zaal is of the opinion that the ambiguity in the act was suited to the government's policy, and in his words:

The semantic muddiness was highly convenient where the government was intent on matching children racially, but at the same time being able to defend the image of the government overseas

23 Sec 17, Act 74 of 1983.

24 Joubert (1993) 727.

25 Heaton (1989) 713ff.

by saying, it is not actually compulsory in section 40.²⁶

With regard to the adoption of children section 18(3) of this Act provides:²⁷

"In considering any such application the children's court shall have regard to the matters mentioned in section 40."

Although section 40 pertains to the determination of custody of children, the matters mentioned relate to the religious and cultural background of the child concerned.

Section 40 was also amended by the promulgation of the Child Care Amendment Act 86 of 1991, on 19 June 1991. The new section 40 now reads:

Determination of custody of children. In the application of the provisions of section 15(1)(b) or 34, regard shall be had to the religious and cultural background of the child concerned, and of his parents, as against that of the person in or to whose custody he is to be placed or transferred.

The express reference to **race** has been omitted, and in place of **race** the concept of **matching** of the child and prospective parent is emphasized. The focus now is on cultural backgrounds. The word **culture** however, is not defined by the Act. This raises the question of whether, at least in practice, **race** and **culture** are in any way synonymous.

Culture may be defined as the customs, civilization and achievements of a particular time or people, in other words, the total way of life that includes the sociological aspects relating to the person in relation to his/her environment and other people. On the other hand, **race** may be defined as each of the major divisions of humankind, having distinct physical characteristics or genetic traits. By definition then, **race** and **culture** are not synonymous.

The fact that the previous Act mentioned both racial and cultural differences to be

26 Zaal (Discrimination) 162.

27 Act 74 of 1983.

considered between the prospective parent and child and that the new Act only mentions the cultural backgrounds, seems to suggest that the legislature has accepted that there is a difference between the two concepts. Furthermore, the segregational criterion of **race** has been removed from all legislation in this country and the new Constitution affirms that we are a non-racist society.²⁸

However, whether or not we are a non-racist society in practice is a moot point. Race is a fact which is associated with a long history of stigmatisation. Although the Constitution affirms that we are a non-racist society, South Africa has a history of enforced segregation which has led to the situation where the *de facto* impact of racial and cultural diversity is greater than elsewhere.²⁹

Zaal is of the opinion that the new section 40 is “perfect legal camouflage for *de facto* apartheid to continue its work”.³⁰ It would be logical to come to this conclusion particularly since our society has been for so long segregated on racial lines. The idea that this was natural could quite possibly have become the norm.

Present legal position relating to transcultural adoption

The legal position regarding children’s rights and transcultural adoption is currently regulated by three main sources, namely:

- i The Child Care Act 74 of 1983
- ii The Constitution of the Republic of South Africa Act 200 of 1993
- iii The UN Convention on the Rights of the Child (1989)

28 Act 200 of 1993; the preamble sec 1(b); sec 8.

29 Nöthling-Slabbert 22.

30 Zaal 378; he refers to a case in which a black social worker had placed a black child in an orphanage which had previously only taken Indian children. Senior white Natal Provincial Administration staff insisted that he be removed to a ‘black’ orphanage purely on the grounds of his colour. Culture was thus seen as synonymous with race regardless of the background and best-interests of the child.

While the first two of these are municipal or national sources the third is an international source.

i The Child Care Act 74 of 1983

In respect of adoption, the Child Care Act as discussed above is still applicable. A draft new bill with regulations, to amend this Act, has been released but has not yet been finalized.³¹

ii The Constitution of the Republic of South Africa Act 200 of 1993

The Constitution which includes a Bill of Rights may be regarded as providing an historic bridge "between the past of a deeply divided society characterised by strife, conflict untold suffering and injustice and a future founded on the recognition of human rights democracy and peaceful co-existence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex".³²

The abovementioned Constitution was assented to on the 25th January 1994 and will be referred to as the interim Constitution. The final Constitution was adopted by the Constitutional Assembly on 8 May 1996 to be certified by the Constitutional Court in accordance with the entrenched constitutional principles. In fact the Constitution has already been before the Constitutional Court and in its judgment delivered at the beginning of September the Court referred it back to the Constitutional Assembly for amendment of certain provisions.³³ These relate to provisions other than those dealt with in this paper and in what follows, the Fundamental rights provisions are referred

31 This Bill is discussed in Nielsen/Van Heerden 247ff. With regard to transcultural adoption there is no amendment of substance.

32 So reads the first paragraph *National Unity and reconciliation* of the postamble to the interim Constitution Act 200 of 1993.

