

**INTERRACIAL AND INTERCULTURAL ADOPTION:  
A SOUTH AFRICAN LEGAL PERSPECTIVE**

**by**

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## **SUMMARY**

The best interests of the child are paramount in every matter concerning the child. This applies in the case of adoption of a child as well. When an adoption is intercultural, culture is an issue to be taken into account. This study is undertaken to consider the role that culture should play in a decision whether an adoption is in the best interests of the child. In order to determine whether intercultural adoption is a viable option that serves the best interests of the child, interracial adoption also needs to be focused on, as intercultural adoption is often also interracial. The research for this thesis is done from a South African legal perspective, although some interdisciplinary and international research is necessary as well.

A brief historical overview of adoption in South Africa is undertaken, as it is important to have some background knowledge about adoption in South Africa in order to understand why race and culture are relevant in the South African adoptive system. The role of the family in the life of the child is investigated. The difference between family care, parental care and alternative care is researched. Thereafter the role of emotional bonding for a child, also known as attachment, is focused on. An important question is whether race and culture is the same thing. This is researched, whereafter the role of race and culture in the adoption process is investigated. The relevant provisions of the Child Care Act 74 of 1983,

which regulates adoption in South Africa, are compared to the relevant provisions of the Children's Act 38 of 2005, which will regulate adoption in South Africa soon. Finally, some conclusions are drawn, shortcomings are highlighted and possible solutions are suggested.

The outcome of this thesis should provide some guidance to those involved in the adoption process with regard to the factors that are important in determining the best interests of the child in an intercultural adoption.

## **KEY TERMS**

Best interests of the child; children's rights; parental rights and responsibilities; family care; parental care; alternative care; attachment; adoption; race; culture; intercultural adoption; interracial adoption

# TABLE OF CONTENTS

## CHAPTER 1: INTRODUCTION

<b>1 1 RESEARCH PROBLEM</b> .....	1
<b>1 2 RESEARCH METHOD</b> .....	6
<b>1 3 OUTLINE OF CHAPTERS</b> .....	8
<b>1 4 TERMINOLOGY</b> .....	11

## CHAPTER 2: HISTORICAL OVERVIEW

<b>2 1 INTRODUCTION</b> .....	13
<b>2 2 ROMAN LAW</b> .....	14
<b>2 3 ROMAN-DUTCH LAW</b> .....	18
<b>2 4 SOUTH AFRICAN LAW</b> .....	19
<b>2 4 1 Introduction</b> .....	19
<b>2 4 2 Customary law and adoption</b> .....	20
2 4 2 1 <i>Introduction</i> .....	20
2 4 2 2 <i>Development of adoption in customary law</i> .....	21
<b>2 4 3 Legislation</b> .....	23
2 4 3 1 <i>Introduction</i> .....	23
2 4 3 2 <i>Adoption of Children Act 25 of 1923</i> .....	24
2 4 3 3 <i>Children's Act 31 of 1937</i> .....	27
2 4 3 4 <i>Children's Act 33 of 1960</i> .....	28
2 4 3 5 <i>Child Care Act 74 of 1983</i> .....	34

2 4 3 6 <i>Children's Act 38 of 2005</i> .....	36
--	----

## **CHAPTER 3: THE CHILD AND THE FAMILY**

<b>3 1 INTRODUCTION</b> .....	40
<b>3 2 FAMILY CARE, PARENTAL CARE AND APPROPRIATE ALTERNATIVE CARE</b> .....	42
<b>3 2 1 Family care</b> .....	42
3 2 1 1 <i>Introduction</i> .....	42
3 2 1 2 <i>What is a family?</i> .....	42
3 2 1 3 <i>Types of family</i> .....	46
3 2 1 4 <i>Family care and the Constitution</i> .....	50
3 2 1 5 <i>Family care and international instruments</i> .....	53
3 2 1 6 <i>Family care and the Child Care Act</i> .....	56
3 2 1 7 <i>Family care and the Children's Act</i> .....	56
3 2 1 8 <i>Family care and adoption</i> .....	57
<b>3 2 2 Parental care</b> .....	58
3 2 2 1 <i>Introduction</i> .....	58
3 2 2 2 <i>Family care versus parental care</i> .....	59
3 2 2 3 <i>Parental care and the Constitution</i> .....	60
3 2 2 4 <i>Parental care and international instruments</i> .....	61
3 2 2 5 <i>Parental care and the Child Care Act</i> .....	63
3 2 2 6 <i>Parental care and the Children's Act</i> .....	63
3 2 2 7 <i>Parental care and adoption</i> .....	64
<b>3 2 3 Appropriate alternative care</b> .....	64
3 2 3 1 <i>Introduction</i> .....	64
3 2 3 2 <i>The role of the State and the Constitution</i> .....	65
3 2 3 3 <i>Alternative care and international instruments</i> .....	68
3 2 3 4 <i>Alternative care and the Child Care Act</i> .....	70
3 2 3 5 <i>Alternative care and the Children's Act</i> .....	71
3 2 3 6 <i>Alternative care and adoption</i> .....	72

<b>3 3 ATTACHMENT</b> .....	72
<b>3 3 1 Introduction</b> .....	72
<b>3 3 2 The theory behind attachment</b> .....	74
3 3 2 1 <i>What is attachment?</i> .....	74
3 3 2 2 <i>How are attachments formed?</i> .....	76
3 3 2 3 <i>When are attachments formed?</i> .....	79
<b>3 4 CONCLUSION</b> .....	83

## **CHAPTER 4: THE BEST INTERESTS OF THE CHILD**

<b>4 1 INTRODUCTION</b> .....	86
<b>4 2 GENERAL DISCUSSION OF THE BEST INTERESTS STANDARD</b> .....	88
<b>4 2 1 Historical development and application in South Africa</b> .....	88
<b>4 2 2 International instruments</b> .....	89
4 2 2 1 <i>Introduction</i> .....	89
4 2 2 2 <i>The Convention on the Rights of the Child</i> .....	90
4 2 2 3 <i>The African Charter on the Rights and Welfare</i> <i>of the Child</i> .....	95
4 2 2 4 <i>International instruments and adoption</i> .....	99
<b>4 2 3 The rights in section 28(1) versus section 28(2)</b> .....	102
<b>4 2 4 Primacy and paramountcy</b> .....	106
<b>4 2 5 Criticism of the best interests standard</b> .....	110
<b>4 2 6 Parent-centered versus child-centered approach</b> .....	113
<b>4 2 7 Factors that determine the best interests of the child</b> .....	119
<b>4 3 ATTACHMENT AND ADOPTION</b> .....	124
<b>4 4 OPEN VERSUS CLOSED ADOPTION</b> .....	129
<b>4 4 1 Introduction</b> .....	129

<b>4 4 2 Open adoption</b> .....	131
4 4 2 1 <i>Forms of open adoption</i> .....	132
4 4 2 2 <i>Benefits of adoption contact</i> .....	134
4 4 2 3 <i>South African law and open adoption</i> .....	145
<b>4 5 CONCLUSION</b> .....	149

## **CHAPTER 5: RACE VERSUS CULTURE**

<b>5 1 INTRODUCTION</b> .....	152
<b>5 2 DEFINITIONS</b> .....	155
<b>5 2 1 Race</b> .....	155
5 2 1 1 <i>The prevalent view of race</i> .....	155
5 2 1 2 <i>A different view of race</i> .....	156
<b>5 2 2 Culture</b> .....	158
5 2 2 1 <i>Culture</i> .....	158
5 2 2 2 <i>Tradition and culture</i> .....	162
<b>5 3 RACE AND CULTURE — IS THERE A DIFFERENCE?</b> .....	163
<b>5 3 1 Introduction</b> .....	163
<b>5 3 2 Making a distinction</b> .....	164
<b>5 4 CONSTITUTIONAL ISSUES</b> .....	170
<b>5 4 1 The Constitution, race and culture</b> .....	170
5 4 1 1 <i>Introduction</i> .....	170
5 4 1 2 <i>The protection of culture by the Constitution</i> .....	172
5 4 1 3 <i>Culture and equality</i> .....	177
<b>5 4 2 Culture and the child</b> .....	179
<b>5 4 3 Competing rights</b> .....	184
5 4 3 1 <i>Introduction</i> .....	184
5 4 3 2 <i>How does the Constitution deal with competing rights?</i> ..	185

5 4 3 3 <i>Which conflicts are we dealing with?</i> .....	196
5 4 3 4 <i>The child's competing rights</i> .....	199
5 4 4 <b>Conclusion</b> .....	202
<b>5 5 INTERNATIONAL INSTRUMENTS</b> .....	203
5 5 1 <b>Introduction</b> .....	203
5 5 2 <b>The Convention</b> .....	203
5 5 3 <b>The Charter</b> .....	204
5 5 4 <b>Conclusion</b> .....	206
<b>5 6 ARGUMENTS FOR AND AGAINST INTERRACIAL/ INTERCULTURAL ADOPTION</b> .....	206
5 6 1 <b>Introduction</b> .....	206
5 6 2 <b>Arguments against intercultural adoption</b> .....	207
5 6 3 <b>Arguments in favour of intercultural adoption</b> .....	214
5 6 3 1 <i>Cultural issues as a factor</i> .....	214
5 6 3 2 <i>Physical appearance as a factor</i> .....	222
5 6 3 3 <i>Studies conducted</i> .....	224
5 6 3 4 <i>Conclusion</i> .....	227
<b>5 7 CONCLUSION</b> .....	228

## **CHAPTER 6: THE CHILD CARE ACT AND THE CHILDREN'S ACT**

<b>6 1 INTRODUCTION</b> .....	233
<b>6 2 GROWING UP IN A FAMILY ENVIRONMENT</b> .....	234
6 2 1 <b>Introduction</b> .....	234
6 2 2 <b>The Child Care Act and growing up in a family environment</b> .....	235

<b>6 2 3 The Children’s Act and growing up in a family environment</b> .....	237
<b>6 3 THE BEST INTERESTS OF THE CHILD</b> .....	246
<b>6 3 1 Introduction</b> .....	246
<b>6 3 2 The Child Care Act, adoption and the best interests of the child</b> .....	247
<b>6 3 3 The Children’s Act and the best interests of the child</b> .....	249
6 3 3 1 <i>General</i> .....	249
6 3 3 2 <i>The Children’s Act, adoption and the best interests of the child</i> .....	254
6 3 3 3 <i>Register of Adoptable Children and Prospective Adoptive Parents</i> .....	271
<b>6 4 QUALIFICATIONS OF THE APPLICANTS</b> .....	274
<b>6 4 1 Who may adopt?</b> .....	274
6 4 1 1 <i>Who may adopt under the Child Care Act?</i> .....	274
6 4 1 2 <i>Who may adopt under the Children’s Act?</i> .....	275
<b>6 4 2 The financial means of the applicant(s)</b> .....	278
6 4 2 1 <i>The Child Care Act and the financial means of the applicant(s)</i> .....	278
6 4 2 2 <i>The Children’s Act and the financial means of the applicant(s)</i> .....	278
<b>6 5 CONSENT AND CHILD PARTICIPATION</b> .....	284
<b>6 5 1 The consent of the parent</b> .....	284
6 5 1 1 <i>The Child Care Act and the consent of the parent</i> .....	284
6 5 1 2 <i>The Children’s Act and the consent of the parent</i> .....	285
<b>6 5 2 The consent of the child</b> .....	290
6 5 2 1 <i>The Child Care Act and the consent of the child</i> .....	290
6 5 2 2 <i>The Children’s Act and the consent of the child</i> .....	296
<b>6 6 ADOPTION CONTACT</b> .....	303
<b>6 6 1 The Child Care Act and adoption contact</b> .....	303

6 6 2 The Children’s Act and adoption contact .....	305
6 6 3 Post-adoption agreements .....	308
6 6 4 Customary law and adoption contact.....	311
<b>6 7 CULTURAL ASPECTS .....</b>	<b>312</b>
6 7 1 The Child Care Act, adoption and culture.....	312
6 7 2 The Children’s Act, adoption and culture .....	313
<b>6 8 CUSTOMARY LAW, ADOPTION AND THE BEST INTERESTS OF THE CHILD .....</b>	<b>317</b>
<b>6 9 CONCLUSION .....</b>	<b>319</b>

## **CHAPTER 7: ADOPTION IN NEW ZEALAND**

<b>7 1 INTRODUCTION .....</b>	<b>322</b>
<b>7 2 LEGISLATION.....</b>	<b>323</b>
7 2 1 <i>Adoption of Children Act 9 of 1881</i> .....	323
7 2 2 <i>Adoption of Children Act 8 of 1895</i> .....	326
7 2 3 <i>Infants Act 86 of 1908</i> .....	326
7 2 4 <i>Maori Land Act 15 of 1909 and the Maori Affairs Act 94 of 1953</i> .....	327
7 2 5 <i>Adoption Act 93 of 1955</i> .....	328
7 2 6 <i>Children, Young Persons, and their Families Act 24 of 1989</i> .....	333
7 2 7 United Nations Convention on the Rights of the Child .....	338
<b>7 3 RACE AND CULTURE IN NEW ZEALAND ADOPTION LAW.....</b>	<b>339</b>
<b>7 4 THE ROLE OF THE CHILD’S BEST INTERESTS IN NEW ZEALAND ADOPTION LAW .....</b>	<b>345</b>

7 4 1 Introduction .....	345
7 4 2 The welfare and interests of the child .....	347
7 4 2 1 Determining welfare and interests.....	347
7 4 2 2 Factors to be taken into account.....	350
7 4 2 3 Is adoption still valid? .....	355
7 4 3 Open versus closed adoption .....	357
7 5 FUTURE REFORM OF NEW ZEALAND ADOPTION LAW .....	362
7 5 1 Introduction.....	362
7 5 2 Reform proposals .....	365

## **CHAPTER 8: ADOPTION IN BOTSWANA**

8 1 INTRODUCTION .....	374
8 2 CUSTOMARY LAW .....	378
8 2 1 Introduction.....	378
8 2 2 Adoption in terms of customary law .....	380
8 3 LEGISLATION.....	384
8 3 1 Introduction.....	384
8 3 2 <i>Adoption of Children Act</i> .....	384
8 3 3 Constitution of Botswana .....	389
8 3 4 United Nations Convention on the Rights of the Child .....	391
8 3 5 The African Charter on the Rights and Welfare of the Child.....	393
8 4 RACE AND CULTURE IN BOTSWANA ADOPTION .....	393
8 4 1 Culture and customary adoption .....	393
8 4 2 Culture and statutory adoption .....	395
8 4 3 Culture and case law .....	395
8 4 4 Race and customary adoption .....	396

8 4 5 Race and statutory adoption .....	397
<b>8 5 THE ROLE OF THE CHILD'S BEST INTERESTS IN BOTSWANA</b>	
<b>ADOPTION LAW</b> .....	400
8 5 1 Introduction .....	400
8 5 2 Adoption and the child's best interests .....	403
8 5 2 1 Customary law .....	403
8 5 2 2 Legislation .....	405
8 5 3 Open versus closed adoption .....	411
<b>8 6 FUTURE REFORM OF BOTSWANA ADOPTION LAW</b> .....	412
8 6 1 Introduction .....	412
8 6 2 Reform proposals .....	413
<b>8 7 CONCLUSION</b> .....	417

## CHAPTER 9: CONCLUSION

<b>9 1 INTRODUCTION</b> .....	420
<b>9 2 THE BEST INTERESTS OF THE CHILD</b> .....	422
9 2 1 Introduction .....	422
9 2 2 Growing up in a family environment .....	427
9 2 3 Attachment .....	428
9 2 4 Financial circumstances of the parties .....	429
9 2 5 Consent of minor parent to adoption .....	431
9 2 6 Child's consent to adoption .....	432
9 2 7 Assessment and counselling .....	434
9 2 8 Adoption contact .....	436
<b>9 3 CULTURE</b> .....	439
9 3 1 Introduction .....	439

9 3 2 How important is culture in the adoption process? .....	441
9 3 3 Least detrimental alternative? .....	443
9 3 4 Culture and the views of all parties .....	445
9 3 5 Cultural awareness .....	446
9 4 CUSTOMARY LAW AND ADOPTION .....	450
9 5 CONCLUSION .....	454

## BIBLIOGRAPHY AND METHOD OF CITATION

BOOKS .....	457
JOURNAL ARTICLES .....	481
OTHER REFERENCES .....	497
Law commission reports/discussion papers/issue papers .....	497
<i>South Africa</i> .....	497
<i>New Zealand</i> .....	497
International documents .....	498
Compact disc .....	498
Internet references .....	499
Newspapers .....	501

## TABLE OF CASES

SOUTH AFRICA .....	503
AUSTRALIA .....	508
BOTSWANA .....	508
ENGLAND .....	509

<b>NEW ZEALAND .....</b>	<b>509</b>
<b>UNITED STATES OF AMERICA .....</b>	<b>511</b>

## **TABLE OF STATUTES**

<b>SOUTH AFRICA.....</b>	<b>513</b>
<b>AUSTRALIA .....</b>	<b>515</b>
<b>BOTSWANA.....</b>	<b>515</b>
<b>ENGLAND .....</b>	<b>515</b>
<b>NEW ZEALAND .....</b>	<b>515</b>

### **BILLS**

<b>South Africa.....</b>	<b>517</b>
<b>Botswana .....</b>	<b>517</b>
<b>New Zealand.....</b>	<b>517</b>

# 1 INTRODUCTION

<b>1 1 RESEARCH PROBLEM</b> .....	1
<b>1 2 RESEARCH METHOD</b> .....	6
<b>1 3 OUTLINE OF CHAPTERS</b> .....	8
<b>1 4 TERMINOLOGY</b> .....	11

How we treat our children, especially those who lack adequate parental care, is a measure of our community.<sup>1</sup>

## 1 1 RESEARCH PROBLEM

Adoption is one of the most researched areas in child welfare.<sup>2</sup> The reason for this can be debated at length, but the drastic invasion into the life of a child caused by an adoption is reason enough — in South Africa only a formal adoption in terms of the Child Care Act<sup>3</sup> can permanently terminate parental responsibilities and rights.<sup>4</sup> Currently, the full implementation of the Children's

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<sup>1</sup> NZLC *Report 65* 3.

<sup>2</sup> Katz in Treacher & Katz *Dynamics of Adoption* 227.

<sup>3</sup> Act 74 of 1983.

<sup>4</sup> Louw 2006 *De Jure* 515, 518-519.

Act<sup>5</sup> is awaited.<sup>6</sup> When the latter Act is fully implemented, there will be major legislative changes as far as children and their adoption are concerned.

There are mainly three situations where adoption occurs. These are where the biological parent(s) or guardian(s):

- voluntarily make the child available for adoption;
- are deceased, or they are not able to care for the child, or they have abandoned the child;
- cannot be entrusted with the care of the child.<sup>7</sup>

There are different kinds of adoption. I believe that there are four main kinds of adoption in South Africa that should be distinguished. They are:

- Adoption by strangers: This kind of adoption is provided for in the Child Care Act, and happens when prospective adoptive parents apply to adopt the child of someone that is usually not known to them.
- Customary adoption: This kind of adoption usually happens within a family and for different purposes than statutory adoption.<sup>8</sup>
- Step-parent adoption: This happens where a child is adopted by the

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<sup>5</sup> Act 38 of 2005.

<sup>6</sup> For more about this Act, see “2 HISTORICAL OVERVIEW” and “6 THE CHILD CARE ACT AND THE CHILDREN’S ACT”.

<sup>7</sup> This is according to Joubert 1983 *De Jure* 132. All these situations could lead to statutory adoption.

<sup>8</sup> Customary adoptions are explained briefly in “2 4 2 2 *Development of adoption in customary law*”.

spouse or civil union partner of a biological parent, as also provided for in the Child Care Act.

- Intercountry adoption: This is the adoption by South African parents of a child from another country, and *vice versa*.

This thesis cannot possibly analyse all the different adoption possibilities. The aim of my research is to investigate whether intercultural adoption is a viable option that serves the best interests of the child.<sup>9</sup> Inevitably, interracial adoption also needs to be focussed on as an intercultural adoption is often also interracial. Although adoption of all children is investigated, the focus is on infant adoption, mainly because the influence on the child is then at its greatest,<sup>10</sup> and also because of South Africa's huge problem with AIDS orphans and the many abandoned babies.