33 The Constitution has subsequently been ratified with a few exceptions. See case CT 23/96 - Certification of the Constitution of RSA 1996.

to as part of the final Constitution.

The Constitution is the supreme law in South Africa and therefore all law that is irreconcilable with it is invalid to the extent of conflict.³⁴ The Constitutional Court has jurisdiction to test and determine the constitutionality of all other legislation.

Chapter 3 of the interim Constitution and chapter 2 of the final Constitution embody the Bill of Rights guaranteed by the Constitution. A bill of rights constitutes one of several constitutional devices to control excessive government power.³⁵ Another form of control is the separation of powers among legislature, executive and judiciary. Thus section 8(1) of the final Constitution provides:

"The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state."

With regard to adoption, the Department of Social Welfare is bound by the Bill of Rights as it is a state organ and part of the executive. The judiciary, when hearing applications for adoptions, would also be bound by the Bill of Rights. Furthermore, adoption proceedings are of an administrative law nature and therefore the rules of administrative law are applicable to such proceedings.³⁶ Thus the administrative justice clause in the Bill of Rights is also applicable to the proceedings. In this regard section 33 of the final Constitution provides that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair". Moreover, adoption proceedings are reviewable in terms of the Common Law and the final Constitution.

Although the question of the application of the Bill of Rights is not yet finally settled,³⁷

34 The position in general is discussed by Carpenter 976ff.

35 Carpenter 979ff.

36 Eckard 72 73.

37 There have been various writings on this debate. Until the recent decision of *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 CC there were conflicting decisions on this question. However, in the *De Klerk* case the majority decision of the Constitutional Court was that the

it seems clear that the debate about vertical/horizontal application of the Bill of Rights would in general not be relevant with regard to adoption because adoption is not merely a private law matter, although the issue of who should have parental rights is also private in nature.³⁸ Even if the Department of Social Welfare is not involved the matter must still be determined in an administrative hearing and is therefore subject to Administrative law and to testing under the Constitution.

While section 30 of the interim Constitution guaranteed rights of children, section 28 of the proposed final Constitution similarly provides (in full):

- (1) Every child has the right -
 - (a) to a name and a nationality from birth;
 - (b) to family care, parental care, or appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services, and social services;
 - (d) to be protected from maltreatment, neglect, abuse, or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that -
 - (i) are inappropriate for a reason of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -
 - (i) kept separately from detained persons over the age of 18 years; and

Constitution did not have horizontal application. Nonetheless as was stated in the separate judgment of Justice Ackermann, courts interpreting questions of private law should be influenced by the principles in the Preamble, Postamble and interpretation clause. In other words there would be indirect influence like the German *Mittelbare Drittwurking*. However, factors mentioned in the separate judgments, may now have changed with the adoption of the final Constitution; for example the word in sec 7(1) of the interim Constitution which provides that "this Chapter shall bind all legislative and executive organs of state at all levels of government" and therefore excluding the judiciary have changed. The application of the final Constitution is embodied in sec 8 and sec 8(1) provides: "The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state" it may well be that in future the court will determine that there is horizontal application.

38 Eg rights of the father of an illegitimate child when his child is to be adopted. In the *Fraser v Naude* case (unreported) the biological father who was not given a hearing at the adoption enquiry maintained that his rights under reg 2 of the Child Care Act were disregarded and that his constitutional right of procedural fairness had been violated. See the discussion in Mosikatsana (1996).

- (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interest is of paramount importance in every matter concerning the child.
- (3) In this section, "child" means a person under the age of 18 years.

The underlined words were not in the interim Constitution but in the proposed final Constitution. For purposes of this paper I will be concentrating mainly on section 28(1)(b) and section 28(2).

As well as protective measures regarding children, both interim and final Constitutions contain the non-discrimination or equality clause. In the interim Constitution this clause is contained in section 8 while in the proposed final Constitution section 9 provides (in full):

- (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.

It is interesting to note that the second half of section 9(4) namely "National legislation must be enacted to **prevent or prohibit unfair discrimination**" (emphasis supplied) has been inserted in the new Constitution. So, too, section 9(5), namely it is unfair to discriminate on one of the grounds in 9(3) unless proved otherwise.

Also of importance is section 30 of the final Constitution (sec 31 of the interim Constitution) which provides:

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

Section 31 furthermore determines:

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of their community, to -
- (a) enjoy their culture, practise their religion and use their language; and
 - (b) form, join and maintain culture, religious and linguistic associations and other organs of civil society.
- (2) This right may not be exercised in a manner inconsistent with any provision of the Bill of rights.

The question which arises is how the Constitution impacts on transcultural adoption?

First section 28(1)(b) emphasizes the child's right to family life and parental care. The importance hereof could be three-fold. First when determining the placement of the child, the focus should be on the needs of the child and not on the needs of the parents. Secondly, because a child has a right to parental care, it would be unconstitutional to delay the process of placing the child in alternative care and it would be unconstitutional to place him or her in inferior care.

Secondly the Constitution also emphasizes the “best interests of the child” principle. Because it is such an important principle and because the “best interest” can be subjectively applied it will be discussed later under a separate heading.

Thirdly the equality clause stresses the importance of equal protection and benefit of the law. If the screening process of prospective adoptive parents differs according to the race of the child, it might be seen to be unconstitutional. As explained earlier the administrative justice clause would be applicable here.³⁹ It would also be unconstitutional if “resources available” on behalf of certain classes of babies, differ.⁴⁰

Furthermore, in terms of section 9(3), the state may not discriminate directly or indirectly against anyone on the grounds of inter alia race, ethnic or social origin, colour, culture and birth. There may therefore be a conflict between the equality clause and section 40 of the Child Care Act which promotes culture matching,⁴¹ as a child might be prejudiced by the culture matching process. It can be argued that a baby is born into a certain culture and section 31(1) would apply, that is the child’s right to enjoy such culture would be protected. This argument may be flawed however, because if it is accepted that one is **born** into a specific culture, race and culture must be synonymous. If a child is not placed in a home, merely because parents of the same culture willing and able to adopt the child, cannot be found, the child might suffer severe prejudice. Would section 31(1) then be in the best interests of the child? There might perhaps be a conflict between the protection of the culture of a child and his best interests. Could the **best interests** test be curbed in order to protect these Constitutional rights?

When interpreting the Constitution, the court will be guided by section 39 of the final Constitution which provides the manner in which the Bill of Rights is to be interpreted.

Section 39 provides (in full):

39 See page 13 above.

40 See too Zaal 382.

41 See above page 9.

Interpretation of the Bill of Rights

- 39 (1) When interpreting the Bill of Rights, a court, tribunal or forum -
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) **must** consider international law; and (emphasis supplied)
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum **must** promote the spirit, purport and objects of the Bill of Rights. (emphasis supplied)
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

As will be shown below South Africa values its children highly and it would seem that this is part of the value system which underlies an open and democratic society based on human dignity. Therefore, when weighing up one provision against the other, for example the equality factor against the cultural factor the court will have recourse to section 39. It follows then that the "best interests" should be the primary factor.

Limitation of Rights

The question arises whether the rights provided for in the Bill of Rights may be lawfully limited. This is relevant in the context of transcultural adoption as the following supposition illustrates: If a child is not placed with a family because of racial/cultural differences, would this mean that he was unfairly discriminated against and hence amount to a contravention of the equality clause. On the other hand, might this be in his best interests and therefore justifiable limitation of the "equality clause".

Limitation of the fundamental rights embodied in the Constitution is provided for in

section 36 of the Final draft Constitution⁴² which provides:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Although the rights in the Bill of Rights may be limited, there are various requirements which must be met before a limitation will be valid. A challenge under the Bill opens up an inquiry into the justification of the decision challenged.⁴³ Firstly, the law limiting the rights must be of general application, that is not only with regard to particular individuals. It may be argued that what seems to be a law of general application such as those which apply only to certain racial, language or religious groups will not meet the requirement of generality.⁴⁴

Secondly, the limitation must be reasonable. Pretorius suggests that a useful guideline in determining what would be reasonable would be the common law *boni mores* test which is often used in the context of delict and criminal law to determine wrongfulness. However, she cautions that the Constitutional Court is faced with the "daunting task of determining the prevailing *mores* of our multi-cultural and diverse society". However, as she points out it is not a simple *boni mores* test; the constitutionally entrenched

42 The position is determined in the interim Constitution in section 33 where an additional requirement is laid down namely that "limitation shall not negate the essential content of the right in question".

43 See in general Mureinik page 31ff.

44 Carpenter; Van de Vyver makes the same point albeit with regard to the Constitution of the former Bophuthatswana *THRHR* 55-57.

values such as freedom and equality must always be realised.⁴⁵ It remains to be seen how the Constitutional Court will interpret "reasonable".