As adoption of a child by strangers in terms of statute is how intercultural adoption normally comes about, this thesis focuses on adoption by strangers. As I shall explain,<sup>11</sup> customary adoption is very different from statutory adoption. Customary adoption does not form an integral part of my research as its purpose and structure are completely different to statutory adoption.<sup>12</sup> Even those legal experts who are opposed to interracial/intercultural adoption, such as Mosikatsana, do not equate customary adoption with statutory adoption or rely

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<sup>9</sup> The best interests of the child are constitutionally protected in s 28(2), and will be discussed and analysed in detail under "4 THE BEST INTERESTS OF THE CHILD".

<sup>10</sup> See "3 3 2 3 *When are attachments formed?*".

<sup>11</sup> See below in this chapter and various references throughout this thesis.

<sup>12</sup> These differences are pointed out directly below and throughout the thesis in the text.

on any reference to customary adoption in their arguments against interracial/intercultural adoption.<sup>13</sup> Although adoption is not unknown in customary law, it is not interracial.<sup>14</sup> It is usually by relatives and it is informal.<sup>15</sup> It is restricted to a part of the population that is of the same race (mostly) and the same culture (mostly) and is used to ensure the continuation of families and the provision of heirs.<sup>16</sup>

The importance of customary law in general and of customary adoption in particular can, however, not be denied. Whereas indigenous races in most countries are in the minority, the situation in South Africa is very different. In South Africa the **majority** of the South African population is black, and thus customary law is extremely important in this country.<sup>17</sup> As a result, customary adoption will be referred to throughout this thesis in order to point out significant concepts.

Step-parent adoptions will not be investigated. This is because the issue here is different from adoption by strangers. If a parent marries someone, the child is automatically subjected to the culture, rules, lifestyle, etcetera, of the new parent.

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<sup>13</sup> See Mosikatsana 1995 *SALJ* 606; Mosikatsana 1997 *SAJHR* 602; Mosikatsana 1998 *Michigan Journal of Race & Law* 341. In these articles customary adoption is not mentioned or discussed at all, as the focus and aim are completely different. This aspect is discussed in more detail under “5 6 2 Arguments against intercultural adoption”.

<sup>14</sup> Mosikatsana 1995 *SALJ* 616 says interracial adoption is fairly new in South Africa. He gives figures since 1991.

<sup>15</sup> Mosikatsana 1997 *SAJHR* 609. People who are subject to customary law may also adopt in terms of the Child Care Act and such adoptions surely occur.

<sup>16</sup> See “2 4 2 2 *Development of adoption in customary law*”.

<sup>17</sup> In 2008, the population in South Africa was nearly 50 million people, of which roughly 38 731 000 were black – StatsOnline at <http://www.statssa.gov.za/timeseriesdata>.

Furthermore, step-parent adoption can occur where the child has a biological parent who is still part of the child's life.<sup>18</sup> This kind of adoption thus implies the termination of an existing relationship, not necessarily for the right reasons.<sup>19</sup> There is a danger with step-parent adoption that the interests of the child are overlooked. The best interests of the child would probably be better served if, instead, the step-parent has guardianship over the child.

Intercountry adoption also does not form part of the research in this thesis. Although children whose adoptive parents are from a different country often face similar issues to children who are adopted locally,<sup>20</sup> the scope of this thesis is limited to intercultural adoption within South Africa because of restrictions relating to the length of the thesis.<sup>21</sup>

It is important to mention that the circumstances and socio-economic environment in South Africa are different to many other countries. While the importance of contact between an adopted child and his/her biological family is recognised,<sup>22</sup> there are millions of abandoned and/or orphaned children in South

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<sup>18</sup> The biological parents may have divorced, or may never have been married or entered into a civil union.

<sup>19</sup> A biological father who is not close to the child may agree to a step-parent adoption in order to avoid paying maintenance for the child.

<sup>20</sup> A child who is adopted by parents from another country usually grows up in a different culture and possibly also with a different race.

<sup>21</sup> As will be explained below under "1 2 RESEARCH METHOD", some comparative research is necessary.

<sup>22</sup> See "4 4 OPEN VERSUS CLOSED ADOPTION".

Africa.<sup>23</sup> As a result, contact between the child and the biological family is not always possible.

In this thesis, I shall try to establish whether it is in the best interests of the child,<sup>24</sup> who has a right to grow up as part of a family,<sup>25</sup> to be adopted by parents of a different culture than his/her biological culture.<sup>26</sup>

## **1 2 RESEARCH METHOD**

This thesis is mainly a literature study, based largely on legislation, books, journal articles and court decisions, but it is not restricted to this form of research.

There is some focus on legal historical matters.<sup>27</sup> Progress and growth are the focus of this method.<sup>28</sup> This component is important not only to provide the background to the research, but also to put into perspective the relevance of this thesis. The historical component of this thesis makes it clear and understandable why intercultural adoption is such a contentious issue in this country and why this specific aspect deserves further research.

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<sup>23</sup> Possible reasons are poverty and the effects of HIV and AIDS.

<sup>24</sup> See "4 THE BEST INTERESTS OF THE CHILD".

<sup>25</sup> See "3 THE CHILD AND THE FAMILY".

<sup>26</sup> See "5 RACE VERSUS CULTURE".

<sup>27</sup> See "2 HISTORICAL OVERVIEW".

<sup>28</sup> Venter *et al Regsnavorsing* 71.

## Chapter 1: Introduction

The legal positivist research method is used because this thesis relies on the understanding and analysis of knowledge.<sup>29</sup> Comparative law is the reciprocal comparison of different legal systems and legal rules with a view to obtaining new critical insights.<sup>30</sup> The legal comparative research method places into perspective corresponding aspects of different legal systems.<sup>31</sup> It is utilised by the researcher to obtain new knowledge and insight.<sup>32</sup> This is done by investigating the similarities and differences between respective legal systems.<sup>33</sup>

Adoption in New Zealand was researched because, like South Africa, New Zealand is a multicultural society<sup>34</sup> and because the socio-economic circumstances in New Zealand and South Africa are similar.<sup>35</sup> Furthermore, when the first adoption legislation in South Africa was drafted,<sup>36</sup> the Bill was modelled on the *Infants Act*<sup>37</sup> of New Zealand.<sup>38</sup> The role of customary law in New Zealand is also of great value. Customary adoptions in New Zealand are no longer recognised, and how New Zealand dealt with this issue can be of use to the South African legislature.<sup>39</sup>

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<sup>29</sup> Venter *et al Regnavorsing* 63-66.

<sup>30</sup> Zweigert & Kötz *An Introduction to Comparative Law* 1-63, as quoted in Esser 2008 *LLD* 13.

<sup>31</sup> Venter *et al Regnavorsing* 71.

<sup>32</sup> Venter *et al Regnavorsing* 71.

<sup>33</sup> Venter *et al Regnavorsing* 213.

<sup>34</sup> NZLC *Preliminary Paper* 38 5.

<sup>35</sup> Kruger 2005 *CILSA* 246.

<sup>36</sup> This was the *Adoption of Children Act* 25 of 1923.

<sup>37</sup> Act 86 of 1908.

<sup>38</sup> See “2 4 3 1 Introduction”.

<sup>39</sup> In the conclusion I shall make recommendations about the future of customary adoption in South Africa.

Botswana has a dual legal system, which recognises the coexistence of both common law and customary law.<sup>40</sup> Similar to South Africa, Botswana has a great variety of ethnic groups,<sup>41</sup> and the indigenous people of that country are in the majority. Furthermore, the *Adoption of Children Act*<sup>42</sup> is based on the Children's Act<sup>43</sup> of South Africa. Unlike New Zealand, but like South Africa, Botswana currently recognises both customary adoption and statutory adoption.<sup>44</sup> The way in which these two systems operate together will be investigated in this thesis to establish if the South African legislature can learn from these systems and how they are applied in practice.

Various research methods are thus employed in this thesis. The goal is to determine whether intercultural adoption in South Africa is in the best interests of the child, and to find practical, viable solutions where these are needed.

### **1 3 OUTLINE OF CHAPTERS**

Chapter 2 investigates and analyses the history of adoption in South Africa. In order to understand the relevance of the choice of topic, a brief historical overview is necessary. This entails considering the history of adoption in Roman

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<sup>40</sup> Booi *Globalex* at <http://www.nyulawglobal.org/Globalex/Botswana.htm>.

<sup>41</sup> Nsereko *Constitutional Law in Botswana* xxi. More is said about this under "8 1 INTRODUCTION".

<sup>42</sup> *Adoption of Children Act* 1952.

<sup>43</sup> Act 31 of 1937.

<sup>44</sup> Quansah *Family Law in Botswana* 138.

*Chapter 1: Introduction*

law and in Roman-Dutch law, and of customary adoption and statutory adoption in South Africa. The aim of this chapter is to explore the history of adoption in South Africa with regard to the topic of this thesis.<sup>45</sup>

It is not possible to consider adoption and the importance thereof for the child without first considering the relevance and/or importance of a child being able to grow up as part of a family or in a family environment. Chapter 3 explores the importance of a child being raised as part of a family. Different forms of family are explored, as well as the impact on a child's emotional security if he/she grows up either with or without a family. The conclusion that is reached in this chapter is important and sets the foundation for the rest of the thesis.

The important shift in the parent-child relationship from the emphasis on the rights of the parents to the interests of the child, and from parental rights to parental responsibilities,<sup>46</sup> confirms the paramountcy of the best interests of the child as provided for in the Constitution of the Republic of South Africa, 1996.<sup>47</sup> The best interests of the child are analysed in chapter 4. Even though the protection of the best interests of the child cannot escape criticism,<sup>48</sup> the importance of this constitutional standard remains undoubted. Although cultural issues and the best interests of the child are closely linked, these two concepts will be discussed separately.

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<sup>45</sup> See "1 1 RESEARCH PROBLEM" above.

<sup>46</sup> Van Heerden "Parental power" in Van Heerden *et al* *Boberg's Law of Persons and the Family* 657-658; Clark 2002 *CILSA* 216-219.

<sup>47</sup> See s 28(2) of the Constitution.

<sup>48</sup> See "4 2 5 Criticism of the best interests standard".

Chapter 5 consists of an in-depth study of the pivot of this thesis – the influence of race and/or culture<sup>49</sup> on the adoption process. Owing to South Africa’s race-conscious history, the relevance of race and culture are crucial when determining whether intercultural adoption has a realistic future in this country. The exact meanings of the terms “race” and “culture” are investigated, and the constitutional influence on the meaning of these terms, the dilemma of competing rights and the arguments for and against intercultural adoption are considered.

During September 1996 a conference, “Towards redrafting the Child Care Act”, was held at Gordon’s Bay at which a comprehensive review and redrafting of the Child Care Act and all other legislation affecting children was planned.<sup>50</sup> The South African Law Reform Commission began researching and developing a new Children’s Act in 1997. Now, 12 years later, some sections of the Children’s Act have been implemented. Although the chapter dealing with adoption has not yet come into effect, its implementation is expected soon. Until then, the Child Care Act regulates adoption in South Africa. Chapter 6 analyses the two Acts and considers how the provisions of the Children’s Act will influence the concept of the best interests of the child and adoption in general, and specifically intercultural adoption, once it comes into effect.

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<sup>49</sup> Again, the focus of this thesis is culture, not race, but it is impossible to consider the relevance of culture without also considering race.

<sup>50</sup> SALC *Issue Paper 13* 26.

The following two chapters, chapters 7 and 8, compare the position with regard to intercultural adoption in South Africa to that of New Zealand and Botswana. In chapter 7 adoption in New Zealand in terms of customary law as well as adoption in terms of statute are researched. In that country, customary adoption happened long before legislation dealing with adoption was enacted.<sup>51</sup> Customary adoption in New Zealand is no longer legal.<sup>52</sup> In chapter 8, adoption in Botswana is discussed. Today, both customary adoption and statutory adoption are recognised in that country. Chapter 8 investigates how this dual system operates and whether it is in the best interests of the child.

Finally, in chapter 9, a summary is provided and some conclusions are drawn about the research that was undertaken. Lastly, recommendations are made about intercultural adoption and the way forward.

## **1 4 TERMINOLOGY**

In order to simplify the text, I shall try to use consistent terms throughout. Some of these terms need further explanation.

- Adoption: Whenever I use the term “adoption”, it refers to statutory adoption, unless I specify otherwise.

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<sup>51</sup> See “7 2 1 *Adoption of Children Act* 9 of 1881”.

<sup>52</sup> See “7 2 4 *Maori Land Act* 15 of 1909 and the *Maori Affairs Act* 94 of 1953”.

## *Chapter 1: Introduction*

- Biological parent: I use the term “biological parent” instead of “natural parent”. **Natural** parent implies that an adoptive relationship is unnatural, which is of course not true, while **birth** parent can only apply to the child’s mother.
- Black: Whereas a black person is often referred to as an African, I believe everyone who lives in Africa is an African, irrespective of race or culture. I therefore prefer to use the term “black”.
- Interracial and inracial: While there is no real difference between the terms, I use the term “interracial” and “inracial” as opposed to **transracial** and **same race**.

## 2 HISTORICAL OVERVIEW

<b>2 1 INTRODUCTION</b> .....	13
<b>2 2 ROMAN LAW</b> .....	14
<b>2 3 ROMAN-DUTCH LAW</b> .....	18
<b>2 4 SOUTH AFRICAN LAW</b> .....	19
<b>2 4 1 Introduction</b> .....	19
<b>2 4 2 Customary law and adoption</b> .....	20
2 4 2 1 <i>Introduction</i> .....	20
2 4 2 2 <i>Development of adoption in customary law</i> .....	21
<b>2 4 3 Legislation</b> .....	23
2 4 3 1 <i>Introduction</i> .....	23
2 4 3 2 <i>Adoption of Children Act 25 of 1923</i> .....	24
2 4 3 3 <i>Children's Act 31 of 1937</i> .....	27
2 4 3 4 <i>Children's Act 33 of 1960</i> .....	28
2 4 3 5 <i>Child Care Act 74 of 1983</i> .....	34
2 4 3 6 <i>Children's Act 38 of 2005</i> .....	36

### 2 1 INTRODUCTION

Adoption is by no means a twentieth century innovation. It is in fact a very old legal institution. Adoption has taken place through the ages, informally at first and later regulated by laws. References to informal adoption are found in the Bible and in mythology. In *Exodus* it is explained that Moses was rescued

from the reeds along the bank of the Nile and raised by Pharaoh's daughter.<sup>1</sup> According to the Roman legend, Romulus and Remus, the twin sons of Mars, the God of War, and Rhea Silvia, the daughter of the king of Alba Longa, were saved from drowning and reared by a wolf.<sup>2</sup>

The aim of this chapter is to explore the history of adoption in South Africa in so far as it impacts on the topic of this thesis.<sup>3</sup> Customary law has existed in South Africa longer than any other law or legislation, and is the law that was originally applicable in this country.<sup>4</sup> Due to the colonisation of South Africa, Roman-Dutch principles became the basis of South African law. The discussion below starts with a summary of the regulation of adoption in Roman and Roman-Dutch law. After that, the South African customary system and then the South African legislative history of adoption are discussed.

## 2 2 ROMAN LAW

The origins of Rome as well as the starting point of the development of the Roman people before 450 BC are unsure,<sup>5</sup> but, according to Benet, it seems that adoption was always part of Roman law.<sup>6</sup> In ancient Rome, there was

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<sup>1</sup> See *Exodus* 2:1-10. This book forms part of the Pentateuch (the first five books of the Old Testament), and was written approximately 1450-1410 BC.

<sup>2</sup> Benet *Character of Adoption* 22. According to tradition, the period of kings commenced in 735 BC, when Romulus became king. This legend thus originates from the earliest development of Rome and the Roman people: Van Zyl *History and Principles of Roman Private Law* 3, 5.

<sup>3</sup> On the origin of adoption in South Africa see also Ferreira 2007 *Fundamina* 1.

<sup>4</sup> Van Niekerk in Bekker *et al Legal Pluralism* 5.

<sup>5</sup> Van Zyl *History and Principles of Roman Private Law* 3.

<sup>6</sup> Benet *Character of Adoption* 29.

dynastic adoption.<sup>7</sup> The aim of dynastic adoption was to serve family and parental interests since it was vital to influential Roman families that they have heirs and that their names should be carried on by later generations.<sup>8</sup> This type of adoption was a method whereby a person without an heir could acquire one,<sup>9</sup> and thus adoption was aimed at serving the needs of the adoptive parent and family.<sup>10</sup> Only later, by the time of the reign of Justinian, philanthropic adoption came to the fore, which took into account the interests of the children who were to be adopted.<sup>11</sup>

Adoption could take place in one of two ways, which differed in both form and function. *Adrogatio*, an institution which dates back to the time before the Twelve Tables,<sup>12</sup> was a procedure whereby a completely independent person (*sui iuris*) was adopted.<sup>13</sup> The relationship of the adopted person (*adrogatus*) with his former family was totally terminated.<sup>14</sup> The *adrogatus* and his family were placed in the power (*potestas*) of the adopter (*adrogator*).<sup>15</sup> Initially, women<sup>16</sup> and children below the age of puberty (*impuberes*)<sup>17</sup> could not be

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<sup>7</sup> Adoption to provide an heir: Blom-Cooper 1956 *Modern Law Review* 202. This was a fairly common procedure in ancient Rome: Griffith *NZ adoption resource vol 1*.

<sup>8</sup> Van Zyl *History and Principles of Roman Private Law* 92.

<sup>9</sup> Van Warmelo *Introduction to Roman Civil Law* 47; Poste *Gai Institutiones* 1.103; Thomas *Institutes* 1.11.9: adoption took place only in the absence of natural children.

<sup>10</sup> Van Zyl *History and Principles of Roman Private Law* 92. This strong right was seen as being to the benefit of the parent: Sonnekus 1985 *TRW* 74.

<sup>11</sup> Adoption to give a child a family. An ancillary objective was the notion of the family being given a child for the amelioration of family life rather than due to any concept of the perpetuation of kinship: Blom-Cooper 1956 *Modern Law Review* 202.

<sup>12</sup> Van Zyl *History and Principles of Roman Private Law* 92.

<sup>13</sup> Poste *Gai Institutiones* 1.99. According to Van Zyl *History and Principles of Roman Private Law* 93 there had to be an extensive enquiry to establish whether *adrogatio* was in the interest of the child or not. This was because the entire estate of the child would fall under the power of the adoptive parent.

<sup>14</sup> Thomas *Textbook* 437-438; Van Zyl *History and Principles of Roman Private Law* 92.

<sup>15</sup> As mentioned above, this was not to protect the child, but to benefit the head of the household.

<sup>16</sup> Poste *Gai Institutiones* 1.101.

<sup>17</sup> Poste *Gai Institutiones* 1.102.

adopted in this way.<sup>18</sup> An important consequence of this was that a father could not adopt his illegitimate daughter.<sup>19</sup> In classical law women were also incapable of adopting, as they did not even have *patria potestas* over their own children.<sup>20</sup>

*Adoptio* was a later form of adoption than *adrogatio* and was directly related to certain principles of the Twelve Tables and the old *ius civile*.<sup>21</sup> It was the process whereby a dependent person was adopted.<sup>22</sup> The transaction had two parts. There was a preliminary sale, known as *mancipatio*, where a father (*pater*) mancipated or sold his son three times to the intending adoptive father or a third person (a *confidant*). The third mancipation finally terminated the *patria potestas*.<sup>23</sup> Thereafter, there was the act of adoption, where the adopting father claimed the son from the original father.<sup>24</sup> As in *adrogatio*, the adoptee passed fully from the *potestas* of one person into that of another,<sup>25</sup> unless adopted by a family member.<sup>26</sup> The adoptee had no further relationship with his original family unit.