Thirdly, the limitation must be justifiable in an open and democratic society that is based on freedom and equality.⁴⁶ According to Carpenter a justifiable limitation must be more than merely rational, it must be reasonable in relation to the reasons given for the limitation. Furthermore, it must be justifiable according to the criterion of an open and democratic society, based on freedom and equality. The courts also still have to determine the precise meaning of this phrase.

iii The UN Convention on the Rights of the Child (1989)⁴⁷

Children's rights have been guaranteed in various general human rights conventions, for example article 10 of the Covenant on Economic, Social and Cultural Rights; article 24 of the Covenant on Civil and Political Rights and the ILO Convention against Child Labour. The most comprehensive is the Convention on the Rights of the Child of November 20, 1989. This document contains a comprehensive compilation of child-specific rights, among others: the right to be registered after birth; the right to family life; the rights of children in adoption (the state must do what is best for the child in all cases of adoption); the right to identity, nationality and refuge, the right not to be separated from one's parents; the right to education, rest and leisure and the right not to be abused physically and sexually. As well as these so-called child-specific rights, under the Convention children also enjoy the general human rights such as freedom of thought, religion and expression, assembly and association. Although it may be argued that the child-specific rights serve to emphasize that the Convention is grounded in (or based upon) the principle of best interests of the child, this principle has also been specifically highlighted in article 3 of the Convention which provides:

45 Pretorius 151 152.

46 As with the *boni mores* Pretorius sees "the best interests of the child" as a common law criterion which might determine whether restriction of rights is reasonable and justifiable - Pretorius 153.

47 *IHR* 84ff. On 16 June 1995, South Africa ratified the UN Convention.

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.

Besides the fact that the UN Convention has been ratified by South Africa, it is also relevant as section 39(1)(b) of the final Constitution provides: "When interpreting the Bill of Rights, a court, tribunal or forum **must** consider international law."

Once again the "best interests"-criterion is highlighted.

The meaning of the concept "Best Interests of the Child"

Various factors suggest that there is in South Africa a value system which rates highly the interests of the child. For example, as Nielsen and Van Heerden have pointed out⁴⁸ children's rights have been implemented by the government in various ways inter alia school feeding schemes throughout the country, free medical aid to children under the age of six years and the abolishment of juvenile whipping as a sentence. Furthermore, this concept of best interests is also embodied in legislation and in our common law as developed by our courts.⁴⁹

According to Heaton,⁵⁰ the "best interests" test encumbers that the "best interests of the child" has to be used as the determining factor in a court's decision regarding the person of a child. The biggest problem with this test is that it is indeterminate. As she points out, for a determinate answer to the question of what would be in the child's best interests:

48 Nielsen/Van Heerden 247.

49 See in general Heaton (1988) 6ff on the common law position. Recent case law on the best interests, although on the matter of custody, were *F v L* 1987 4 SA 525 (W); *F v B* 1988 3 SA 948 (D); *W v S* 1988 1 SA 475 (N); *D v L* 1990 1 SA 894 (W); *B v P* 1 4 SA 113 (T); *B v S* 1993 2 SA 211 (W); confirmed on appeal on this particular point in *B v S* 1995 3 SA 571 (A).

50 Heaton (1988) 11.

- (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.

One must agree with her that it is impossible to comply with all of these requirements and therefore the best interests of the child cannot be determined with certainty and rests largely on speculation.

The question then is whether in determining the best interests of the child one factor weighs more heavily than another for example does the child's right to a cultural identity weigh more heavily to her/his right to a family or equality of treatment.

In the context of this paper, that is transcultural adoption, I will now consider the debate of whether "culture" is of overriding importance. In considering this I will look at the position in America and the views of American writers in this regard and also at the position in the United Kingdom.

The American Experience: Transracial Adoption⁵¹

In the United States of America there has been longstanding debate over transracial adoption which started there after the end of World War Two in the face of thousands of homeless children in Europe and Asia. Nonetheless there weren't many transcultural adoptions until the mid-1960s when there were major changes in social work and adoption agencies' policies encouraging such adoptions. The children who were most affected by these changes were the black and the native Americans.

A few years later organised opposition to transracial adoption began and this was strong enough to bring about a reversal of adoption agencies' policies in most states throughout the country. Opposition came mainly from black social workers who felt that

51 See in general Simon 136ff; see too Bartholet 151ff.

the transcultural adoption scheme was depriving their communities of their most valuable future resource namely their children. With regard to minority groups and preservation of cultural identity in what has become a political issue, certain native American leaders took a stand against transracial adoptions. They even went as far as to label transcultural adoption as cultural "genocide". Both groups felt that it would be impossible for white parents to rear black or native American children and help to retain or develop a black or Indian identity. As a result of this opposition the number of transcultural adoptions declined and unfortunately the problem which gave rise to transcultural adoption remained, namely the large number of black or native American children in institutions.