Justinian abolished this form of adoption and replaced it with a far simpler procedure. He dispensed with the sales and considerably altered the

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<sup>18</sup> Schulz *Classical Roman Law* 146-147. According to Thomas *Institutes* 39, Antoninus Pius first allowed adrogation of an *impubes*, and women were first adrogated in the time of Diocletian.

<sup>19</sup> Schulz *Classical Roman Law* 147.

<sup>20</sup> Thomas *Institutes* 1.11.10; Poste *Gai Institutiones* 1.104; Thomas *Textbook* 440; Schulz *Classical Roman Law* 144.

<sup>21</sup> Van Zyl *History and Principles of Roman Private Law* 94.

<sup>22</sup> Thomas *Institutes* 1.11.1; Poste *Gai Institutiones* 1.99; Van Zyl *History and Principles of Roman Private Law* 92.

<sup>23</sup> Poste *Gai Institutiones* 1.132; Van Zyl *History and Principles of Roman Private Law* 94; Dannenbring *Roman Private Law* 311-312.

<sup>24</sup> Poste *Gai Institutiones* 1.134.

<sup>25</sup> Poste *Gai Institutiones* 1.107.

<sup>26</sup> Thomas *Textbook* 441.

consequences of adoption. The two fathers and the *alieni iuris* who was to be adopted would appear before an official. The original father would then declare that he wished to give the child in adoption and this declaration would be recorded by such official in the court register.<sup>27</sup> Justinian also introduced the rule that the *pater adoptans* was to be at least eighteen years older than the person to be adopted.<sup>28</sup> If the adoption was not by a natural ascendant, the effect of the adoption was severely limited in order to protect the person who was adopted.<sup>29</sup> The adoption was *minus plena*, which meant that the adopted person remained in the power of his original *paterfamilias*.<sup>30</sup> He retained his rights of succession against his original *paterfamilias* and did not pass into the *potestas* of his adopter, but acquired the right of intestate succession from his adopter (but not from the latter's relatives).<sup>31</sup> Initially women, not having *potestas*, could not adopt,<sup>32</sup> but Diocletian allowed a woman who had lost her own child to treat her stepson as though he had been born to her (thus basically conferring the right of intestate succession upon the stepson).<sup>33</sup> By the reign of Justinian *adrogatio* of women was permitted,<sup>34</sup> and he retained the provision of Diocletian allowing women to adopt.<sup>35</sup>

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<sup>27</sup> Van Zyl *History and Principles of Roman Private Law* 94; Dannenbring *Roman Private Law* 312.

<sup>28</sup> Van Zyl *History and Principles of Roman Private Law* 94.

<sup>29</sup> Dannenbring *Roman Private Law* 312; Van Warmelo *Introduction to Roman Civil Law* 47. Adoption by a natural ascendant was called *adoptio plena*. Here we see the rights of the adopted child being protected.

<sup>30</sup> Thomas *Institutes* 1.11.2.

<sup>31</sup> Thomas *Institutes* 1.11.2; Thomas *Textbook* 441; Dannenbring *Roman Private Law* 312.

<sup>32</sup> Poste *Gai Institutiones* 1.104.

<sup>33</sup> Thomas *Institutes* 1.11.10; Thomas *Institutes* 39-40.

<sup>34</sup> Van Zyl *History and Principles of Roman Private Law* 93; Schulz *Classical Roman Law* 148.

<sup>35</sup> Thomas *Textbook* 440; Buckland *Textbook of Roman Law* 123-124.

## 2 3 ROMAN-DUTCH LAW

Roman law had no impact on adoption in Holland.<sup>36</sup> As mentioned above, *patria potestas* was acquired by the Romans inter alia through adoption. *Patria potestas* was not recognised in Holland,<sup>37</sup> and parental power in Roman-Dutch law could not be conferred by means of adoption.<sup>38</sup> The adoption of children had fallen into disfavour.<sup>39</sup> In fact, formal adoption was unknown in Holland.<sup>40</sup> In Holland adopted children were not seen as children of the adoptive parents either in status or in wills, and there were no records of adoption procedures.<sup>41</sup> Adoption did not enjoy official recognition in most Western European countries.<sup>42</sup> There is no doubt that informal adoptions took place. In fact, adoption may have been effected by Deeds of Adoption,<sup>43</sup> but as those adopted were not by law considered as children of the adoptive

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<sup>36</sup> Voet *Commentarius* 1.7.7; Gane *Selective Voet* 143. Also see Wessels *Roman-Dutch Law* 417.  
<sup>37</sup> Grotius *Inleydinge* 1.6.3; Lee *Introduction to Roman-Dutch Law* 33; Wessels *Roman-Dutch Law* 445. As adoption was not legally recognised, it did not create a bar to marriage in any way.

<sup>38</sup> Lee *Introduction to Roman-Dutch Law* 38; Van der Linden *Koopmans Handboek* I.IV.II.

<sup>39</sup> Van der Westhuizen 1949 *THRHR* 126.

<sup>40</sup> Grotius *Inleydinge* 1.6.1; Van der Linden *Koopmans Handboek* I.IV.II; De Blecourt *Oud-Vaderlands Burgerlijk Recht* 88. In *Robb v Mealey's Executor* (1899) 16 SC 133 at 135, 136 Innes QC, for the defendant, stated that there was no machinery for adoption in Roman-Dutch law. See also Mosikatsana in Van Heerden *et al Boberg's Law of Persons and the Family* 435 n 2; Spiro *Law of Parent and Child* 4, 62. Although *de facto* adoption probably took place, there was no *de jure* adoption. A possible exception was Friesland. According to Voet *Commentarius* 1.7.7 there was a perception that adoption still existed in Friesland since Frisian statutes never abolished adoption. However, he believes this argument to be weak: Studiosus 1946 *THRHR* 45.

<sup>41</sup> Spiro 1983 *CILSA* 242.

<sup>42</sup> Benet *Character of Adoption* 54-55 looks at adoption through the ages and offers a possible explanation for the rebirth of adoption after the period where no formal adoption was practiced at all. She explains that the “dark ages of adoption” began around the collapse of the Roman Empire in 476. Practices like adoption gave way to the supremacy of blood ties and feudal bonds, and adoption was only reinstated in the English-speaking countries around the end of the nineteenth century. Obviously adoption may have occurred during this time, but because it was *de facto* rather than *de jure*, there is no way of knowing its extent.

<sup>43</sup> According to Judge of Appeal Morley in *Ex parte Leask* [2007] 4 All SA 1018 (D) at 1020. A common-law adoption in fact formed the basis of the application in *Robb v Mealey's Executor* (1899) 16 SC 133 at 136.

parent, these children did not succeed in intestacy to the adoptive father.<sup>44</sup> Once adoption became regulated by statute, however, the position changed.<sup>45</sup>

## 2 4 SOUTH AFRICAN LAW

### 2 4 1 Introduction

As was mentioned above,<sup>46</sup> South African law is based on Roman-Dutch principles, although it has also been influenced by English legal principles. As Dutch law did not recognise adoption, it is not surprising that no record of adoption in South Africa could be found before adoption legislation came into effect in 1923. Although informal adoptions must have taken place, which of course would have included customary adoptions, adoption was not a recognised legal institution in South Africa until 1923, when the Adoption of Children Act<sup>47</sup> came into effect. It was also confirmed in *Robb v Mealey's Executor*<sup>48</sup> that the law of the (then) Cape of Good Hope just before the turn of the twentieth century did not recognise adoption as a measure that created the legal relationship of parent and child.

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<sup>44</sup> *Robb v Mealey's Executor* (1899) 16 SC 133 at 136.

<sup>45</sup> See *Ex parte Hopwood and Savage* 1943 SR 145.

<sup>46</sup> See "2 1 INTRODUCTION" above.

<sup>47</sup> Act 25 of 1923.

<sup>48</sup> (1899) 16 SC 133 at 135-136.

## 2 4 2 Customary law and adoption

### 2 4 2 1 Introduction

Customary law is an integral part of South African law.<sup>49</sup> Until the Interim Constitution<sup>50</sup> it had never been fully recognised as a basic component of the South African legal system,<sup>51</sup> but the status of customary law in South Africa is now constitutionally entrenched.<sup>52</sup> In terms of section 211(3) of the Constitution<sup>53</sup> South African courts are now constitutionally obliged to apply customary law.<sup>54</sup> This section elevates customary law to the same status as the common law.<sup>55</sup>

Customary law is the legal system that is generally applicable to the majority of the black population of South Africa,<sup>56</sup> but the Constitution brought about an important change in the underlying reason for applying customary law. What was previously perceived in strictly separatist racial terms, is now associated with African cultural traditions and is now based on a right to culture.<sup>57</sup> Customary law derives its legitimacy from tradition<sup>58</sup> and social practices that

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<sup>49</sup> *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 478.

<sup>50</sup> Act 200 of 1993.

<sup>51</sup> Bennett *Customary Law in SA* 34.

<sup>52</sup> *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) at 926.

<sup>53</sup> The Constitution of the Republic of South Africa, 1996.

<sup>54</sup> S 211(3): “The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

<sup>55</sup> Bennett in Bekker *et al Legal Pluralism* 17.

<sup>56</sup> Maithufi in Davel *Child Law* 137.

<sup>57</sup> Bennett in Bekker *et al Legal Pluralism* 18. More will be said about this in the chapter “5 RACE VERSUS CULTURE”.

<sup>58</sup> Bennett *Customary Law in SA* 128.

the community concerned accepts as obligatory.<sup>59</sup> Unlike statutory law, it is not a fixed body of formally classified and easily ascertainable rules.<sup>60</sup>

#### 2 4 2 2      *Development of adoption in customary law*

Although Bennett says that adoption is not an established practice of customary law,<sup>61</sup> there is evidence that the possibility of adoption of a child does exist in customary law. Customary adoption is completely different to statutory adoption. Even though the process has the same legal consequences as statutory adoption,<sup>62</sup> there are significant differences in customary adoption and common-law adoption in South Africa.<sup>63</sup>

Adoption in customary law is a private arrangement that involves only the families concerned. The relatives of the adopted child and of the adoptive parents are involved in the adoption process.<sup>64</sup> The child's biological father and the adoptive parents must enter into an agreement (in other words both families have to agree to the adoption)<sup>65</sup> and they should notify their traditional ruler or chief of the adoption.<sup>66</sup> Although the biological mother needs to be informed of the adoption, the decision about the adoption rests with the biological father and his family, who may ignore the wishes of the mother.<sup>67</sup>

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<sup>59</sup> Bennett *Customary Law in SA* 1.

<sup>60</sup> *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 479.

<sup>61</sup> Bennett *Human Rights* 107.

<sup>62</sup> SALC *Project 110* 24; Maithufi 2001 *De Jure* 391, 394.

<sup>63</sup> Bennett *Customary Law in SA* 319.

<sup>64</sup> Maithufi 2001 *De Jure* 391.

<sup>65</sup> Olivier *et al Die Privaatreg van die SA Bantoetaalsprekendes* 462.

<sup>66</sup> Bekker *Seymour's Customary Law* 236.

<sup>67</sup> *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) at 1147. I believe that the non-recognition of the views of the mother in an adoption is not acceptable and not in the best interests of the

The validity of an act of adoption in terms of customary law thus largely depends on the agreement between the two families.<sup>68</sup> Once adopted, the child becomes, for all intents and purposes, the child of the adoptive parent(s).<sup>69</sup>

For a long time there was uncertainty about whether the statutory provisions that govern the procedure and effect of adoption override customary law.<sup>70</sup> In terms of section 18(1)(a) of the Child Care Act<sup>71</sup> adoptions *must* be effected by an order of a children's court. However, in *Kewana v Santam Insurance Co Ltd*<sup>72</sup> the Court held that the previous Act, the Children's Act,<sup>73</sup> did not modify or replace adoption under customary law.<sup>74</sup> In the earlier case of *Zibi v Zibi*<sup>75</sup> it was held unnecessary to comply with the statutory provisions of the Adoption of Children Act. Thus, the customary system of adoption does not have to comply with the requirements of the Child Care Act to be valid.<sup>76</sup>

Under customary law, adoption is the solution sought by a man who has no sons or no heir to inherit property and carry on the deceased's family name.<sup>77</sup>

Where a family head has no sons, he may adopt a boy for the express

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child. It would be preferable if both parents had to consent to the adoption, as is the case with statutory adoption.

<sup>68</sup> Maithufi 2001 *De Jure* 391-392; SALC *Project 110 24*.

<sup>69</sup> Maithufi 2001 *De Jure* 392.

<sup>70</sup> Bennett *Customary Law in SA* 320.

<sup>71</sup> Act 74 of 1983.

<sup>72</sup> 1993 (4) SA 771 (TkA).

<sup>73</sup> Act 33 of 1960, which regulated adoption before the Child Care Act.

<sup>74</sup> At 776. In *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) at 1150 Judge Bertelsmann held that a customary adoption was valid, even though there was a formal defect in the particular adoption.

<sup>75</sup> 1952 (2) NAC 167 (S) at 170.

<sup>76</sup> Also see Maithufi 2001 *De Jure* 390, 394. In *Flynn v Farr* 2009 (1) SA 584 (C) an application was brought for the recognition of *de facto* adoption, but this application was quite correctly turned down by the court.

<sup>77</sup> Bennett *Customary Law in SA* 319; SALC *Project 110 25*; Bennett *Human Rights* 107; Maithufi 2001 *De Jure* 392.

purpose of making the child his heir. He will usually try to obtain the son of a closely related family head in his own family group.<sup>78</sup> Bennett equates this custom with the Roman-law concept of *adoptio*, the purpose of which was simply to perpetuate the adopter's bloodline.<sup>79</sup> The child becomes a full member of the adoptive family and his/her ties with the biological family are terminated.<sup>80</sup> Another reason may be to strengthen the adoptive family with more children, or to safeguard the interests of the child in the case where his/her biological parents cannot afford to maintain him/her.<sup>81</sup> Both males and females may adopt a child in terms of customary law,<sup>82</sup> and both boys and girls may be adopted.<sup>83</sup> More will be said about the reasons for adopting in customary law in other chapters.<sup>84</sup>

### 2 4 3 Legislation

#### 2 4 3 1 Introduction

Van der Merwe and Rowland have suggested<sup>85</sup> that the South African legislature was possibly influenced by English law when it enacted the first

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<sup>78</sup> Bekker *Seymour's Customary Law* 284; Olivier *et al Die Privaatreg van die SA Bantoetaalsprekendes* 462.

<sup>79</sup> Bennett *Customary Law in SA* 319. Also see "2 2 ROMAN LAW".

<sup>80</sup> Olivier *et al Die Privaatreg van die SA Bantoetaalsprekendes* 462; Bekker in Robinson *Law of Children and Young Persons* 193.

<sup>81</sup> SALC *Project 110* 25. Even though the SALC provides this reason for adoption in terms of customary law, authors who refer to customary adoption maintain that adoption under customary law takes place to provide a man with an heir. It is thus my contention that customary adoption that protects the interests of the child probably does not take place very often.

<sup>82</sup> SALC *Project 110* 27; Maithufi 2001 *De Jure* 392. It is unusual for a single woman to adopt a child in customary law, but it was held in *Kewana v Santam Insurance Company Limited* 1993 (4) SA 771 (TCA) at 774 that it is possible.

<sup>83</sup> Bekker *Seymour's Customary Law* 236.

<sup>84</sup> See "4 THE BEST INTERESTS OF THE CHILD" and "5 RACE AND CULTURE".

<sup>85</sup> See Van der Merwe & Rowland *Suid-Afrikaanse Erfreg* 83.

adoption legislation. They based their view on the statement in *Wille's Principles of South African Law*<sup>86</sup> that the English legislation on adoption at the time<sup>87</sup> was practically identical to ours. At first glance this seems to be a valid observation. Upon closer inspection, however, it becomes clear that the South African legislature did not base its first adoption legislation on English law, for England's *Adoption of Children Act*<sup>88</sup> (the first adoption law in England) was enacted in 1926,<sup>89</sup> whereas the South African Adoption of Children Act was already enacted in 1923.<sup>90</sup> The Debates of the House of Assembly on South Africa's adoption legislation indicate that, although it was not an exact copy, the Bill, which preceded the 1926 Act was, in fact, modelled on the *Infants Act*<sup>91</sup> of New Zealand.<sup>92</sup>

#### 2 4 3 2      *Adoption of Children Act 25 of 1923*

The sole aim of the Adoption of Children Act was to provide for the adoption of children, and it was the first piece of legislation in South Africa to regulate adoption. The Bill to provide for the adoption of children<sup>93</sup> was first read on 30 January 1923 in the House of Assembly of the Union of South Africa by a Mr

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<sup>86</sup> Gibson *Wille's Principles of South African Law* 80.

<sup>87</sup> Gibson refers to the "Adoption of Children Act, England, 1927", but presumably this is a typing error, as this piece of legislation was enacted in 1926.

<sup>88</sup> 16 & 17 Geo 5 c 29 (1926).

<sup>89</sup> According to Benet *Character of Adoption* 72, it was the First World War that pushed England into adoption legislation because there were so many war orphans.

<sup>90</sup> I believe that the statement in *Wille's Principles of South African Law* might have suggested the complete opposite to Van der Merwe & Rowland's interpretation. It is, in fact, quite possible that the English Act may have been modelled on the earlier South African legislation. This was not investigated.

<sup>91</sup> Act 86 of 1908.

<sup>92</sup> At the second reading of the Bill on 15 March 1923, Mr Feetham indicated that it was modelled on New Zealand's *Infants Act*.

<sup>93</sup> The Adoption of Children Bill 25 of 1923.

R Feetham, a member of the House of Assembly.<sup>94</sup> On the day of the second reading of the Adoption of Children Bill,<sup>95</sup> Mr Feetham gave a lengthy presentation that explained the need to formalise adoption in South Africa, saying that this need arose because of the number of informal adoptions which took place.<sup>96</sup> The rights of the natural parents remained unaffected, and any possible agreement that might have been entered into between the natural parents and the adoptive parents was not considered binding by the courts. He concluded that the adoptive parents had no legal rights over the children. He further explained that many people shied away from adoption because of the insecurity of their position, even though they might have been able to provide the children with a good home. He concluded that this situation resulted in a loss not only for the prospective parents and the children, but also for the state, because these children were brought up in institutions instead of family homes.<sup>97</sup> The Bill was passed on 12 June 1923,<sup>98</sup> and on 21 June 1923 the Minister of Justice<sup>99</sup> (on behalf of the Prime Minister) announced that the Governor-General, in the name and on behalf of His Majesty the King, assented to the Adoption of Children Act. The Act was

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<sup>94</sup> This was reported in the *Cape Times* on 31 January 1923, and reproduced in the “Debates of the House of Assembly of the Union of South Africa as reported in the *Cape Times* 20<sup>th</sup> November, 1915 – 25<sup>th</sup> June, 1923” at 31.

<sup>95</sup> On 15 March 1923, as reported in the *Cape Times* on 16 March 1923 and reproduced in the “Debates of the House of Assembly of the Union of South Africa as reported in the *Cape Times* 20<sup>th</sup> November, 1915 – 25<sup>th</sup> June, 1923” at 159.

<sup>96</sup> Contributions were also made by a number of other people. In this regard, it should be noted that informal adoptions still exist today and are still not recognised – see *Flynn v Farr* 2009 (1) SA 584 (C).

<sup>97</sup> Mr Feetham acknowledged the great service that the State provided, but added that an institution could never take the place of a family home.

<sup>98</sup> The Dutch version was signed by the Governor-General.

<sup>99</sup> Senator, the *Hon* NJ de Wet KC.

promulgated in the Government Gazette,<sup>100</sup> and it came into operation on 1 January 1924.<sup>101</sup>

The aim of the Adoption of Children Act was solely to provide for the adoption of children. According to Joubert<sup>102</sup> the underlying object of the Act was to create an institution whereby the existing legal bonds between a child and its natural parents or guardians could be severed and a new legal bond created between the adoptive parents and the adopted child.