In accordance with what may be termed a new cultural consciousness various measures were taken. By 1978, Congress had passed the Indian Child Welfare Act which reflected the policy of placing Indian children within the ethnic and cultural groups of origin, priority being given first to the child's extended family, second to members of the child's tribe, third to other Indians and as a last resort to non-Indians. In recent years several states have passed laws modelled on the Indian Child Welfare Act. Furthermore, the civil rights laws governing adoption agencies that receive federal funds have been administered in such a way as specifically to authorize the use of race in adoption decision-making.⁵²

Nevertheless while there have been cases where racial policy considerations have unjustly taken precedence over the best interests of the child, after much litigation,⁵³ the precedent has been established that the general rule is that while race may be regarded as a factor in the placement of a child in certain instances, it may not be decisive in the outcome of the proceedings. For example, in the case of *Palmore v Sidoti*,⁵⁴ a custody case decided by the Supreme Court, and a landmark case which set the standard of how race should be considered in child placement proceedings, the

52 Bartholet 1181 1182 1229 1230.

53 See generally Angela McCormick 303ff.

54 400 US 429, 433 (1984).

court did not allow racial prejudice to justify the placement of a child.⁵⁵

In this case the Supreme Court based its decision on constitutional grounds. The court found that the trial court's decision had been based on race and was therefore in direct conflict with the fourteenth amendment, which encompasses the right to equal protection. An important reason given by the Supreme Court, was that the Constitution cannot be held to give effect to prejudices by upholding laws to fit the social differences between blacks and whites.

Leaving the racial issues aside, however, this highlights the fact that the best interests test was limited by the Constitution which implies that the court may in future limit the best interests test in order to protect other constitutional rights. Nonetheless, despite this decision, cases continue to deny adoptions on exactly these grounds. In the words of Angela McCormick:⁵⁶

Courts claiming to decide cases based on the established standard have cleverly hidden the biased outcome of their decisions by framing the holding using phrases such as "race was relevant but not decisive to the case ... While the rule has curtailed discrimination based on race in a great many decisions, courts too easily can circumvent this test and deny using race as the factor that tips the judicial scale against the prospective parents."

To sum up although technically all people should be treated equally in practice this is not always the case. Consequently, in the light of the American experience, one should not disregard the fact of political influence whether it be based on the fear of cultural genocide or racist attitudes.

An outline of transracial placements in the United Kingdom⁵⁷

After the second World War and because of the economic boom there was a large flow

55 See discussion of the case by *inter alios* Backwood 209ff; McCormick 305-309; Silverberg/Jonas 335ff.

56 McCormick 303.

57 Gaber 12ff.

of people emigrating from the West Indies and Asian sub-continent to Britain. At this stage it was almost impossible to place children from ethnic backgrounds, purely on the grounds of their colour. Over the next two decades more and more white families took on the responsibility of looking after children from different ethnic backgrounds. A notion existed that a pluralist society with shared core values could be created and transcultural adoptions were seen as a possible step in achieving this goal. Despite this, it was still difficult to place children from ethnic minority backgrounds (coloureds as they were known).

In 1962 the Adoption Committee of the International Social Service of Great Britain, were worried about the growing number of coloured children for whom prospective homes could not be found. As a result the British Adoption Project was formally established in 1965. It had two purposes: First, to provide a service for children of diverse racial groups and to facilitate the adoption of such children; secondly to answer two questions - could adoptive homes be found for the children and if they could, how would such placements work out? Of importance to my paper is that, from the outset, the project recognised the principle of matching children to parents who shared their own racial and cultural origins. As the economic boom seemed to tail off, immigrants were competing with whites for jobs, housing and social services and, with the aim of tackling racial prejudice, in 1965 the first Race Relations Act was passed. However, as the number of immigrants increased, older liberal ideas of "colour blindness" and assimilation gave way to ethnic pride and multiculturalism.

In 1970, the Home Office gave its official backing to transracial placements. Their guidelines stated that children of mixed parentage should be considered equally for black or white placements. There was even the suggestion that black children be placed in white families in areas where there were no other black families. This was contrary to current thinking and the adoption agencies did not follow these guidelines. The urgency for permanent placement of these children was not realized. However, in 1973 after the publication of Jane Rowe and Lydia Lambert's research - 'Children who Wait', this perspective changed.

At the same time that the official trend towards transracial placements was developing, the ethnic minorities were starting to oppose this and there was an increasing tendency for Afro-Caribbean birth mothers to state that they wanted their babies to be adopted by people of their own ethnic background. Throughout the seventies other changes were taking place in black people's perceptions of transracial placements and they were influenced by what was taking place in the United States. At that stage the politics in that country had changed from "blacks and white uniting to fight" to that of black self-identity and, for some separation.

Simultaneously, in the United Kingdom various campaigns were launched to encourage the ethnic minority groups to offer themselves as prospective adoptive parents. Among other black British social-workers John Small, a London-based social worker, argued against transracial placements maintaining that transracial placements was not a response to black children needing homes, but a response to the needs of white childless couples wanting children. In 1980 Small became the first Director of the new Black Families Unit, which was established to find substitute black families for the coloured children awaiting placement. Small explained that it was necessary to establish this unit, because the predominantly white social workers were rejecting black substitute families on the grounds that they were not the "ideal type".