In general, the South African legislature made every attempt to ensure the protection of adopted children. The adoption of a child<sup>103</sup> was confirmed by a magistrate, but only if the welfare and interests of the child would be promoted by the adoption.<sup>104</sup> For the purposes of the topic of this thesis, the most interesting thing is that this Act did not disallow interracial and/or intercultural adoption. There was no indication that race or culture<sup>105</sup> had to be considered in any way before an adoption could take place. This meant that theoretically it was possible to have a legally binding interracial and/or intercultural adoption. Interracial adoptions, in particular, were unlikely to have occurred however. It has to be assumed that this aspect was not regulated because the

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<sup>100</sup> GG 1330 of 30 June 1923, Government Notice 1074.

<sup>101</sup> GG 1353 of 30 November 1923, Proclamation 244.

<sup>102</sup> 1993 *SALJ* 726.

<sup>103</sup> A boy or girl who was, in the opinion of the court that exercised jurisdiction under this Act, under the age of sixteen years – s 1. If the child was over the age of ten years, he or she had to consent to the adoption – s 4(1)(d).

<sup>104</sup> S 4(1)(c) of the Act.

<sup>105</sup> It will be argued in “5 RACE VERSUS CULTURE” that the concepts of race and culture are not the same.

legislature probably did not even consider the possibility of anybody wanting to adopt a child of a race or culture different to their own.<sup>106</sup>

### 2 4 3 3 *Children's Act 31 of 1937*

When the Adoption of Children Act became outdated,<sup>107</sup> it was replaced by the Children's Act of 1937.<sup>108</sup> The latter Act was assented to on 13 May 1937<sup>109</sup> and came into operation on 18 May 1937. The aim of the Act was much wider than that of the Adoption of Children Act. It addressed all issues relating to children, not just adoption. Chapter VII dealt with the adoption of children, who could now be adopted up to the age of nineteen years.<sup>110</sup> An adoption was effected by an order of a children's court of the district in which the adopted child resided,<sup>111</sup> and the court could not grant such application unless it was satisfied inter alia that the proposed adoption would serve the interests and was conducive to the welfare of the child.<sup>112</sup> Although the Act did stipulate that the court had to be satisfied that the applicant(s) were fit and proper to be entrusted with the custody of the child,<sup>113</sup> it once again contained no reference to race or culture and thus did not prohibit interracial and/or

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<sup>106</sup> Mosikatsana 1995 *SALJ* 607 says that no such adoptions are known to have taken place. See also Joubert 1993 *SALJ* 726, where he says that no such adoptions were known, and adds that it can be accepted that such adoptions would have run counter to the accepted social views of the time.

<sup>107</sup> Verloren van Themaat 1939 *THRHR* 192.

<sup>108</sup> To prevent confusion, this Act will be referred to as the Children's Act of 1937.

<sup>109</sup> The Afrikaans text was signed by the Governor-General on that day.

<sup>110</sup> In terms of s 1 of the Act, a child meant a person under the age of nineteen years and included an infant. In terms of s 69(2)(e) a child, if over the age of ten years, had to consent to an adoption.

<sup>111</sup> S 69(1).

<sup>112</sup> S 69(2)(c).

<sup>113</sup> S 69(2)(b).

intercultural adoption. Mosikatsana<sup>114</sup> believes that this omission was because racism was already so firmly rooted in the national psyche that it was assumed that there was no need for legislative intervention in this regard. The Children's Act of 1937 was in turn replaced by the Children's Act of 1960.

#### 2 4 3 4      *Children's Act 33 of 1960*

This Act, which came into operation on 14 April 1960,<sup>115</sup> was wide in its scope.<sup>116</sup> A child was defined<sup>117</sup> as any person, including an infant,<sup>118</sup> who was under the age of eighteen years. Very importantly, in this Act the first reference since the legislative introduction of adoption legislation in South Africa was made to race. By this stage, various legislative interventions aimed at racial segregation had been introduced,<sup>119</sup> but this Act was the first in which race was brought into the parent-child relationship. The Children's Amendment Act<sup>120</sup> brought about the insertion of a definition of a "black" (originally defined as "Bantu") person,<sup>121</sup> and specifically a definition of a "Black children's court" (originally defined as a "Bantu children's court").<sup>122</sup>

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<sup>114</sup> Mosikatsana 1995 *SALJ* 607.

<sup>115</sup> The Act, of which the Afrikaans text was signed by the Governor-General, was assented to on 7 April 1960. To avoid confusion, this Act will be referred to as the Children's Act of 1960.

<sup>116</sup> It provided for various issues relating to children, including the appointment of commissioners of child welfare, the establishment of children's courts, the protection and welfare of certain children, and the adoption of children.

<sup>117</sup> S 1.

<sup>118</sup> An infant was defined in s 1 as "a person under the age of seven years".

<sup>119</sup> Immorality Act 5 of 1927 (later renamed the Sexual Offences Act 23 of 1957); Prohibition of Mixed Marriages Act 55 of 1949; Population Registration Act 30 of 1950.

<sup>120</sup> Act 74 of 1973.

<sup>121</sup> Defined in s 1 as "a person who is or is to be classified as a black under the Population Registration Act, 1950".

<sup>122</sup> S 1(f) of this Act defined a "Bantu children's court" as a "Bantu children's court established by or under section 5 and includes a native children's court so established". In the Children's Act of 1937 "children's courts" was described in s 4(1). With regard to the children's courts, no distinction based on race was made, even though a distinction was made between the Minister of Justice and the Minister of Native Affairs.

The Children's Act of 1960 *inter alia* provided for the adoption of children in chapter VII, which contained general and supplementary issues. Nowhere in chapter VII was interracial adoption prohibited, but section 35(2) of this Act<sup>123</sup> set a pattern for interracial placement law in South Africa that has influenced adoption ever since.<sup>124</sup> It first introduced the terms "culture" and "ethnological grouping" into South African adoption legislation. Section 35(2), later to become section 35(2)(a),<sup>125</sup> 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 **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 [my emphasis].

It remained to be seen what was meant by the phrase "regard shall be had".

In 1964, section 35(2) was tested in a court case, *Joffin v Commissioner of Child Welfare, Springs*.<sup>126</sup> An illegitimate child was born to a mother who was a member of the Dutch Reformed Church and she gave the baby up for adoption. She consented to the child's adoption by a Jewish couple, but because of the vast religious differences, the Commissioner refused the

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<sup>123</sup> Read with s 71(1)(b).

<sup>124</sup> On 8 January 1960 clause 1(x)(j) of the Children's Bill of 1960 was published in GG 6347. This clause would have made it possible for a child to be forcibly and permanently removed from its family purely upon the ground of a difference in race classification between the child and its parents or other guardian. It was however withdrawn before it could become law. Zaal 1992 *Journal of SA studies* 390 emphasises the importance of this clause, by indicating that it provided strong evidence that ideological considerations (as opposed to considerations of the child's interests) had influenced governmental thinking as far as child placement was concerned in the late 1950s.

<sup>125</sup> This was when subs 35(2)(b) and 35(2)(c) were added by the Children's (Amendment) Act 50 of 1965 (hereafter the Children's Amendment Act of 1965).

<sup>126</sup> 1964 (2) SA 506 (T).

adoption and the matter went to court. The first question to be answered was whether section 35(2) provided for a discretion or was mandatory.<sup>127</sup> After referring to the English cases of *Illingworth v Walmsey*<sup>128</sup> (in which the words “regard shall be had to” were held to mean “bear in mind” and to give a discretion) and *Perry v Wright*<sup>129</sup> (in which similar words were said to be a guide, not a fetter), Ludorf J came to the conclusion that the words “have regard to” were not mandatory but simply meant “bear in mind” or “do not overlook” and thus gave the court adjudicating the adoption a discretion.<sup>130</sup> The adoption was granted. Joubert<sup>131</sup> interpreted this decision to mean that the court could legally permit interracial adoptions.

The Children’s Amendment Act of 1965 added two further subsections to section 35(2), namely subsections 35(2)(b) and 35(2)(c). The subsections read as follows:

- (b) Any illegitimate child whose classification in terms of the Population Registration Act, 1950 (Act 30 of 1950), 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 [my emphasis].

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<sup>127</sup> At 508.

<sup>128</sup> (1900) 2 QBD 142.

<sup>129</sup> (1908) 1 KB 441.

<sup>130</sup> At 508.

<sup>131</sup> Joubert 1993 SALJ 727.

Thus, because of section 35(2)(c) a child would never have been placed in the custody of a person of a different race to the child even if the biological mother had given her consent to such a placement. Section 71(1)(b) of the Children's Act of 1960 dealt with adoption requirements and also stipulated that "the court shall have regard to all the matters mentioned in subsection (2) of section *thirty-five*", which included reference to the racial prohibitions in section 35(2)(c).

In 1979 section 35(2)(c) and section 71(1)(b) came under scrutiny from the (then) Supreme Court in the matter of *Ex parte Kommissaris van Kindersorg: In Re NL*.<sup>132</sup> The Supreme Court provided some guidance on the question of whether sections 35(2)(c) and 71(1)(b) of the Children's Act of 1960 should be read together as entirely prohibiting interracial adoptions by applicants who were not biological parents.<sup>133</sup>

In *In Re NL* a child, whose natural parents were both coloured, was placed with a couple (the husband was coloured and his legitimate wife, Mrs W, was black) for adoption. Subsequent to their marriage the wife had been redesignated "coloured" by virtue of section 12(1)(c)(ii) of the Group Areas Act.<sup>134</sup> Before the adoption was finalised, however, the prospective adoptive

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<sup>132</sup> 1979 (2) SA 432 (T) - hereafter referred to as "*In Re NL*".

<sup>133</sup> Zaal 1992 *Journal of SA Studies* 392.

<sup>134</sup> Act 36 of 1966. In terms of this section any woman, to whichever race, tribe or class she may belong, who is married to or cohabits with a person who is not a member of the white group or of the Bantu group, belongs to a coloured group.

father died. The wife thus reverted back to African status,<sup>135</sup> although she was allowed to stay on in the Coloured community after her husband died.<sup>136</sup> The social worker approved of and supported the adoption because Mrs W had associated herself completely with the coloured community and regarded herself as coloured. Although he at first signed the consent form for the adoption, the Children's Commissioner of Boksburg was of the opinion that the adoption would be illegal because section 35(2)(c) of the Children's Act of 1960 prohibited the adoption of a child by someone of a different race to the child. He referred the matter to the (then) Supreme Court. The Supreme Court, as upper guardian of all minors, decided that section 71(1)(b) of the Children's Act of 1960 meant that section 35(2)(c) could not be seen as a complete ban on interracial adoptions by applicants who were not biological parents.<sup>137</sup> Judge Esselen said that it would not be in the interest of the child or anybody else to set aside the adoption just because the court did not consider section 35(2)(c), and that it has to be borne in mind that the welfare of the child is of the utmost ("allegrootste" (sic)) importance. He added that he was satisfied that the Commissioner of Child Welfare would not necessarily have made a different decision if he had indeed taken section 35(2)(c) into account.<sup>138</sup> The Supreme Court confirmed the adoption order, but this did not mean that interracial placements were now acceptable. As Zaal subsequently indicated, interracial adoption would only be permissible in a situation where

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<sup>135</sup> The Group Areas Act did not provide for the occasion where a s 12(1)(c)(ii) marriage (see n 134) is terminated, but it has to be presumed that she would revert to African status, as the wording "who is married" in s 12(1)(c)(ii) in my opinion indicates that the section only applies while such a marriage exists. This is also the opinion of Zaal 1992 *Journal of SA Studies* 393.

<sup>136</sup> At 433.

<sup>137</sup> At 434. A similar decision was reached in an unreported case, case H 19/79, decided in the Transvaal Division of the Supreme Court of South Africa (now the North Gauteng High Court), as discussed in Coetzer 1979 *The Magistrate* 214.

<sup>138</sup> At 435.

“the prospective adoptive parent had committed cultural suicide and thus effectively belonged to a population group appropriate for the child”.<sup>139</sup> Furthermore, it is submitted that if the child had not been left with Mrs W “by mistake” after her husband’s death, the court would not have found that the adoption was in the interest of the child, and the adoption would never have been confirmed by the court.<sup>140</sup> Regarding Joubert’s belief that interracial adoptions were possible,<sup>141</sup> Mosikatsana,<sup>142</sup> quite correctly I believe, argues that Joubert failed to take into account the practical implications of section 35(2)(c), such as the child not being able to live with the adoptive parents or attend a school in the adoptive parents’ residential area without violating the Group Areas Act.

According to Zaal the pattern of adoption did not change much after the *In Re NL* decision. He says<sup>143</sup> that, throughout the 1980s, race-matching remained the norm in child placements, and where differences in race classification intervened between a child and a prospective caregiver, child welfare agencies were forced to resort to an application for the reclassification of one of the parties. This reclassification, Zaal says, was not easily achieved and even when it was achieved, it often created other problems like terminating an adult’s residential rights in the neighbourhood where he or she had a home, or in the case of a child, terminating his or her right to continue schooling amongst peers with whom the child had previously built up important relationships.

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<sup>139</sup> Zaal 1994 *SAJHR* 376-377.

<sup>140</sup> At 435.

<sup>141</sup> This is discussed under “2 4 3 4 *Children’s Act 33 of 1960*” above.

<sup>142</sup> Mosikatsana 1995 *SALJ* 609.

<sup>143</sup> Zaal 1994 *SAJHR* 376.

2 4 3 5      *Child Care Act 74 of 1983*

The Child Care Act<sup>144</sup> (which has the aim inter alia to provide for adoption) has for the past 26 years been the instrument that regulates adoption in South Africa,<sup>145</sup> and chapter 4 (sections 17-27) currently sets out the legal framework for adoptions in South Africa. The replacement of the Children's Act of 1960 by the Child Care Act unfortunately did not bring about much change in so far as interracial adoptions are concerned.<sup>146</sup>

Sections 18(3), 18(4) and 40 of the Child Care Act are relevant to the topic of this thesis. Section 18(4) prescribes the requirements that have to be met before an adoption order may be granted. In terms of subsection 18(4)(c) the overriding factor that the children's court must consider<sup>147</sup> is whether the adoption will "serve the interests and conduce to the welfare of the child". Section 18(3) provides that in considering an application for adoption the children's court must have regard to the matters mentioned in section 40. At least the reference to "ethnological grouping"<sup>148</sup> disappeared, but the main provision barring interracial placements in the Children's Act of 1960, namely section 35(2)(c), was taken over verbatim as section 40(b) of the Child Care Act. The obvious conclusion is that this resulted in the status quo concerning

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<sup>144</sup> This Act came into operation on 1 February 1987.

<sup>145</sup> This will soon change, when the relevant sections of the Children's Act 38 of 2005 come into operation.

<sup>146</sup> Zaal 1992 *Journal of SA Studies* 395.

<sup>147</sup> According to Schäfer & Schäfer in Robinson *Law of Children* 78.

<sup>148</sup> See s 35(2)(a) of the Children's Act.

interracial adoption being maintained. When it was originally enacted, section 40 provided that:

- (a) **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; and
- (b) a child shall not be placed in or transferred to 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 [my emphasis].

Following the repeal of section 40(b) of the Child Care Act in 1991,<sup>149</sup> interracial adoptions became a reality in South Africa. Section 40(a), dealing with adoption across cultural or religious boundaries, was retained though and has led to much debate about the desirability of interracial adoption.<sup>150</sup> Section 40 currently reads as follows:

... 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.

Chapter 6 of this thesis deals with adoption as it is presently regulated.

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<sup>149</sup> This was done by s 14 of the Child Care Amendment Act 86 of 1991.

<sup>150</sup> As will be seen, intercultural adoption is so closely related to interracial adoption, that the two concepts will be discussed together — see “5 3 RACE AND CULTURE – IS THERE A DIFFERENCE?”.

2 4 3 6 Children's Act 38 of 2005

The Children's Act of 2005<sup>151</sup> was gazetted on 19 June 2006, and certain provisions came into effect on 1 July 2007. Although the sections dealing with adoption have not yet come into operation, the Child Care Act will eventually be replaced in totality by the Children's Act of 2005. When this happens, some major changes will occur in the adoption process.

Chapter 15 of the Children's Act of 2005 (sections 228-253) deals with adoption. Whereas chapter 4 of the Child Care Act<sup>152</sup> contains 11 sections, chapter 15 of the Children's Act of 2005 contains 26 sections. This excludes intercountry adoption, which is covered by a further 20 sections in chapter 16 of the Children's Act. As far as adoption is concerned, the Children's Act of 2005 is thus far more comprehensive than the Child Care Act.

In any matter concerning a child, the best interests of the child are of paramount importance.<sup>153</sup> The best interests of the child are, correctly so, likewise regarded as paramount in the Children's Act of 2005.<sup>154</sup> The question that needs to be answered is whether the best interests of a prospective adopted child will be served by the new adoption legislation if the child and the prospective adoptive parents belong to different cultural groups. Section 240(1)(a) of the Children's Act of 2005 provides that the court considering the

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<sup>151</sup> This Act was gazetted in GG 28944 on 19 June 2006. To avoid confusion, this Act will be referred to as the Children's Act of 2005.

<sup>152</sup> Chapter 4 deals with adoption.

<sup>153</sup> See s 28(2) of the Constitution; see also *Fletcher v Fletcher* 1948 (1) SA 130 (A).

<sup>154</sup> S 9.

adoption of a child must take into account all relevant factors, including the religious and cultural background of the child, the child's parents and the prospective adoptive parent. This reflects the reality (which is not evident in the Child Care Act) that there may be other relevant factors besides religion and culture which should be taken into account when an application for an adoption is considered. Adoption of a child by someone of a different racial classification to the child is not prohibited in terms of the Children's Act of 2005. The Act does not even list race as a factor in respect of adoption or the child's best interests.

In chapter 6<sup>155</sup> attention will be given to the provisions of the Child Care Act and the Children's Act of 2005 that relate to the topic of this thesis.

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<sup>155</sup> See "6 THE CHILD CARE ACT AND THE CHILDREN'S ACT".

## 3 THE CHILD AND THE FAMILY

<b>3 1 INTRODUCTION</b> .....	40
<b>3 2 FAMILY CARE, PARENTAL CARE AND APPROPRIATE ALTERNATIVE CARE</b> .....	42
<b>3 2 1 Family care</b> .....	42
3 2 1 1 <i>Introduction</i> .....	42
3 2 1 2 <i>What is a family?</i> .....	42
3 2 1 3 <i>Types of family</i> .....	46
3 2 1 4 <i>Family care and the Constitution</i> .....	50
3 2 1 5 <i>Family care and international instruments</i> .....	53
3 2 1 6 <i>Family care and the Child Care Act</i> .....	56
3 2 1 7 <i>Family care and the Children’s Act</i> .....	56
3 2 1 8 <i>Family care and adoption</i> .....	57
<b>3 2 2 Parental care</b> .....	58
3 2 2 1 <i>Introduction</i> .....	58
3 2 2 2 <i>Family care versus parental care</i> .....	59
3 2 2 3 <i>Parental care and the Constitution</i> .....	60
3 2 2 4 <i>Parental care and international instruments</i> .....	61
3 2 2 5 <i>Parental care and the Child Care Act</i> .....	63
3 2 2 6 <i>Parental care and the Children’s Act</i> .....	63
3 2 2 7 <i>Parental care and adoption</i> .....	64
<b>3 2 3 Appropriate alternative care</b> .....	64
3 2 3 1 <i>Introduction</i> .....	64
3 2 3 2 <i>The role of the State and the Constitution</i> .....	65
3 2 3 3 <i>Alternative care and international instruments</i> .....	68
3 2 3 4 <i>Alternative care and the Child Care Act</i> .....	70
3 2 3 5 <i>Alternative care and the Children’s Act</i> .....	71

3 2 3 6 Alternative care and adoption .....	72
<b>3 3 ATTACHMENT</b> .....	72
<b>3 3 1 Introduction</b> .....	72
<b>3 3 2 The theory behind attachment</b> .....	74
3 3 2 1 What is attachment?.....	74
3 3 2 2 How are attachments formed? .....	76
3 3 2 3 When are attachments formed?.....	79
<b>3 4 CONCLUSION</b> .....	83

### 3 1 INTRODUCTION

The importance of children growing up in a stable family environment where they can form lasting psychological bonds with family members can hardly be over-emphasised.<sup>1</sup> It is parents and other family members who, in the first instance, have the duty to assist a child to develop into a rational adult.<sup>2</sup> Section 28(1)(b) of the Constitution recognises this reality by giving every child the right “to family care or parental care, or to appropriate alternative care when removed from the family environment”.<sup>3</sup> This section acknowledges the importance for a child to grow up within a family environment<sup>4</sup> and affects one of the most basic of private-law relationships, namely the relationship between parent and child. As will be

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<sup>1</sup> Kruger 2006 *THRHR* 452.