Reaction followed in 1986 when the PPIAS (Parent to Parent Information on Adoption Services - the organisation of adoptive parents) launched their policy statement. While recognising and encouraging the principle of same-race placements they also recognised the importance of urgent permanent placement even if it then meant transcultural placements. However, various bodies opposed this view inter alia the British Agencies for Adoption and Fostering (BAAF) and the "Black and In-Care" group.

In 1987, the BAAF issued its own practice notes and although recognising transracial placements, the main focus was on same-race placements. Just when the white social workers felt comfortable with the BAAF's policy, opposition came from black intellectuals who rejected what they saw as an over-simplification of highly complex

issues. On the ground level however, adoption agencies continued to move away from transracial adoptions.

In 1989 the new Children's Bill was published and in 1990 the Government sent out a letter of guidance to directors of social services.⁵⁸ Although the need for sensitive planning and recruitment that would result in same-race placements was emphasised, the guidelines also stated that placement with a family of different ethnic origin might be the best choice for a particular child and sometimes it might be the best available choice.

In the same year the Commission for Racial Equality published its guidelines.⁵⁹ Whilst they favoured same-race placements or as close as possible alternatives, they did recognise that transracial placements might be necessary in some circumstances. The Government had finally intervened with a statement of what they regarded as good practice namely ethnic-matching was to be encouraged but flexibility and the best interests of the individual children were to remain paramount.

The Government intervened again in 1991 when the new Children Act became law. It did not address the issue of transcultural adoption directly, but both supporters and opposers of transcultural adoption could point to it to support their views.

From what has been said thus far, in the United Kingdom, as in the United States, there has been a measure of ambivalence; the pendulum has swung between the policies of transcultural adoption and intracultural adoption. However, in 1993, the Government published a White Paper on adoption which determined that although ethnicity should be taken into account it should never be the only consideration.

58 See document "The Department of Health: Document C1(90)(2) 'Issues of Race and Culture in the Family Placement of Children' - Letter to Directors of Social Services from Chief Inspector, Social Services Inspectorate (29 January 1990)" as contained in Gaber & Aldridge Appendix 8.

59 See document "Commission for Racial Equality: Extract from 'Adopting a Better Policy: Adopting and Fostering of Ethnic Minority Children - The Race Dimension' (1990)" as contained in Gaber & Aldridge Appendix 7.

Against this background one must consider a few of the arguments, which have been raised for and against adoption.

Arguments for and against transcultural adoptions

One of the arguments against transcultural adoptions that have been put forward in other countries, more particularly the United States, is that the ethnic community will lose its own valuable future resource, namely its children. In other words, in a minority ethnic group such as the community of Black Americans, when a child born into such a group is adopted into another cultural group it reduces the opportunity for cultural growth within the former group, and this has been termed cultural genocide.⁶⁰ However, it seems at least for South Africa, that the number of children involved in such cases would be relatively small so as not to make any difference to the cultural growth of the community concerned.

A closely allied argument and one that was raised by the Association of Black Social Workers to a House of Commons Select Committee in 1983, was that black children placed with white families failed to form a positive black identity and had a low self-image.⁶¹ In the first place the meaning of identity is not all that clear and the term can mean a range of different things. Identity and self-image are not necessarily the same thing. Moreover there are many people who have serious identity problems that have nothing to do with being adopted.⁶² Although the question of self-image permeates the writings of those who oppose transcultural adoption there is as yet no conclusive research study which proves that adoption across cultures lessens the chances of

60 Simon 137.

61 See Gaber 22ff; Tizard/Phoenix 89 and document "Association of Black Social Workers and Allied Professions: extract from 'Black Children in care - Evidence to the House of Commons Social Services Committee' (March 1983)" as contained in Gaber & Aldridge Appendix 1.

62 See in general Richards 77ff.

developing a good self-image.⁶³

It may well be that an adoptive parent is faced with a question such as was put to Elizabeth Bartholet by her adopted Peruvian son "I wish you looked like me ... I wish you were the same color".⁶⁴ However, this does not necessarily mean that the child has an identity crisis or a self-image problem. Perhaps it is merely as Bartholet states that a question like this only signals that "living as part of a multi-racial, multi-ethnic, multi-cultural family will force us to confront the meaning of racial and other differences on a regular basis?"⁶⁵

Another argument is that white families could not provide black children with the skills and "survival techniques" which they would need for coping in a racist society. However, according to studies cited by Bartholet, this is not the case. In the United States black children transculturally adopted reported many advantages and outperformed their counterparts in the cultural group of origin.⁶⁶ As already indicated South Africa is in any case not supposed any longer to be a racist society.