<sup>2</sup> Kruger 2006 *THRHR* 452.

<sup>3</sup> S 28(1)(b) of the Constitution of the Republic of South Africa, 1996. Hereafter referred to as “the Constitution”.

<sup>4</sup> Robinson 1998 *Obiter* 335.

seen below,<sup>5</sup> it is in the best interests of a child to grow up as part of a family if at all possible. It is not always possible though for a child to be raised by his/her biological parents. This being so, it is appropriate to consider adoption, which offers a child the opportunity to experience “family care or parental care, or ... appropriate alternative care when removed from the family environment”.<sup>6</sup>

The word “care” in this context clearly acknowledges that children are vulnerable and need to be assisted to overcome their own vulnerability and lack of maturity relating to judgement and experience.<sup>7</sup> What has to be determined is what “family care”, “parental care” and “appropriate alternative care” actually mean.

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<sup>5</sup> See “3 3 ATTACHMENT”. Also see “4 3 ATTACHMENT AND ADOPTION”.

<sup>6</sup> See “3 2 1 7 *Family care and adoption*”, “4 2 2 2 *The Convention on the Rights of the Child*” and “4 2 2 4 *International instruments and adoption*”.

<sup>7</sup> Robinson 1998 *Obiter* 333.

## 3 2 FAMILY CARE, PARENTAL CARE AND APPROPRIATE ALTERNATIVE CARE

### 3 2 1 Family care

#### 3 2 1 1 Introduction

The family is the central organising structure of society.<sup>8</sup> In fact, an upbringing within a family is the optimum form of child care.<sup>9</sup> The family is regarded as the primary institution within which the child must grow up.<sup>10</sup> Today families can be defined in many ways. I shall attempt, in the following paragraphs, to establish what a family is in the South African context.

#### 3 2 1 2 What is a family?

It is difficult to find a suitable definition for the word “family”. There is no consensus in South African society as to what constitutes a family.<sup>11</sup> Bonthuys<sup>12</sup> explains that families can be defined in many ways, ranging from the western nuclear family to extended family groups<sup>13</sup> and families where there is no genetic tie.<sup>14</sup> Human explains that the description of family in a traditional African

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<sup>8</sup> Mosikatsana 1996 *SAJHR* 549.

<sup>9</sup> Eekelaar *Family Law* 190.

<sup>10</sup> Robinson 1998 *Obiter* 333. See also Cronjé & Heaton *Family Law* 51.

<sup>11</sup> Mosikatsana 1996 *SAJHR* 549; Van der Linde 2000 *De Jure* 3.

<sup>12</sup> Bonthuys 1997 *SAJHR* 633-634.

<sup>13</sup> Such as are found in customary law.

<sup>14</sup> An example would be an adoptive family.

community differs from the description of a family in a typical Western community. She says in a traditional African community it is usually the extended family that is referred to in this regard.<sup>15</sup> Robinson<sup>16</sup> believes the term “family” includes both the nuclear family and the extended family.

In customary law, the idea of an extended family as an African tradition is firmly rooted in popular imagination.<sup>17</sup> The most important unit is the family,<sup>18</sup> which consists of the family head<sup>19</sup> and his wife or wives and children.<sup>20</sup> Each wife creates a house, which is a group distinct from any other house.<sup>21</sup> In terms of the South African common law, the term “family” is restricted to an institution which comprises a union between a husband and a wife who are legally married and their offspring.<sup>22</sup> This “narrow, more archaic definition” refers to spouses in a valid marriage.<sup>23</sup> Van der Linde<sup>24</sup> confirms that this traditional family is often considered to be the true family. However, the legislature has now recognised the changing nature of the traditional family. The Recognition of Customary Marriages Act<sup>25</sup> gave official recognition to customary marriages for the first time in South African legal history, and civil unions, which are now equivalent to civil

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<sup>15</sup> Human 2000 *SAPL* 380.

<sup>16</sup> Robinson 1998 *Obiter* 335.

<sup>17</sup> Bennett *Customary Law in SA* 180.

<sup>18</sup> The family is the essence of customary law, and family relationships are of fundamental importance as far as customary law is concerned – Jansen in Bekker *et al Legal Pluralism* 31.

<sup>19</sup> Bekker *Seymour’s Customary Law* at 71 defines a family head as a Black male who has married one or more wives by customary rites.

<sup>20</sup> Bekker *Seymour’s Customary Law* 69.

<sup>21</sup> Bekker *Seymour’s Customary Law* 70.

<sup>22</sup> Robinson 1998 *Obiter* 332. Robinson makes the submission that the exclusivity relates not only to marriage as defined in the common law (see “3 2 1 3 *Types of family*”), but also to the family concept.

<sup>23</sup> Cronjé & Heaton *Family Law* 3.

<sup>24</sup> Van der Linde 2000 *De Jure* 4.

<sup>25</sup> Act 120 of 1998, as discussed under “3 2 1 3 *Types of family*”.

marriage, have also been legalised.<sup>26</sup> I will refer to these families as the nuclear family.

Used in a wide sense, the family includes all people who are blood relations or have become related through adoption or marriage, as well as the family unit which is created by people who have entered into a marriage-like relationship.<sup>27</sup> I will refer to these families as the extended family. The *Oxford Student's Dictionary* defines **family** as “parents and their children, sometimes including grandchildren and other relatives”.<sup>28</sup> This definition is in line with the modern view of the extended family.

Van der Linde is of the view that a revision of the definition of a family is essential to include the diverse families that exist in practice, and that the term “family” means different things for different people.<sup>29</sup> Our courts have also recognised the changing nature of the modern family. In *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*<sup>30</sup> the court held that the family is the **natural** and **fundamental** unit of our society, but that the definition of family also changes as social practices and traditions change, and that we must take care not to entrench particular forms of family at the expense of other forms.<sup>31</sup> In *National Coalition for Gay & Lesbian Equality v*

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<sup>26</sup> Civil unions are discussed under “3 2 1 3 Types of family”.

<sup>27</sup> Cronjé & Heaton *Family Law* 3.

<sup>28</sup> Allen & Delahunty *Oxford Student's Dictionary* 367.

<sup>29</sup> Van der Linde 2000 *De Jure* 5.

<sup>30</sup> 2000 (3) SA 936 (CC).

<sup>31</sup> At 960.

*Minister of Home Affairs*<sup>32</sup> the court emphasised that an important process of transformation had taken place in family relationships, as well as in societal and legal concepts regarding the family and what it comprises.<sup>33</sup> Van der Linde<sup>34</sup> sums it up well when he explains that the concept of a family is difficult to define because it has a dynamic core.

As already mentioned, the use of the word “family” could refer to either the nuclear family or the extended family, and there are different opinions about the exact meaning of the word.<sup>35</sup> In Afrikaans this problem does not exist, as the word “familie” is used to refer to the extended family, while “gesin” refers to the nuclear family. Unfortunately there is no English equivalent for the term “gesin”, which is why **family** is used both when referring to the nuclear and the extended family. In my opinion, there is a way to get around this problem, at least to some extent. Although the word “parent” only refers to the adult in the nuclear family and does not include the child, I believe that when confusion might exist in so far as adoption is concerned, the term “family” could be used when referring to the extended family of the child,<sup>36</sup> and the term “parent” could be used when referring to the nuclear family of the child.<sup>37</sup> In the rest of this thesis, I shall use the terms “family” and “parent” in this way.

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<sup>32</sup> 2000 (2) SA 1 (CC).

<sup>33</sup> At 30.

<sup>34</sup> Van der Linde 2000 *De Jure* 18.

<sup>35</sup> Also see “3 2 1 4 *Family care and the Constitution*” below.

<sup>36</sup> See n 28 and the accompanying text above.

<sup>37</sup> See n 24 and the accompanying text above. Also see my remarks under “3 2 1 8 *Family care and adoption*” as well as “3 2 2 2 *Family care versus parental care*”.

3 2 1 3      *Types of family*

As we have already established, the family in South Africa has changed over the years and is still changing.<sup>38</sup> Clark refers to family life in South Africa as **fluid**.<sup>39</sup> As far as the nuclear family is concerned, three types of marriages are currently recognised by our law, namely, civil marriages, customary marriages, and civil unions.<sup>40</sup>

“Marriage” is traditionally defined as the legally recognised lifelong voluntary union between one man and one woman to the exclusion of all other persons.<sup>41</sup> Although the Marriage Act<sup>42</sup> does not define marriage, a civil marriage is one concluded in terms of the common law as amended by the Marriage Act.<sup>43</sup> Mosikatsana<sup>44</sup> says the common law of marriage is based on Roman-Dutch law which is influenced by Christianity, and that the exclusive nature of the common law definition of marriage does not reflect social reality as it is restricted to civil marriages.<sup>45</sup>

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<sup>38</sup> See “3 2 1 2 *What is a family?*”.

<sup>39</sup> Clark in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 262.

<sup>40</sup> Provided that they are solemnised in terms of the Marriage Act 25 of 1961, Jewish and Christian marriages are recognised by South African law as they are monogamous. However, as also discussed below, Muslim and Hindu marriages receive only limited protection in our law as they are potentially polygamous and are usually not solemnised in terms of the Marriage Act. In this regard reference can be made to *Ismail v Ismail* 1983 (1) SA 1006 (A); *Kalla v The Master* 1995 (1) SA 261 (T) and *Singh v Ramparsad* 2007 (3) SA 445 (D) – see also Cronjé & Heaton *Family Law* 215 n 2.

<sup>41</sup> Cronjé & Heaton *Family Law* 17. A similar definition is used in *Seedat’s Executors v The Master (Natal)* 1917 AD 302 at 309.

<sup>42</sup> Act 25 of 1961. This Act came into effect on 1 January 1962.

<sup>43</sup> Cronjé & Heaton *Family Law* 191.

<sup>44</sup> Mosikatsana 1996 *SAJHR* 555.

<sup>45</sup> Mosikatsana 1996 *SAJHR* 552.

Customary marriages,<sup>46</sup> which permit polygyny,<sup>47</sup> gained full legal recognition, regardless of when they were concluded and regardless of how many customary wives a husband has,<sup>48</sup> when the Recognition of Customary Marriages Act<sup>49</sup> came into operation.<sup>50</sup> A spouse in a customary marriage is not legally allowed to enter into a civil marriage in terms of the Marriage Act during the existence of such customary marriage, unless the parties to the customary marriage enter into a civil marriage with each other.<sup>51</sup>

A civil union is defined in the Civil Union Act<sup>52</sup> as “the voluntary union of two persons who are both 18 years of age or older, which is solemnised or registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others”.<sup>53</sup> This Act allows both same-sex and heterosexual couples to enter into either a civil partnership or a marriage in terms of the Act. The partners can choose whether they wish to call the union a marriage or a civil partnership.<sup>54</sup> The consequences of the union are the same as those for a civil marriage concluded in terms of the Marriage Act.<sup>55</sup> I find it interesting that while a traditional civil

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<sup>46</sup> S 1 of the Recognition of Customary Marriages Act defines a customary marriage as a marriage concluded in accordance with customary law.

<sup>47</sup> Polygyny means that a man may marry as many wives as he can afford – see Bennett *Customary Law in SA* 243.

<sup>48</sup> S 2.

<sup>49</sup> This Act came into operation on 15 November 2000.

<sup>50</sup> S 4.

<sup>51</sup> S 10(1).

<sup>52</sup> Act 17 of 2006. This Act came into operation on 30 November 2006.

<sup>53</sup> S 1.

<sup>54</sup> S 11(1).

<sup>55</sup> S 13(1).

marriage is a **lifelong voluntary union**,<sup>56</sup> the definition of a civil union makes mention of the fact that this union is a voluntary union to the exclusion of all others **while it lasts**.<sup>57</sup> The legislature has obviously taken into account the reality that, today, marriages and now also civil unions often do not last for a lifetime.

Although Muslim and Hindu marriages do not yet have full legal recognition in South Africa, the South African Law Reform Commission has drafted the Muslim Marriages Bill which, if enacted, will mean that if the provisions of the legislation apply to a Muslim marriage, the marriage will be recognised as a valid marriage in terms of South African law if it meets all the requirements set by the proposed legislation.<sup>58</sup> Currently though, Muslim marriages do have limited legal recognition in South Africa.<sup>59</sup> The court in *Ryland v Edros*<sup>60</sup> held that the contractual obligations flowing from a Muslim marriage can be enforced.<sup>61</sup> This decision did not grant full legal recognition to the marriage. A few years later the Supreme Court of Appeal in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*<sup>62</sup> held that a dependant who was not legally married to a deceased could have an action for compensation for loss

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<sup>56</sup> See Cronjé & Heaton's definition under "3 2 1 3 Types of family" above.

<sup>57</sup> As defined in the Act.

<sup>58</sup> This Bill is attached to SALRC *Project 106*. It is hoped that the Law Reform Commission will soon also investigate Hindu marriages.

<sup>59</sup> As explained by Cronjé & Heaton *Family Law* 217, recognising certain contractual obligations which flow from a Muslim marriage does not mean that the marriage is legally recognised for all purposes.

<sup>60</sup> 1997 (2) SA 690 (C) (also reported in [1996] 4 All SA 557 (C) and 1997 1 BCLR 77 (C)).

<sup>61</sup> At 707.

<sup>62</sup> 1999 (4) SA 1319 (SCA) (also reported in [1999] 4 All SA 421 (SCA)).

of support if certain requirements were met,<sup>63</sup> and concluded that the contractual duty of support which flows from a Muslim marriage should be recognised and legally enforceable.<sup>64</sup> In *Daniels v Campbell*<sup>65</sup> the Constitutional Court held that, for purposes of the Intestate Succession Act<sup>66</sup> and the Maintenance of Surviving Spouses Act,<sup>67</sup> a party to a monogamous Muslim marriage is a “spouse”.<sup>68</sup> Judge Sachs held that the word “spouse” has to be given a broad and inclusive construction<sup>69</sup> which is consistent with the ordinary meaning of the word,<sup>70</sup> and that the Acts should be interpreted so as to include a party to a monogamous Muslim marriage as a spouse.<sup>71</sup> In all these cases, though, the marriages were *de facto* monogamous. In contrast, the Muslim marriage in *Khan v Khan*<sup>72</sup> was polygamous. The Transvaal Provincial Division (now the North Gauteng High Court) held that it will be blatant discrimination to grant a Muslim wife in a monogamous Muslim marriage a right to maintenance but to deny a Muslim wife married in terms of the same Islamic rites, which are inherently polygamous, a right to maintenance.<sup>73</sup> Therefore, partners in a polygamous Muslim marriage were entitled to maintenance after divorce as they fell within the ambit of the Maintenance Act.<sup>74</sup> In a recent case, *Hassam v Jacobs NO*,<sup>75</sup> the Cape

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<sup>63</sup> At 1331.

<sup>64</sup> At 1327, 1331-1332.

<sup>65</sup> 2004 7 BCLR 735 (CC) (also reported in 2004 (5) SA 331 (CC)).

<sup>66</sup> Act 81 of 1987.

<sup>67</sup> Act 27 of 1990.

<sup>68</sup> At 750.

<sup>69</sup> *Daniels v Campbell* 2004 7 BCLR 735 (CC) at 744 (also reported in 2004 (5) SA 331 (CC)).

<sup>70</sup> At 746.

<sup>71</sup> At 750. In a minority judgement, Judge Moseneke at 758 held that the word “spouse” could not have a meaning other than a partner in a legally enforceable marriage.

<sup>72</sup> 2005 (2) SA 272 (T).

<sup>73</sup> At 283.

<sup>74</sup> Act 99 of 1998.

<sup>75</sup> [2008] 4 All SA 350 (C).

Provincial Division (now the Western Cape High Court) held that the word “survivor” in the Maintenance of Surviving Spouses Act includes a surviving spouse in a polygamous Muslim marriage, and that the word “spouse” in the Intestate Succession Act includes a surviving spouse in a polygamous Muslim marriage. This case therefore extends the recognition afforded to monogamous Muslim marriages in *Daniels v Campbell* to polygamous Muslim marriages.

Even though the situation with regard to polygamous marriages has not yet been tested in the Constitutional Court, I am of the opinion that the Constitutional Court, if approached, will come to a similar conclusion. The reality is that there are various forms of marriage in our country which all deserve equal recognition. To illustrate, customary marriages, which permit polygyny, are legally recognised in South African law.<sup>76</sup> There is thus no reason why the same should not happen with regard to Muslim marriages.

### 3 2 1 4 *Family care and the Constitution*

Besides knowing what the word “family” means, it is also important to look at the meaning of the term “family care”. Before I discuss family care, attention should be directed at the fact that the Constitution makes no reference to the family in its Preamble, and the right to family life is not entrenched in the Constitution. Although there is an argument that the omission of a right to family life from the

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<sup>76</sup> See the discussion under “3 2 1 3 *Types of family*” above.

Bill of Rights was intentional,<sup>77</sup> Robinson says that this omission falls short of the prescriptions of the Convention which, in article 5, orders States Parties to respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family to provide appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention.<sup>78</sup> Bekink & Brand submit that a right to family life could be read to be one of the implied entitlements of the right to family or parental care.<sup>79</sup> Kruger is of the view that a constitutionally protected right to family life may be inferred from the fact that section 39(3) of the Constitution does not deny the existence of any other rights or freedoms that are recognised or conferred by, inter alia, the common law.<sup>80</sup> The Constitutional Court brought some clarity when it ruled that the right to dignity<sup>81</sup> includes the right to family life.<sup>82</sup>

Mosikatsana believes the right to family care includes the right to be cared for by the extended family.<sup>83</sup> Robinson agrees with this view when he says that the child's right to family care is aimed at the extended family,<sup>84</sup> where the philosophy is that the family must take care of its own.<sup>85</sup> He says that this recognition will serve the best interests of the child.<sup>86</sup> He illustrates his view by

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<sup>77</sup> Cockrell in *Bill of Rights Compendium* 3E-21-22.

<sup>78</sup> Robinson 1998 *Obiter* 334-335.

<sup>79</sup> Bekink & Brand in Davel *Child Law* 186-187.

<sup>80</sup> Kruger 2007 *THRHR* 254.

<sup>81</sup> S 10 of the Constitution.

<sup>82</sup> *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at 963.

<sup>83</sup> Mosikatsana 1998 *Michigan Journal of Race & Law* 375.

<sup>84</sup> Robinson 1998 *Obiter* 332.

<sup>85</sup> Robinson 1998 *Obiter* 335.

<sup>86</sup> Robinson 1998 *Obiter* 335.

reference to the Family Group Conference in New Zealand in terms of which the family of the child, including the extended family, is primarily responsible for the well-being of the child, with the result that matters which can be resolved within the family environment are not referred to the State. He then adds that the financial burden on the State would be alleviated if the extended family became more involved with protecting the best interests of a child.<sup>87</sup> Human, however, says this view of family care does not allow for rights on the part of the child.<sup>88</sup>

The question that has to be answered in the context of this research, is what the makers of the Constitution envisioned when they included *family care* in section 28(1)(b). The Interim Constitution<sup>89</sup> only provided for parental care, but section 28(1)(b) of the Constitution provides for family care. In my view this clearly shows that family care is aimed at the extended family, whereas parental care is aimed at the nuclear family, or the immediate family. A child has the right to care against his/her family, including the extended family. This right of the child thus now operates against the family, including the extended family, not just against the parents.<sup>90</sup> Robinson believes this view is supported by section 15(3)(i) of the Constitution, which states that it does not prevent legislation recognising “marriages concluded under any tradition”, and that these words convey that the child’s right to family care applies not only to the nuclear family, but also to the

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<sup>87</sup> Robinson 1998 *Obiter* 335-336.

<sup>88</sup> Human 2000 *SAPL* 380.

<sup>89</sup> The Constitution of the Republic of South Africa Act 200 of 1993, hereafter referred to as “the Interim Constitution”.

<sup>90</sup> Bekink & Brand in Davel *Child Law* 183 n 85.

extended family.<sup>91</sup> He further argues that the Constitution attaches more weight to family care than to parental care, because it places the right to family care before the right to parental care and links the two concepts with an *or*.<sup>92</sup> I do not believe that that was necessarily the intention, but rather that the legislature simply wanted to include both forms of care.

### 3 2 1 5      *Family care and international instruments*

The relationship between child and family is contextualised in the Preamble of the United Nations Convention on the Rights of the Child,<sup>93</sup> which states that the family is the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.<sup>94</sup> It further recognises that a child should grow up in a family environment, in an atmosphere of happiness, love and understanding. Children are primarily dependent on those closest to them: their family. The Convention recognises that the primary responsibility for the child rests with the family.<sup>95</sup> The family therefore has the primary responsibility to provide for the rights of their own children, and States

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<sup>91</sup> Robinson 1998 *Obiter* 332-333.

<sup>92</sup> Robinson 1998 *Obiter* 333.

<sup>93</sup> Adopted by the General Assembly on 20 November 1989, it entered into force on 2 September 1990. Hereafter referred to as “the Convention”.

<sup>94</sup> Art 1 defines a child for the purposes of the Convention as every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier. In South Africa majority is attained at the age of eighteen (s 17 of the Children’s Act of 2005), except if majority is attained earlier through marriage or emancipation (Heaton *Law of Persons* 114-115).

<sup>95</sup> Sloth-Nielsen 1995 *SAJHR* 404-405.

Parties have to respect the rights of children to preserve family relations as recognised by law without unlawful interference.<sup>96</sup>

The Convention does not define the concept “family”. Sloth-Nielsen says the absence of a definition of the concept of family opens the possibility for a wider interpretation of family, and points out that article 5 of the Convention<sup>97</sup> supports this view.<sup>98</sup> I believe that the Convention is purposely vague about the exact interpretation of family because of the many different forms that a family can take, such as the common-law form or the customary-law form,<sup>99</sup> but it is very clear about the importance of family.

Criticism against the Convention has been that parents and other adults in authority have historically been responsible for deciding what is in the best interests of a child and that by granting participation rights to children the Convention was “anti-family”.<sup>100</sup> Sloth-Nielsen, however, says the Convention cannot be said to be supportive of an anti-family stance, but should rather be seen to be striking a balance between establishing children as independent

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<sup>96</sup> Art 8(1).

<sup>97</sup> Art 5: “State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention”.

<sup>98</sup> Sloth-Nielsen 1995 *SAJHR* 406.

<sup>99</sup> See “3 2 1 2 *What is a family?*” above.

<sup>100</sup> Sloth-Nielsen 1995 *SAJHR* 404.

bearers of rights yet at the same time acknowledging the importance of families.<sup>101</sup> I agree with her view.

The Preamble of the African Charter on the Rights and Welfare of the Child<sup>102</sup> also recognises that a child<sup>103</sup> should grow up in a family environment in an atmosphere of happiness, love and understanding for the full and harmonious development of his/her personality. Similar to the Convention, the Charter does not define the family, but it does acknowledge the role of the family as the basis of society.<sup>104</sup> Here, my argument is the same as in respect of the Convention above,<sup>105</sup> namely that it is a good thing that “family” is not defined in the Charter, but rather left open to change as society and the concept of the family change, especially since Western culture and African culture are sometimes worlds apart.<sup>106</sup> The Charter does not focus much on the family but instead places much more emphasis on parental care.<sup>107</sup> This, to my mind, confirms the primary importance of parental care, with family care being an additional right of the child.

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<sup>101</sup> Sloth-Nielsen 1995 *SAJHR* 406.

<sup>102</sup> Hereafter referred to as “the Charter”.

<sup>103</sup> Defined in art 2 as every human being below the age of eighteen years.

<sup>104</sup> In terms of art 18(1) the family shall be the natural unit and basis of society. It shall enjoy the protection and support of the state for its establishment and development.

<sup>105</sup> Also see “4 2 2 3 *The African Charter on the Rights and Welfare of the Child*”.

<sup>106</sup> In this regard, see “3 2 1 2 *What is a family?*” above.

<sup>107</sup> Only art 18 of the Charter deals with family care. See the discussion under “3 2 2 4 *Parental care and international instruments*”.

3 2 1 6      *Family care and the Child Care Act*

Even though the child has the right to family care in terms of the Constitution, there is no reference in the Child Care Act to family care. In terms of the Constitution and, now, the Children's Act, the child has a right to family care and to grow up in a stable family environment or, where this is not possible, an environment resembling as closely as possible a caring family environment. The right to family care thus applies within the context of the Child Care Act too.<sup>108</sup>

3 2 1 7      *Family care and the Children's Act*

Although the Children's Act of 2005 does not define "family", it does define "family member" which, in relation to a child, means a parent of the child; any other person who has parental responsibilities and rights in respect of the child; a grandparent, brother, sister, uncle, aunt or cousin of the child; or any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship.<sup>109</sup> The definition given to "family member" in this Act is so wide that it encompasses all possible forms of family, obviously including the extended family that is part of customary law. The Children's Act of 2005 makes provision for a child to be cared for by his/her parents or family. The Preamble states that a child, for the

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<sup>108</sup> For a complete discussion of this topic, see "6 2 2 The Child Care Act and growing up in a family environment" below.

<sup>109</sup> S 1(1) of the Children's Act of 2005.

full and harmonious development of his/her personality, should grow up in a family environment in an atmosphere of happiness, love and understanding.<sup>110</sup> Section 7(1)(f)(i) of the Children's Act of 2005 acknowledges the need for the child "to remain in the care of his/her parent, family and extended family", while section 7(1)(k) confirms the need for a child to grow up within a stable family environment.<sup>111</sup> What is interesting and, I believe, an indication that the legislature recognises that there is an important difference, is that the Act distinguishes between the family ("gesin") and the extended family ("familie"). Furthermore, section 7(1)(f)(i) clearly shows that the legislature acknowledges the importance of customary law in the South African legal system.<sup>112</sup>

### 3 2 1 8      *Family care and adoption*

The right of a child to "family care or parental care, or to appropriate alternative care when removed from the family environment" includes care by adoptive parents.<sup>113</sup> In *Du Toit v Minister of Welfare and Population Development*<sup>114</sup> Acting Judge Skweyiya referred to the reality of the vast number of parentless children in our country.<sup>115</sup> He said that family care, which is an important feature of South African family life, includes care by the extended family of the child.<sup>116</sup>

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<sup>110</sup> The Preamble is discussed in "6 2 3 The Children's Act and growing up in a family environment".  
<sup>111</sup> In terms of s 7(1)(k) the best interests of the child requires that a child 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.  
<sup>112</sup> More will be said about this under "6 THE CHILD CARE ACT AND THE CHILDREN'S ACT".  
<sup>113</sup> Clark 2000 *Stell LR* 11.  
<sup>114</sup> 2003 (2) SA 198 (CC).  
<sup>115</sup> At 208.  
<sup>116</sup> At 206.

The court further indicated that family life as contemplated in the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.<sup>117</sup> Although the court here seems to equate “family life” with “family care”, I firmly agree with the gist of the judge’s view. However, in my view the court confused family care with parental care. It held that adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them,<sup>118</sup> and also stated that the applicants were suitable to adopt the children and provide them with **family care**.<sup>119</sup> In this context the reference by the court should rather have been to **parental care**.<sup>120</sup>

### 3 2 2 Parental care

#### 3 2 2 1 Introduction

At the outset, reference must again be made to the Interim Constitution, and the fact that it protected “parental care” but not “family care”.<sup>121</sup> This is in contrast to the Constitution which protects both these notions. Also important is the use of the word “care”, which shows that both the Interim Constitution and the

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<sup>117</sup> At 206-207.

<sup>118</sup> At 206. Note that family care is not the same as parental care.

<sup>119</sup> At 208.

<sup>120</sup> Also see the discussion above about the difference between the use of the term family in the narrow sense and the use of family in the wide sense and my discussion below under “3 2 2 2 *Family care versus parental care*” about the difference between family care and parental care.

<sup>121</sup> In terms of s 30(b) of the Interim Constitution, which was repealed by s 242 of the Constitution, every child had the right to parental care.

Constitution radically deviate from the parental **authority** notion of the common law.<sup>122</sup>

### 3 2 2 2 *Family care versus parental care*

In terms of the common law, parental authority comprises the complex of rights, powers, duties and responsibilities vested in or imposed upon parents in respect of their minor child.<sup>123</sup> The right to parental care, on the other hand, is the child's right to be cared for by both biological parents.<sup>124</sup>

The terms "family care" and "parental care" are often confused in our law.<sup>125</sup> Providing the child with love and support by more people than the child's parents is obviously positive, but — although the importance of the extended family in the life of a child is not in any way denied — there is an important difference between care by the family in the wide sense<sup>126</sup> and care by parents. I say this because the legal relationship that exists between the child and his/her parents differs from the legal relationship between the child and his/her extended family. When, for instance, a child is put up for adoption, section 18(4)(d) of the Child Care Act specifies whose consent needs to be given. The consent required is that of the

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<sup>122</sup> Robinson 1998 *Obiter* 333.

<sup>123</sup> Van Heerden "Parental power" in Van Heerden *et al* *Boberg's Law of Persons and the Family* 313.

<sup>124</sup> Mosikatsana 1998 *Michigan Journal of Race & Law* 376; Currie & De Waal *Bill of Rights Handbook* 605, 607; Du Plessis & Corder *Understanding SA's Transitional Bill of Rights* 186; Heaton in *Bill of Rights Compendium* 3C-54; Kruger 2007 *THRHR* 251, 253.

<sup>125</sup> This is illustrated further in the discussion under "3 2 1 2 *What is a family?*" above as well as the discussion under "3 2 1 7 *Family care and adoption*" where I refer to the Constitutional Court's decision in *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).

<sup>126</sup> As discussed under "3 2 1 2 *What is a family?*" above.

**parent** or **guardian** of the child, not that of any member of the extended family.<sup>127</sup>

According to Bennett, in the African system of kinship and family relations parental care might include care by more remote kinfolk.<sup>128</sup> I do not support this interpretation of “parental care”. What Bennett is referring to is “family care”. Family care, in the sense of care by the extended family, is an important part of a child’s life, but it is a right quite separate from parental care. I believe that it will be much less confusing and much clearer if the term “family care” were used consistently to refer to care by the extended family, and the term “parental care” for care by the nuclear family or the parents or legal guardians of the child.

### 3 2 2 3      *Parental care and the Constitution*

The right to parental care is not confined to care by biological parents, but extends to step-parents, adoptive parents and foster parents.<sup>129</sup> Adoption is thus one of the ways in which a child can be afforded parental care.

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<sup>127</sup> This is also the position in terms of s 233(1) of the Children’s Act of 2005, which deals with consent to adoption.

<sup>128</sup> Bennett *Human Rights* 101.

<sup>129</sup> “Parent” in the Children’s Act of 2005 is interpreted to include the adoptive parent of a child — s 1. Also see *Heystek v Heystek* [2002] 2 All SA 401 (T) at 404.

The right to “parental care” is formulated as a constitutional right of the **child**.<sup>130</sup> It does not refer to a constitutional right on the part of the parents to exercise care and control over the child.<sup>131</sup>

The Constitutional Court is of the view that the rights in section 28(1)(b) of the Constitution impose a duty which rests primarily on parents (and, in the case of family care, on other family members).<sup>132</sup> The Constitutional Court takes this duty a step further in *M v S*<sup>133</sup> by saying that parents have a moral obligation towards their children to teach them how to deal with problems and difficult situations.<sup>134</sup>

### 3 2 2 4 Parental care and international instruments

The Convention refers to the right of the child to be cared for by his/her parents at first instance.<sup>135</sup> Separation from parents should only happen where this is necessary for the best interests of the child,<sup>136</sup> and, if separation cannot be avoided, contact with both parents should be maintained, except if it is contrary

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<sup>130</sup> Currie & De Waal *Bill of Rights Handbook* 605, 607; Kruger 2007 *THRHR* 251, 253; Heaton in *Bill of Rights Compendium* 3C-54; Mosikatsana 1998 *Michigan Journal of Race & Law* 376; Du Plessis & Corder *Understanding SA's Transitional Bill of Rights* 186.

<sup>131</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) at 808; *SW v F* 1997 (1) SA 796 (O) at 803; *P v P* 2002 (6) SA 105 (N) at 107; Cockrell in *Bill of Rights Compendium* 3E-14. See also Currie & De Waal *Bill of Rights Handbook* 605.

<sup>132</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at 82 (also reported in 2000 11 BCLR 1169 (CC)); *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) at 375-376 (also reported in 2003 2 BCLR 111 (CC)).

<sup>133</sup> 2007 12 BCLR 1312 (CC).

<sup>134</sup> At 1328.

<sup>135</sup> Art 7(1).

<sup>136</sup> Art 9(1). This would be necessary, for example, in the case of abuse or neglect, or where the parents are living separately and a decision has to be made as to the child's place of residence.

to the child's best interests.<sup>137</sup> States Parties have to render appropriate assistance to parents in the performance of their child-rearing responsibilities.<sup>138</sup>

The Convention confirms the principle that parents and legal guardians have the primary responsibility for the upbringing and development of the child, and that the best interests of the child must be their basic concern.<sup>139</sup> Sloth-Nielsen<sup>140</sup> believes that there could be a possible conflict here – by including both of these statements, the Convention underscores the potential for conflict between the best interests of the child and the interests of the adult members of the family in being responsible for the upbringing and development of the child.<sup>141</sup> In my opinion this article is a necessary one, as it confirms that parental authority has been replaced by parental responsibility, namely, the duty to provide parental care.

In terms of the Charter every child is entitled to the enjoyment of parental care and protection and has the right to reside with his/her parents where possible.<sup>142</sup> Parents and other persons responsible for the child have the primary responsibility for the upbringing and development of the child and have the duty to ensure that the best interests of the child are their basic concern at all times.<sup>143</sup> A child may only be separated from his/her parents against his/her will if such

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<sup>137</sup> Art 9(3).

<sup>138</sup> Art 18(2).

<sup>139</sup> Art 18(1).

<sup>140</sup> Sloth-Nielsen 1995 *SAJHR* 401.

<sup>141</sup> At 405.

<sup>142</sup> Art 19(1).

<sup>143</sup> Art 20(1)(a).

separation is in the best interest of the child,<sup>144</sup> and if separated from his/her parents, he/she has the right to maintain personal relations and direct contact with parents on a regular basis.<sup>145</sup> Where it concerns guidance and direction to a child with regard to religion, conscience and freedom of thought, this duty falls on parents or legal guardians.<sup>146</sup>

Both the Convention and the Charter therefore make it clear that parents are obliged to provide parental care and that the child is entitled to parental care, unless parental care is not in his/her best interests.

### 3 2 2 5 *Parental care and the Child Care Act*

Parental care is not expressly mentioned in the Child Care Act, but as this right of the child is provided for in section 28 of the Constitution the child also enjoys it in the context of the Child Care Act.

### 3 2 2 6 *Parental care and the Children's Act*

The Children's Act of 2005 uses the term "parental responsibilities and rights" instead of the traditional term "parental authority",<sup>147</sup> and thus shifts the emphasis

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<sup>144</sup> Art 19(1).

<sup>145</sup> Art 19(2). Although art 19(1) allows for the removal of a child from his/her parents if such separation is in the best interests of the child, art 19(2) does not take into account the possibility that contact with parents might not be in the best interests of the child.

<sup>146</sup> Art 9(2).

<sup>147</sup> Parental responsibilities and rights are covered by s 18 of the Act.

with regard to the relationship between parents and children and places the emphasis on the rights of the child.<sup>148</sup> The shift in emphasis as well as the definition of parental responsibilities and rights emphasise that parents have responsibilities as well as rights with regard to children, which include the responsibility and the right to care for the child, to maintain contact with the child, to act as guardian of the child, and to contribute to the maintenance of the child.<sup>149</sup>

### **3 2 2 7**      *Parental care and adoption*

As discussed above,<sup>150</sup> I believe that it is important to distinguish between **family care** and **parental care**. Unfortunately, the term “family” is used in English to refer to both the nuclear family and the extended family. I argue that it will be far more clear if the term “family care” is used to refer to the extended family, while the term “parental care” should be reserved for the nuclear family. With reference to adoption, the distinction is important because adoption provides a child with the opportunity to experience parental care.

### **3 2 3**    **Appropriate alternative care**

#### **3 2 3 1**      *Introduction*

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<sup>148</sup> Also see the discussion under “6 2 3 The Children’s Act and growing up in a family environment”.

<sup>149</sup> S 18(2).

<sup>150</sup> See “3 2 1 8 *Family care and adoption*”.

Section 28(1)(b) of the Constitution imposes an obligation on the State to respect existing parental or family care and limits State interference in family or parental care to cases where such interference is justified.<sup>151</sup> The duty to provide care to the child passes to the State only if the child's parents or family members fail, or are unable, to care for the child.<sup>152</sup> The State's role is thus largely confined to situations where something has gone wrong, and the parents are unable to provide as they are obliged.<sup>153</sup>

### 3 2 3 2      *The role of the State and the Constitution*

[T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.<sup>154</sup>

This passage clarifies the relationship between the State and the family with regard to children. There is a positive duty on the State to provide alternative care when a child does not have family care or parental care<sup>155</sup> and also to create the environment for parents and family members to provide children with

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<sup>151</sup> Bekink & Brand in Davel *Child Law* 185.

<sup>152</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at 82 (also reported in 2000 11 BCLR 1169 (CC)); Van der Vyver in Robinson *Law of Children* 306. See also the Convention, art 20(1) and (3), which stipulates that a child in whose best interests it cannot be to remain in its family environment, shall be entitled to special protection and assistance provided by the state, and that such care could include adoption.

<sup>153</sup> Boshier *World Congress* at <http://www.childjustice.org/docs/boshier2005.pdf>.

<sup>154</sup> This is a quote from the Preamble of the Convention.

<sup>155</sup> Kruger 2007 *THRHR* 254.

proper care.<sup>156</sup> There is, however, much uncertainty about the State's exact role in the child's life. The Interim Constitution<sup>157</sup> granted children the right to parental care only. The inclusion of "appropriate alternative care when removed from the family environment" in the Constitution<sup>158</sup> emphasises the duty that rests on the State to provide for alternative care under certain circumstances.

Human believes that the nature of the State's role with regard to the family and parents is mainly supervisory and supportive.<sup>159</sup> Bekink & Brand seem to agree as they are of the opinion that there is a preference for care in the context of a family, and that the State has to respect the institution of the family as the context within which such care should be provided.<sup>160</sup> Schoeman says the family<sup>161</sup> is entitled to certain rights of privacy and autonomy, and that the right to privacy "entitles the adults of the family to exclude others from scrutinizing obtrusions into family occurrences".<sup>162</sup>

According to Boshoff the categorisation of family law as part of private law has been criticised extensively. She submits that this debate has an important influence on the perception of the parental role in family law. If child care is a

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<sup>156</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at 82 (also reported in 2000 11 BCLR 1169 (CC)).

<sup>157</sup> S 30(1)(b).

<sup>158</sup> S 28(1)(b).

<sup>159</sup> Human 2000 *SAPL* 381.

<sup>160</sup> Bekink & Brand in Davel *Child Law* 186.

<sup>161</sup> For purposes of his article, he defines "family" at 9-10 as an intense continuing and intimate organisation of at least one adult and child, wherein the child is extensively and profoundly dependent on the adult, in which the adult supplies the child with its emotional and material needs, and in which the parent is dependent on the child for a certain kind of intimacy.