One of the major and widely recognised reasons for adoptions whether intra-cultural or transcultural, is that it gives a child who would otherwise be left in institutions, a family life. As the President of the North American Council on Adoptable Children testified in 1980, "we believe every child has the right to a loving, 'forever' family of his or her own. For a great many children now in foster or institutional care, permanency and love can only be found through adoption ..."⁶⁷

63 Bartholet 1211-1216; see too Golombok 110 111; Tizard/Phoenix 89ff. Moreover, as these authors point out: first that the studies conducted did not use children living with their families of origin as a control group and secondly that in any case the concept of a 'positive black identity' is problematic, imprecise and needs further analysis.

64 Bartholet 1171.

65 *ibid.*

66 See Bartholet 1207ff; Bartholet *Race matching* 162ff.

67 As quoted in Simon 185.

Customary Law⁶⁸

We have looked at transcultural adoption in the United States and United Kingdom and although we can fruitfully learn from their experience, it is necessary particularly because we are such a rainbow nation, to consider the question of transcultural adoption in the context of indigenous law.

Bennett says "Adoption cannot be considered an established practice of customary law. The nearest equivalent is the institution of an heir by a family head who has no male progeny of his own, a practise that is not conceived to be in the interests of the child."⁶⁹ However, to have no family would not be in the interest of the child. In the context of indigenous law that is oriented towards the family and where with extended families there are no orphans, it would seem that adoption would not be in conflict with the traditional African ethos.⁷⁰ In a recent decision of *Thibela v Minister van Wet en Order en Andere*,⁷¹ an action to determine damages for loss of support, the custom of transferring a child from its biological group of origin to another group was held to be comparable to the Western institution of adoption.

Concluding remarks

As previously discussed children's rights are protected in the proposed final Constitution inter alia by section 28, section 9 (the so-called equality clause), and section 31. When determining whether a child should be transculturally placed, the courts will have to interpret the Constitution and the way in which the court interprets it is very important, particularly since there are what seem to be conflicting provisions.

68 The application and testing of customary law is also recognized in the Constitution sec 211; see generally the judgment of Mokgora, page 498ff in *S v Makwonyane and Another* 1995 3 SA 391 (CC).

69 Bennett 106.

70 See generally Nhlapo 135 137; Myburgh 87 112.

71 1995 3 SA 147 (T).

For example if the court focuses on equality and disregards the cultural factor, this might not be in the best interests of a child in a particular case. Say the child to be adopted is 5 years old and has been accustomed to a particular culture, adoption into another culture might not be in her best interests; if the child was a baby the position might be quite different. In my opinion each case should be decided on merit.

With regard to the question of equality versus cultural preference, Mosikatsana⁷² convincingly argues that adherence to the idea of formal equality and universality in liberal thinking can "reproduce and reinforce social relations of oppression and inequality". In other words what is ostensibly non-racist could be just the opposite. In developing his argument he refers to the policies of affirmative action and the Reconstruction and Development Programme and states that under the guise of racial neutrality writers might undervalue the importance of these programmes in redressing past injustices or at the very least might see them as temporary measures. There is merit in his argument. On the other hand under the guise of cultural sensitivity people might be disadvantaged. This is in fact what happened under the apartheid regime. It is common knowledge that the segregation policy of the past while on the face of it separate but equal, taking account of cultural differences, was in fact oppressively racist.

One must agree with him that one of the legacies of apartheid is a society racially and culturally polarized. He maintains that because of this a child who is transracially adopted in such a racially and culturally disparate society might suffer racial prejudice and be ostracized and this in turn may damage the child's self-image. However while it is accepted that we are a rainbow nation, a society of many cultures does this mean that, for example, a person of colour could not be part of the Greek and Jewish culture say, and if she were would be ostracized because of her colour. As I have already indicated race and culture are not synonymous.⁷³ Once again the criterion should be

72 Mosikatsana 612.

73 See page 17 above.

best interests⁷⁴ of the child which may or may not be that it should be placed within a cultural group to which its biological parents belong. The emphasis should not be on either cultural identity or equality. To hold otherwise might lead to what I believe would be an unacceptable situation and not in the child's interest, an example of which was recently reported in *The Times* of London.⁷⁵

If the report is correct the facts briefly were as follows:

Two boys aged eight and six had been living in the northeast of England with their white foster mother, who had been caring for them all their lives save for a few weeks when they were infants. They had not spent much time with their biological mother, a Nigerian woman living in London. Their biological father was living in Nigeria. The biological mother applied to the High Court for an order that the children be returned to her. Despite the fact that the court heard evidence that the children regarded their foster mother as their own mother and had a place in her family and in the local community, the court ordered that the boys be returned to the biological mother. In applying for leave to appeal counsel representing the foster mother argued that the court had been wrong to give greater weight to the needs of the children to have a knowledge and understanding of their race and culture than to the trauma which removal from the foster mother could cause. Nevertheless, leave to appeal was denied. It seems clear that race was the overriding criterion here.