<sup>162</sup> Schoeman 1980 *Ethics* 10.

private matter, then State intervention should be restricted to a minimum, but if the norms of child care are fundamentally community-based, the State will be very involved with the upbringing of the child.<sup>163</sup> Kruger, though, points out that if the constitutional protection of parental rights or the right to family life is too strong, it becomes difficult for the State to remove children from families. She argues that the omission of the right to family life from the Bill of Rights, together with the wider formulation of section 28(1)(b), could lead to the conclusion that a more active role for the State in family life is favoured.<sup>164</sup> She submits that State intervention should be somewhere between the extremes of maximum coercive intervention and minimum intervention, bearing in mind the best interest of the child.<sup>165</sup>

Boshoff argues that the user's assumptions regarding the true nature of the role of the parent will influence the interpretation of the best interests of the child,<sup>166</sup> which is certainly true. However, ultimately, I believe, there can be no absolute answer here. The permissible degree of State involvement in a child's life is to be determined in accordance with the Constitution. Section 28(1)(b) imposes an obligation on the State to respect existing family or parental care, and limits its interference in such care to cases where it is justified.<sup>167</sup> In terms of section 28(2) of the Constitution, the best interests of the child must determine whether

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<sup>163</sup> Boshoff 1999 *TSAR* 277-278.

<sup>164</sup> Kruger 2007 *THRHR* 253-254.

<sup>165</sup> Kruger 2006 *THRHR* 453.

<sup>166</sup> Boshoff 1999 *TSAR* 278.

<sup>167</sup> These circumstances are, inter alia, described in the Child Care Act and the Children's Act of 2005.

interference is required as those interests must be paramount.<sup>168</sup> Thus, in every case the role of the State has to be determined with the best interests of the child as the criterion, and those interests will determine what the State's role in the particular case should be.

The right to alternative care includes the right to adoptive care,<sup>169</sup> which needs to be in the best interests of the child.<sup>170</sup> Adoptive care provides a child the opportunity to be part of a "gesin" and experience parental care. If the State is to consider adoption as a form of alternative care for a child, it is important to know when a child is in need of appropriate alternative care such as adoption.<sup>171</sup> This need has to be determined by ascertaining what the best interests of the child are.

### 3 2 3 3      *Alternative care and international instruments*

The Convention confirms the child's right to alternative care in article 20, which states that a child temporarily or permanently deprived of his or her family environment, or who in his/her best interests cannot be allowed to remain in that environment, is entitled to special protection and assistance provided by the

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<sup>168</sup> See "4 2 GENERAL DISCUSSION OF THE BEST INTERESTS STANDARD".

<sup>169</sup> Clark 2000 *Stell LR* 11. Art 20(2) and (3) of the Convention supports this statement. In *SW v F* 1997 (1) SA 796 (O) at 802 the child's constitutional right to parental care was interpreted to include adoption. The court confirmed that the Child Care Act specifically protects the right to care of children in need of care by making provision for adoption in cases where the care of natural persons was lacking or inadequate. See also Currie & De Waal *Bill of Rights Handbook* 608.

<sup>170</sup> S 28(2) of the Constitution; Joubert 1993 *SALJ* 731.

<sup>171</sup> Once again, the factors that determine the best interests of a child in s 7(1) of the Children's Act of 2005 are important here.

State.<sup>172</sup> In accordance with their means and national conditions, States Parties have to take all appropriate measures to assist parents and others responsible for the child and, in case of need, to provide material assistance.<sup>173</sup>

The relevance of article 12 must not be overlooked. This article gives children the right to express their views in all matters affecting them.<sup>174</sup> These views are to be weighted in relation to the age and maturity of the child.<sup>175</sup> This is an important article in the context of alternative care, as the views of the child who is of an age and maturity to express such, have to be considered in the case of alternative care. This means that should an adoption be considered, a child might be able to express a view with regard to the adoption. This article, according to Sloth-Nielsen, does not on the face of it give children the right to a say that outweighs that of parents or family, but simply affords children the opportunity to express themselves when matters affecting them are discussed.<sup>176</sup> Children are afforded a much greater role in deciding what is in their best interest than was the position under the traditional approach,<sup>177</sup> but Anderson & Spijker warn that the right to speak has to be distinguished from the right to be heard, and that the first is of no

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<sup>172</sup> Art 20(1).

<sup>173</sup> Art 27(3). Such assistance could include clothing, housing, and food. In South Africa, financial constraints will play an important role, but as will be discussed in “9 CONCLUSION” there are ways to overcome this difficulty.

<sup>174</sup> In terms of art 12(1) State Parties have to ensure that a child who is capable of forming his/her own views has the right to express those views freely in all matters affecting him/her, and to have those views given due weight in accordance with the age and maturity of the child. Freeman “Future of children’s rights” in Freeman *Children’s Rights ii* 300 says this is perhaps the most important provision in the Convention.

<sup>175</sup> Art 12(1).

<sup>176</sup> Sloth-Nielsen 1995 *SAJHR* 406.

<sup>177</sup> Bekink & Bekink 2004 *De Jure* 27.

value if the second is not taken seriously.<sup>178</sup> This point is important because it emphasises the need to allow children to participate in any decisions affecting them where they are able to do so and to attach weight to their participation.

The Charter instructs the State to provide protection and support for the establishment and development of the family.<sup>179</sup> In terms of the Charter, States Parties have to ensure that a child who is parentless or who in his/her best interests cannot be brought up by his/her parents shall be provided with alternative family care.<sup>180</sup> Similar to article 12 of the Convention, the Charter in article 7 protects the right of a child to form and express views regarding his/her welfare and interests.<sup>181</sup>

### 3 2 3 4      *Alternative care and the Child Care Act*

The right to alternative care includes the right to adoptive care.<sup>182</sup> Section 17 of the Child Care Act, read with *Du Toit v Minister of Welfare and Population Development*,<sup>183</sup> provides that a child may be adopted by a husband and his wife jointly; same-sex life partners jointly; a widow, widower, unmarried or divorced person; a married person whose spouse is the parent of the child; a person who

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<sup>178</sup> Anderson & Spijker 2002 *Obiter* 369.

<sup>179</sup> Art 18(1). The Charter uses the terms “parents” and “family” loosely, and in my opinion “family” in the articles referred to in this paragraph really refers to “parents”.

<sup>180</sup> Art 25(2).

<sup>181</sup> In terms of art 7, every child who is capable of forming his/her own views is assured the right to express his/her opinions freely in all matters and to disseminate his/her opinion subject to such restrictions as are prescribed by law.

<sup>182</sup> *SW v F* 1997 (1) SA 796 (O) at 802.

<sup>183</sup> 2003 (2) SA 198 (CC) at 213, as read with the order handed down in *Du Toit v Minister of Welfare and Population Development* 2001 12 BCLR 1225 (T).

is the child's parent's same-sex life partner; or the natural father of a child born out of wedlock.<sup>184</sup> Although this section has been altered over time to reflect a more liberal approach to the persons who may adopt, there are still sections of the South African community who are excluded from statutory adoption.<sup>185</sup>

### 3 2 3 5      *Alternative care and the Children's Act*

The Children's Act of 2005 greatly extends the position as far as the categories of persons who may adopt, are concerned.<sup>186</sup> Partners in a permanent domestic life partnership may adopt jointly in terms of the Children's Act of 2005.<sup>187</sup> The Children's Act of 2005 also provides for other persons sharing a common household and forming a permanent family unit<sup>188</sup> to adopt jointly. This subsection was included to allow for joint adoption by, for instance, a husband and all his wives (the kraal) in a customary-law setting.<sup>189</sup> Clearly, the legislature has taken account of the changing format of the nuclear family and has opened up the restrictions with regard to the parties who are able to adopt quite dramatically, inter alia, to allow for more recognition of customary law principles in the legislation.

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<sup>184</sup> Acting Judge Skweyiya did emphasise though that prospective adoptive parents should in each decision concerning adoption be evaluated on a case by case basis as provided for in the Child Care Act – at 214.

<sup>185</sup> Although customary marriages have been recognised, adoption by all the parties to such a marriage is currently not possible. Another example that could be mentioned is that of siblings living together and wishing to adopt a child together — see also “6 4 1 2 *Who may adopt under the Children's Act?*”.

<sup>186</sup> This portion of the Act has not yet come into operation.

<sup>187</sup> S 231(1)(a)(ii).

<sup>188</sup> S 231(1)(a)(iii).

<sup>189</sup> SALC *Report on Project 110* 235-236.

3 2 3 6      *Alternative care and adoption*

Section 28(1)(b) of the Constitution grants the child the right to family care, parental care, or to appropriate alternative care when removed from the family environment. As I have indicated,<sup>190</sup> alternative care includes the right to adoptive care. When a child is adopted, the adoption will provide the child with the opportunity to grow up as part of a family and thus experience parental care. What I am arguing, is that “family care”, “parental care” and “alternative care” must not be confused. Adoption is a form of alternative care which grants the child the opportunity to experience the family environment by growing up as part of a family and experiencing parental care.

**3 3    ATTACHMENT**

**3 3 1   Introduction**

[W]hat is believed to be essential for mental health is that the infant and young child should experience a warm, intimate, and continuous relationship with his mother (or permanent mother-substitute) in which both find satisfaction and enjoyment.<sup>191</sup>

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<sup>190</sup> See “3 2 3 2 *The role of the State and the Constitution*”, “3 2 3 4 *Alternative care and the Child Care Act*” and “3 2 3 5 *Alternative care and the Children’s Act*”.

<sup>191</sup> Bowlby *Maternal Care* 11. The attachment theory can be viewed, in large part, as a theory of personality development that arose from Bowlby’s interest in the nature of human development – Belsky & Cassidy in Rutter & Hay *Development through Life* 373. Therefore this quotation is

One of the factors that need to be taken into account to determine the best interests of a child is the child's emotional security, which is closely linked to the environment in which he/she grows up.<sup>192</sup> A child's development unfolds in response to the environmental influences to which he/she is exposed. The self-identity, our image of ourselves, is what we believe about who we are.<sup>193</sup> The development of the self-identity takes place with the development of attachment.<sup>194</sup> As human interaction plays such an important role in the development of the child's self-identity, the nature of the environment that the child lives in is extremely important, and the self-identity of a child who grows up in an institution will greatly differ from that of a child who grows up in a family.<sup>195</sup> It is, generally, in the child's best interests to grow up in a family. As discussed in more detail below,<sup>196</sup> "family" in this context does not necessarily mean that a child has to be raised by his/her biological family,<sup>197</sup> but could also refer to appropriate alternative care which, of course, could include adoption. The crucial point is that the child should grow up in a family environment. In a family

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deemed appropriate to start off this discussion. The reference to mother or mother-substitute does not necessarily refer to the biological mother - see "3 3 2 1 *What is attachment?*".

<sup>192</sup> S 7(1)(h) of the Children's Act of 2005. Even prior to the coming into operation of s 7(1)(h) of the Children's Act of 2005, one of the factors included by the court in *McCall v McCall* 1994 (3) SA 201 (C) at 205 was the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development. Also see "6 3 THE BEST INTERESTS OF THE CHILD".

<sup>193</sup> Papalia *et al A Child's World* 232.

<sup>194</sup> Smith *Leer die Kind Ken* 12.

<sup>195</sup> Landman 1985 *Welfare Focus* 17.

<sup>196</sup> See "3 3 2 1 *What is attachment?*" and "4 3 ATTACHMENT AND ADOPTION".

<sup>197</sup> Wait 1989 *Welfare Focus* 52.

environment where each child gets enough individual attention the child's feelings of self-worth increase.<sup>198</sup>

Delay in finding permanent families for children has long been acknowledged as harmful.<sup>199</sup> In fact, even before the child can make his/her feelings known, he/she experiences feelings of acceptance or rejection.<sup>200</sup> Therefore, if adoption is the appropriate alternative care that the child is to be placed in, it is in the child's best interests that he/she be adopted as early as possible so that the attachment process can develop as early as possible.

### **3 3 2 The theory behind attachment**

#### **3 3 2 1 What is attachment?**

Known also as emotional bonding,<sup>201</sup> attachment is the strong, affectional tie we have with special people in our lives that leads us to feel pleasure when we interact with them and to be comforted by their nearness during times of stress.<sup>202</sup> It is also described as a reciprocal, enduring emotional tie between an infant and a caregiver, each of whom contributes to the quality of the relationship,<sup>203</sup> and as a system whose primary objective is the achievement of

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<sup>198</sup> Landman 1985 *Welfare Focus* 17; Smith *Leer die Kind Ken* 9.

<sup>199</sup> Ryburn *Open Adoption* 70.

<sup>200</sup> Landman 1985 *Welfare Focus* 18; Bowlby *Attachment and Loss* 2 100.

<sup>201</sup> Mudie 1989 *De Rebus* 688.

<sup>202</sup> Berk *Child Development* 417.

<sup>203</sup> Papalia *et al A Child's World* 224.

physical proximity to an adult caretaker with the accompanying subjective experience of security.<sup>204</sup> The attachment theory is widely regarded as the best supported theory of socio-emotional development yet available.<sup>205</sup> As the founding relationship of a child's life,<sup>206</sup> it is often considered to be synonymous with the best interests of the child.<sup>207</sup> The development of attachment relationships seems to be a universal feature of infant development across cultures,<sup>208</sup> and Golombok believes there is a growing body of evidence to show that the course of a child's social and emotional development is closely related to the quality of the child's attachment relationships.<sup>209</sup> She says that the most important factor for a child's development of secure attachments seems to be the quality of interaction between the attachment figures and the child.<sup>210</sup> Consequently, adopted children can develop secure attachments to their adoptive parents where the adoptive parents are responsive to them.<sup>211</sup>

The attachment theory is concerned with the early years of life.<sup>212</sup> There is no legal, sociological or psychological basis to assume that children are better off being raised by men or by women. The main issue is that their attachments must

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<sup>204</sup> Simmonds in Treacher & Katz *Dynamics of Adoption* 33. Attachment has to be distinguished from attachment behaviour. Attachment behaviour refers to the various forms of behaviour that a child uses to attain and maintain proximity to another individual – Bowlby *Attachment and Loss* 1 195, 371.

<sup>205</sup> Bowlby *Maternal Care* 11; Bowlby *A Secure Base* 28; Papalia et al *A Child's World* 228.

<sup>206</sup> Golding 2007 *Adoption & Fostering* 79.

<sup>207</sup> Clark 2000 *Stell LR* 19; Cassidy in Cassidy & Shaver *Handbook of Attachment* 4-5.

<sup>208</sup> Patterson *Infancy & Childhood* p 235; Papalia et al *A Child's World* 225.

<sup>209</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 103; Patterson *Infancy & Childhood* 237; Berk *Child Development* 425.

<sup>210</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 109-110.

<sup>211</sup> This was also found in a study by Singer, Brodzinsky, Ramsay, Steir and Waters (1985) "Mother-infant attachment in adoptive families", in *Child Development* 56: 1543-1551, as quoted by Golombok in Gaber & Aldridge *In the Best Interests of the Child* 110.

<sup>212</sup> Golding 2007 *Adoption & Fostering* 77.

be protected.<sup>213</sup> What is important to bear in mind is that the profile of the family has changed drastically over the past few years, as discussed above.<sup>214</sup> Owing to this, we now have families where there is no biological mother or no mother at all, but there is a mother figure or where there is more than one person who fulfils the role of the mother, for instance where there is a polygynous customary marriage. These are only some possible examples of the changing family. The importance of this discussion here is that references to the **mother** of the child do not necessarily refer to the **biological** mother or even to a female.<sup>215</sup> Our courts agree that a mother of a child does not necessarily have to be a biological mother. In *Van der Linde v Van der Linde*<sup>216</sup> it was held that the quality of a parent's role is not determined by gender and that a father can be as good a **mother** as the child's biological mother. References in my discussion to the mother should therefore be read to include the mother figure or the caregiver and references to parents should not be assumed to be one man and one woman.<sup>217</sup> Where the terms "mother", "mother figure", "caregiver" or "parent" are used, they should therefore be interpreted to refer to the primary caregiver.

### 3 3 2 2      *How are attachments formed?*

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<sup>213</sup> Strous 2007 *SA Journal of Psychology* 231.

<sup>214</sup> See "3 2 1 2 *What is a family?*".

<sup>215</sup> Much of the available research focuses on the relationship between the child and the mother. As Patterson *Infancy & Childhood* 233 explains, mothers are usually the caregivers in Western culture, which is why so many infants form attachment relationships with their mothers.

<sup>216</sup> 1996 (3) SA 509 (O).

<sup>217</sup> See also Bowlby *Attachment and Loss* 1 177 n 2; Bowlby *Attachment and Loss* 2 3 n 1, who indicates that every reference in his works to *mother* is to the person who mothers the child, rather than to the biological mother.

Attachment is the result of a relationship that builds between two partners,<sup>218</sup> an infant and a caregiver.<sup>219</sup> It occurs when certain behavioural systems are activated.<sup>220</sup> The primary attachment figure is usually, but not necessarily, the child's mother.<sup>221</sup> Continuity of care-giving is very important when we deal with attachment and this determines whether a child is likely to develop favourably.<sup>222</sup> When the relationship of an infant with a caregiver is disrupted more than once, as happens due to multiple placements in the child's early years, the child's emotional attachment becomes increasingly shallow and indiscriminate, in which case the child grows up as a person who lacks warmth in his/her contacts with fellow beings.<sup>223</sup> Infant attachment to parents is most likely to be compromised when families are separated as well as when infants are reared in institutional settings such as orphanages.<sup>224</sup> In a series of studies by Spitz of infants who were institutionalised and placed in a large ward where a nurse looked after several babies, the infants changed from happy, outgoing babies to withdrawn, crying babies who experienced emotional difficulties after the separation because they were prevented from forming a bond with adults.<sup>225</sup>

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<sup>218</sup> Berk *Child Development* 423.

<sup>219</sup> Papalia *et al A Child's World* 225.

<sup>220</sup> Bowlby *Attachment and Loss I* 179.

<sup>221</sup> Belsky in Cassidy & Shaver *Handbook of Attachment* 254. Also see my discussion under "3 3 2 1 What is attachment?" above.

<sup>222</sup> Goldstein *et al Beyond the Best Interests* 32-33; Berk *Child Development* 426; Papalia *et al A Child's World* 226; Patterson *Infancy & Childhood* 236-237.

<sup>223</sup> Goldstein *et al Beyond the Best Interests* 32-33.

<sup>224</sup> Patterson *Infancy & Childhood* 235.

<sup>225</sup> As referred to in Berk *Child Development* 422.

A child who has not formed an attachment to a caregiver inevitably shows evidence of behavioural and emotional difficulties.<sup>226</sup> Bowlby believes that when an individual is confident that an attachment figure will be available to him/her whenever he/she desires it, that person will be much less prone to either intense or chronic fear than will an individual who for any reason has no such confidence.<sup>227</sup> When Ainsworth and her colleagues assessed infant behaviour and the attachment patterns that they form, they found that there are three types of attachment.<sup>228</sup> These are “secure attachment”,<sup>229</sup> “anxious resistant attachment”<sup>230</sup> and “ambivalent (resistant) attachment”.<sup>231</sup> Secure attachment is considered to be central to mental health and effective functioning in the community. The child is able to explore, experiment and deal confidently with the world.<sup>232</sup> Golombok says studies have shown that the most important determinant of a secure attachment relationship for a child is the sustained presence of a responsive attachment figure.<sup>233</sup> Bowlby<sup>234</sup> and Ainsworth<sup>235</sup>

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<sup>226</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 109; Berk *Child Development* 426.

<sup>227</sup> Bowlby *Attachment and Loss* 2 235.

<sup>228</sup> Papalia *et al A Child's World* 225. Later research identified a fourth type of attachment, disorganised-disoriented attachment. Although they are referred to differently, the first three are basically the same as those identified by Mudie — see n 229-231 below. Disorganised-disoriented attachment is where a child experiences the parent as frightened, frightening or dangerous.

<sup>229</sup> Papalia *et al A Child's World* 225; Patterson *Infancy & Childhood* 230-231. Mudie 1989 *De Rebus* 688 explains that this is where the child is confident that the parent or parent figure will be available, responsive and helpful.

<sup>230</sup> Papalia *et al A Child's World* 225. Mudie 1989 *De Rebus* 688 explains that this is where the parent is inconsistent, which leads to uncertainty and insecurity.