It is recommended that this principle of best interests should be firmly entrenched in Departmental Policy and if needs be there should be amendment to the Child Care Act in order to facilitate its implementation. Zaal indicates that section 40, which provides for culture-matching, should perhaps be left out of the Child Care Act. According to him section 40 has become an impediment to many children's right to parental care as

74 As already indicated "best interests test" could serve as a guideline to the court when determining the issue. This has been supported by other writers (Pretorius 153) and in the words of Mosikatsana: "... the best interests of a child would be considered a reasonable limit that might justify a race-sensitive ... decision (Mosikatsana 622).

75 *The Times* (London) Friday Oct 25 1996.

entrenched in section 28 of the final Constitution.⁷⁶ As already mentioned,⁷⁷ the Constitution provides that national legislation should prevent or prohibit unfair discrimination. I agree with Zaal that there should be law reform to facilitate a greater tolerance of and even promotion of trans-cultural placements if this is in the child's best interests.

With regard to the question of departmental policy there is, according to the Registrar of the Department of Welfare, presently no formal policy document in respect of transracial adoption. In a radio programme⁷⁸ recorded by the writer recently, a social worker stated: "I think the first priority in a placement is to place a child within his or her own cultural group. That will be our first priority. If we can't find **parents within that child's own cultural group then we will look for alternative placements**" (emphasis supplied). She did say that the department has no problem with transracial placements and agreed that in South Africa there is a large number of black babies needing homes and a large number of prospective white parents. Statistics indicate that the number of transracial adoptions taking place yearly have increased substantially. In 1992 there were only two transcultural adoptions. By the end of August 1996 38 transcultural adoptions had been made.⁷⁹

It seems clear that in South Africa there are many children in need of permanent homes. These children are presently either in institutions or on the street. In 1990 it was estimated that there were already more than 9 000 street children.⁸⁰ It may be that even if adoption, transcultural or otherwise, were facilitated this alone would not solve

76 Zaal 383. On the other hand Joubert has stated that: "Once it is accepted that interracial adoption is legally possible, no other change has to be made in the basic rules of the law of adoption. It is then up to those involved with adoptions to apply the rules." (Joubert (1993) 737). Unlike Zaal, Mosikatsana is of the opinion that intra-cultural adoption would best serve the interest of black and coloured children who need to be adopted (Mosikatsana 627 628).

77 Page 16 above.

78 A radio programme on SA FM hosted by Will Bernard in September 1996. The guests were Adv Francis Bosman and Annette Schröder, a social worker.

79 Statistics kindly supplied by the Registrar of Adoption, MS F De Bruyn, Department of Welfare.

80 Simpkins/Boult/Cunningham 272

the problem of homeless children.

Maybe inter-country adoption should be one of the solutions. As Pretorius shows this is not a new idea and about 20 000 children are involved each year in this practice which is increasing.⁸¹ It is common knowledge that after the Second World War a large number of refugee and homeless children were adopted by Americans. As already indicated,⁸² the courts in the interpretation of the Bill of Rights, must have regard to international human rights law. Conventions regulating such adoptions are inter alia the UN Convention on International Cooperation and Protection of Children in Respect of Inter-country Adoption, and several other bilateral and regional agreements.⁸³

At present section 18 of the Child Care Act⁸⁴ discriminates against aliens in adoption proceedings in that adoption is limited to citizens only. Pretorius convincingly argues that this provision is unconstitutional and that it would not withstand a challenge in terms of the equality clause. The purpose of limiting adoption to citizens only cannot be justified in a society which "affirms the democratic values of human dignity, equality and freedom".⁸⁵

As has been shown, in both the United States and the United Kingdom although there has been a move towards the recognition of transcultural adoption there is ambivalence as to whether this is in the best interests of the child. Furthermore in these countries there have been no conclusive research studies that prove one way or the other what is in the best interests of the child. This perhaps highlights the need for further research

81 Pretorius 274.

82 See above page 18.

83 Pretorius 274.

84 Act 74 of 1983.

85 Sec 7 Act 200 of 1993.

in South Africa and also the need for inter-disciplinary ongoing research within the social sciences. A final recommendation is that lawyers and social workers should work together in the best interests of the children.

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