<sup>231</sup> Papalia *et al A Child's World* 225; Patterson *Infancy & Childhood* 230-231. Mudie 1989 *De Rebus* 688 calls this “anxious avoidant attachment” and explains that this is where the parent ignores or rebuffs the child when he/she approaches the parent for comfort or help.

<sup>232</sup> Mudie 1989 *De Rebus* 688.

<sup>233</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 111.

<sup>234</sup> Bowlby *Making & Breaking of Affectional Bonds* 130.

<sup>235</sup> Ainsworth 1989 *American Psychologist* 710-711, 715.

believe that attachment to parents remains important beyond infancy and throughout the lifespan.

Mothers are usually the principal caregivers for their infants, but most infants also form attachment relationships with other people, such as grandparents or child care providers.<sup>236</sup> However, attachment behaviour is nearly always shown earlier, more strongly and more consistently towards mothers.<sup>237</sup> Freud first suggested that the infant's emotional tie to the mother provides the foundation for all later relationships.<sup>238</sup> If the mother consistently and lovingly provides the infant with his/her needs, the infant feels safe, secure and stable and perceives the world as safe and reliable.<sup>239</sup> Although attachment behaviours vary across cultures,<sup>240</sup> both mothers and babies contribute to security of attachment by the way they respond to each other.

### 3 3 2 3      *When are attachments formed?*

The attachment relationship is the foundation relationship of a child's life.<sup>241</sup> For a person to know that an attachment figure is available, gives him/her a strong and pervasive feeling of security, and so encourages him/her to value and continue

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<sup>236</sup> Patterson *Infancy & Childhood* 233; Papalia *et al A Child's World* 228; Berk *Child Development* 417, 425.

<sup>237</sup> Bowlby *Attachment and Loss I* 201. Also see Smith *Leer die Kind Ken* 10; Bowlby *Attachment and Loss I* 199. Again, bear in mind that "mother" does not necessarily refer to the biological mother.

<sup>238</sup> Berk *Child Development* 417.

<sup>239</sup> Smith *Leer die Kind Ken* 10.

<sup>240</sup> Berk *Child Development* 422.

<sup>241</sup> Golding 2007 *Adoption & Fostering* 79.

the relationship.<sup>242</sup> The obvious question now is whether it matters to a child's development when these attachments are formed, in other words, whether there is a critical period when children become attached to a parent-figure.

Although there are researchers who believe that a critical period for bonding does not exist for human beings, such as Chess & Thomas as well as Klaus & Kennell who did studies in 1982, and Lamb who researched this in 1983,<sup>243</sup> they seem to be in the minority. A 1975 study by Tizard & Rees<sup>244</sup> found that a first attachment bond can develop as late as four to six years of age, but these youngsters are more likely to display emotional and social problems.<sup>245</sup>

Most researchers in this field are of the belief that attachment has to happen when the child is young. These proponents believe that attachment or bonding between children and their primary carers is particularly crucial in the early years of life when children are totally dependent on others.<sup>246</sup> Berk believes the possibility exists that completely normal development depends on establishing close bonds with caregivers during the early years of life.<sup>247</sup> Bowlby<sup>248</sup> says the infant from birth to approximately eight weeks of age is not yet attached,<sup>249</sup> but most infants of about three months are already responding differently to the

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<sup>242</sup> Bowlby *A Secure Base* 26-27.

<sup>243</sup> As quoted in Papalia *et al A Child's World* 135.

<sup>244</sup> As referred to in Berk *Child Development* 422.

<sup>245</sup> Berk *Child Development* 422.

<sup>246</sup> Triseliotis in Treacher & Katz *Dynamics of Adoption* 83.

<sup>247</sup> Berk *Child Development* 422.

<sup>248</sup> Bowlby *Attachment and Loss I* 266-268 divides the development of attachment into four phases which stretch from birth to approximately the middle of the third year.

<sup>249</sup> Bowlby *Attachment and Loss I* 268.

mother as compared with other people,<sup>250</sup> and that within 12 months almost all infants have developed a strong tie to the mother.<sup>251</sup> Golombok agrees with this view. She says<sup>252</sup> studies show that when infants fail to form attachments early in life, they show several signs of social deprivation, such as rigid body postures, delayed language development and signs of depression after the first six months of life.<sup>253</sup> Smith believes the infant does not discriminate with regard to attachment in the first six months, but develops an attachment to one specific person from the age of six months<sup>254</sup> and starts forming multiple attachments from the age of eighteen to 24 months.<sup>255</sup> Wait<sup>256</sup> similarly opines that a baby becomes attached to a specific person from the age of about six to eight months, and that the critical phase for the forming of emotional ties is probably between the ages of six months and four years.<sup>257</sup> Rutter<sup>258</sup> is of the opinion that attachment during infancy is not crucial, but says this is a sensitive period and he believes that completely normal social and emotional development will be less likely if attachments are not established early in life. Golombok explains that long-term studies indicate that there were significant differences between children who were fostered during the first year of life and children who spent their first three years in an orphanage. The children from the orphanage showed

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<sup>250</sup> Bowlby *Attachment and Loss* 1 199.

<sup>251</sup> Bowlby *Attachment and Loss* 1 177. Although he uses the term “mother”, this in every case refers to the person who mothers the child and to whom he/she becomes attached, rather than the biological mother – see n 237 above.

<sup>252</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 107.

<sup>253</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 108.

<sup>254</sup> Smith *Leer die Kind Ken* 10. This is also the opinion of Howe *Patterns of Adoption* 73 and Papalia *et al A Child's World* 226.

<sup>255</sup> Smith *Leer die Kind Ken* 11.

<sup>256</sup> Wait 1989 *Welfare Focus* 48.

<sup>257</sup> Wait 1989 *Welfare Focus* 50.

<sup>258</sup> Rutter *Maternal Deprivation* 63.

much slower developmental progress and a high rate of behavioural problems, compared to the children who were fostered.<sup>259</sup>

As can be seen, the studies all show that the younger the child is when this attachment is formed, the better it is for the child's later development.<sup>260</sup> I believe the correct approach would be that early attachments are not necessarily crucial for bonding purposes but, where it is possible to achieve early attachment, such early attachment will assist in forming a bond between a child and a parent-figure and thus also provide the child with the necessary skills to develop positive relationships as he/she grows up. Whatever the circumstances of a child are, it will always be in the best interests of the child to establish an attachment with a caregiver, whatever the age of the child. As also discussed elsewhere,<sup>261</sup> children do not need to be raised by their biological parents to form attachments. The quality of the interaction between the child and the adult is more important than the biological relationship. Adoption is one way of giving a child the opportunity of forming an attachment with an adult, which will go a long way towards ensuring that the child will become an emotionally secure, balanced adult.

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<sup>259</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 108-109.

<sup>260</sup> Papalia *et al A Child's World* 228-229.

<sup>261</sup> See "3 3 2 1 *What is attachment?*" and "4 3 ATTACHMENT AND ADOPTION".

### **3 4 CONCLUSION**

In this chapter, I distinguished between the different forms a family may take, and I also distinguished between family care and parental care. The discussion in this chapter should leave no doubt in the reader's mind about the importance of a child's being in an environment where he/she can grow up as part of a family and form attachments. Adoption is one way to provide a family environment to the child and to enable him/her to form attachments.

The next chapter will focus on the best interests of the child in the context of adoption.

## 4 THE BEST INTERESTS OF THE CHILD

<b>4 1 INTRODUCTION</b> .....	86
<b>4 2 GENERAL DISCUSSION OF THE BEST INTERESTS STANDARD</b> .....	88
<b>4 2 1 Historical development and application in South Africa</b> .....	88
<b>4 2 2 International instruments</b> .....	89
4 2 2 1 <i>Introduction</i> .....	89
4 2 2 2 <i>The Convention on the Rights of the Child</i> .....	90
4 2 2 3 <i>The African Charter on the Rights and Welfare                     of the Child</i> .....	95
4 2 2 4 <i>International instruments and adoption</i> .....	99
<b>4 2 3 The rights in section 28(1) versus section 28(2)</b> .....	102
<b>4 2 4 Primacy and paramountcy</b> .....	106
<b>4 2 5 Criticism of the best interests standard</b> .....	110
<b>4 2 6 Parent-centered versus child-centered approach</b> .....	113
<b>4 2 7 Factors that determine the best interests of the child</b> .....	119
<b>4 3 ATTACHMENT AND ADOPTION</b> .....	124
<b>4 4 OPEN VERSUS CLOSED ADOPTION</b> .....	129
<b>4 4 1 Introduction</b> .....	129
<b>4 4 2 Open adoption</b> .....	131
4 4 2 1 <i>Forms of open adoption</i> .....	132
4 4 2 2 <i>Benefits of adoption contact</i> .....	134
4 4 2 3 <i>South African law and open adoption</i> .....	145
<b>4 5 CONCLUSION</b> .....	149

## 4 1 INTRODUCTION

Statutory adoptions in South Africa are currently dealt with in terms of the Child Care Act of 2005. Section 18(4)(c) of the Child Care Act provides that an application for adoption shall not be granted by a children's court to which such application was made, unless it is satisfied that the proposed adoption will serve the interests and conduce to the welfare of the child. This is an absolute requirement which must be met before the adoption order is granted.<sup>1</sup> The provisions of the Children's Act which regulate adoption have not yet come into effect,<sup>2</sup> but when they do come into operation, section 240(2)(a), in terms of which an adoption order has to be in the best interests of the child, will regulate this aspect.<sup>3</sup> The best interests of the child will therefore remain central in statutory adoption applications.

In contrast, the welfare of the extended family, not that of the child, predominates in customary law.<sup>4</sup> In fact, customary adoption is rooted in the protection of the family<sup>5</sup> and the interests of the child might be subordinated to those of the

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<sup>1</sup> Schäfer & Schäfer in Robinson *Law of Children* 78-79.

<sup>2</sup> For a detailed discussion of the relevant provisions of the Children's Act, see "6 THE CHILD CARE ACT AND THE CHILDREN'S ACT".

<sup>3</sup> In terms of s 240(2)(a) a children's court considering an adoption application may make an order for the adoption of a child only if the adoption is in the best interests of the child. Also see the discussion under "6 THE CHILD CARE ACT AND THE CHILDREN'S ACT".

<sup>4</sup> Customary adoption is described under "2 4 2 2 *Development of adoption in customary law*" above.

<sup>5</sup> Mosikatsana 1998 *Michigan Journal of Race & Law* 346.

family.<sup>6</sup> However, the Constitution provides that the courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law.<sup>7</sup> Section 28(2) of the Constitution provides protection for children by rendering a child's best interests of paramount importance in every matter concerning the child. The requirement that the best interests of the child should be a primary consideration in all issues involving children is furthermore found in almost all human rights documents.<sup>8</sup> Customary adoption law will thus have to be adapted to recognise the importance of the best interests of the child.<sup>9</sup>

To act in accordance with the best interests of a child, it is essential that there are guidelines indicating how the child can and should be protected. There can be no doubt about the importance of the best interests standard when it comes to children, but in practice the contents and extent of this standard are uncertain.<sup>10</sup> What follows is a discussion of general aspects that are, in my opinion and in the context of this thesis, important to determine the best interests of the child. That

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<sup>6</sup> Bennett *Human Rights* 96.

<sup>7</sup> S 211(3) of the Constitution of the Republic of South Africa, 1996. There is currently no legislation dealing with customary adoption.

<sup>8</sup> Maithufi in Davel *Child Law* 140 — see “4 2 GENERAL DISCUSSION OF THE BEST INTERESTS STANDARD” below.

<sup>9</sup> In *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) the court had to make a decision about the validity of a customary adoption which did not comply with the formalities. It took account of customary law and added principles of rationality and common sense to protect the best interests of the child and held that the adoption was valid (at 1147-1148). I believe this approach by the court shows us that it is possible to find a way to apply customary law and statutory law together to act in the best interests of the child. As I shall argue under “9 CONCLUSION”, the legislature has to consider ways of including the principles of customary adoption in statutory adoption in such a way that the best interests of the child will be served, and I believe that there should be only one system of adoption that applies to everyone in South Africa.

<sup>10</sup> Davel 2001 *De Jure* 274.

discussion is followed by a look at the best interests of the child in the context of adoption.

## 4 2 GENERAL DISCUSSION OF THE BEST INTERESTS STANDARD

### 4 2 1 Historical development and application in South Africa

The concept “best interests of the child” was already introduced into our customary law by courts in the Transkei and Natal at the turn of the twentieth century.<sup>11</sup> The common-law rule laid down in the 1948 case of *Fletcher v Fletcher*<sup>12</sup> was that the most important factor the courts must consider in making a decision regarding a child is not the rights of parents but the best interests of the child. The court thus confirmed that the best interests standard must be the main consideration in matters concerning the child.<sup>13</sup>

As long ago as 1969, the standard of the child’s best interests was described by our courts as “a golden thread which runs throughout the whole fabric of our law relating to children”.<sup>14</sup> Today, South Africa has a Constitution which has turned serving the best interests of the child into a constitutional imperative. The standard of the best interests of the child is constitutionalised in section 28(2) of

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<sup>11</sup> Bennett 1999 *Obiter*145.

<sup>12</sup> 1948 (1) SA 130 (A) at 143.

<sup>13</sup> Bekink & Bekink 2004 *De Jure* 22-23.

<sup>14</sup> *Kaiser v Chambers* 1969 (4) SA 224 (C) at 228.

the Constitution,<sup>15</sup> in terms of which the child's best interests are of paramount importance<sup>16</sup> in every matter concerning the child. Unfortunately, though, the exact meaning of the standard is not constitutionally defined, and requires judicial interpretation.<sup>17</sup> There are many factors to be considered when deciding what the best interests of a child are. What would be in the best interests of a child in a particular case would depend on the circumstances of that case, and has to be determined for each case individually.<sup>18</sup>

## 4 2 2 International instruments

### 4 2 2 1 Introduction

In terms of section 39(1)(b) and (c) of the Constitution, a court, tribunal or forum must consider international law and may consider foreign law in its deliberations. The provisions of these instruments will thus be important in the interpretation of the Constitution. A closer look at international law shows us that section 28(2) of the Constitution is in keeping with the universal recognition that the interests of the child must prevail.<sup>19</sup> By ratifying and acceding to the following conventions, South Africa confirmed its commitment to international human rights efforts

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<sup>15</sup> S 28(2): "A child's best interests are of paramount importance in every matter concerning the child." See also *Fraser v Naude* 1999 (1) SA 1 (CC) at 5 (also reported in 1998 11 BCLR 1357 (CC)); *Jackson v Jackson* 2002 (2) SA 303 (SCA) at 317.

<sup>16</sup> In *Fletcher v Fletcher* 1948 (1) SA 130 (A) the Appellate Division first gave paramourcy to the standard of the best interests of the child.

<sup>17</sup> Bekink 2003 *THRHR* 255.

<sup>18</sup> Davel & de Kock 2001 *De Jure* 274.

<sup>19</sup> Bekink & Bekink 2004 *De Jure* 25.

directed towards the protection of (inter alia) children in accordance with the standards of international declarations and conventions.<sup>20</sup>

#### 4 2 2 2      *The Convention on the Rights of the Child*

An important international instrument that has to be consulted when determining the best interests of a child is the Convention on the Rights of the Child.<sup>21</sup> It has been hailed as a watershed in the history of children.<sup>22</sup> Its importance is underscored by the unprecedented “rapidity with which States have ratified or acceded to it and by the sheer number of States Parties which it has attracted”.<sup>23</sup> The Convention is a comprehensive treaty on the rights of the child and the most universally accepted human rights document in history.<sup>24</sup> It places children<sup>25</sup> at the centre of the spread of human rights generally.

Since its introduction, the Convention has become the international standard against which legislation and policies are measured.<sup>26</sup> It has been ratified by 192 countries, with only 2 member states yet to do so.<sup>27</sup> South Africa became a signatory to the Convention on 29 January 1993 and ratified the Convention on

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<sup>20</sup> Nicholson & Politis 2001 *De Jure* 594.

<sup>21</sup> See “3 THE CHILD AND THE FAMILY” n 93.

<sup>22</sup> Sloth-Nielsen 1995 *SAJHR* 401.

<sup>23</sup> Alston in Freeman *Children’s Rights ii* 183-184. Sloth-Nielsen 1995 *SAJHR* 402 explains that no other treaty has been ratified by so many states within so short a period of time.

<sup>24</sup> Todres in Freeman *Children’s Rights ii* 146-147.

<sup>25</sup> A child is defined in art 1 as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.

<sup>26</sup> *Brandt v S* [2005] 2 All SA 1 (SCA) at 7.

<sup>27</sup> These states are Somalia and the United States of America. According to Simon “United Nations Convention on wrongs to the child” in Freeman *Children’s Rights ii* 311 two issues that have held up the United States’ ratification of the Convention are abortion and the death penalty.

16 June 1995.<sup>28</sup> This means that South Africa must comply with the obligations the Convention imposes on States Parties.<sup>29</sup>

The best interest of the child forms one of the foundation stones of the Convention.<sup>30</sup> The Preamble recognises that children are entitled to the same basic set of human rights as every person, but that children are also entitled to special care and assistance. The relationship between children and family is also contextualised in the Preamble, which states that the family is the fundamental group in society and the natural environment for the growth and well-being of all its members and particularly of children. It further recognises that children should grow up in a family environment, in an atmosphere of happiness, love and understanding. The Convention refers to the right of children to be cared for by their parents at first instance.<sup>31</sup> Separation from parents should be a last resort that should only happen where such separation is in the best interests of the child.<sup>32</sup> If separation cannot be avoided, family ties are to be preserved, unless this will be contrary to the best interests of the child.<sup>33</sup> Children are primarily dependent on those closest to them: their family. The family therefore has the primary responsibility to provide for the rights of their own children.<sup>34</sup> This is also

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<sup>28</sup> In terms of art 47, South Africa could not become a party to the Convention through signature alone. Subsequent ratification was also required.

<sup>29</sup> Cronjé & Heaton *Family Law* 263; Sloth-Nielsen 1995 *SAJHR* 419.

<sup>30</sup> Clark 2000 *Stell LR* 3.

<sup>31</sup> Art 7(1).

<sup>32</sup> Art 9(1).

<sup>33</sup> Art 9(3). As discussed under “4 4 OPEN VERSUS CLOSED ADOPTION”, contact with the biological family is usually in the best interests of the child when a child is adopted.

<sup>34</sup> Although the family is described in the Preamble, it is not defined. Because the concept of family changes as society changes, this might be a good thing — see “3 2 1 2 *What is a family?*” and “3 2 1 3 *Types of family*” above.

evident from article 18(1), which accords parents and legal guardians the primary responsibility for the upbringing and development of children and provides that the best interests of children will be the basic concern of the parents or legal guardians.

Article 3(1) of the Convention seems to place the best interests standard at the heart of international children's rights law.<sup>35</sup> In terms of article 3(1) the best interests of the child shall be a primary consideration in all actions concerning children. This article is of fundamental importance to the whole Convention because it contains the general standard which underpins the application of the rights guaranteed.<sup>36</sup> The Convention does not provide any definitive statement of how an individual child's interests would best be served in a given situation. It contains no definition or list of factors that would indicate the best interests of the child,<sup>37</sup> but provides "a number of signposts capable of guiding those seeking to identify what is in the best interests of the child".<sup>38</sup> These are participation (children should participate in decisions affecting their destiny and should participate in community life and play an active role in society), protection (against discrimination and all forms of torture, cruel, inhuman and degrading treatment and punishment, neglect and exploitation), prevention (of harm to children, the development of preventative health care and the prevention of child abduction) and provision (children have a right to have their basic needs met,

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<sup>35</sup> Parker 1994 *International Journal of Law and the Family* 26.

<sup>36</sup> McGoldrick in Freeman *Children's Rights* ii 82.

<sup>37</sup> Bekink & Bekink 2004 *De Jure* 27.

<sup>38</sup> Alston 1994 *International Journal of Law and the Family* 19.

e.g. education, health care, and access to justice).<sup>39</sup> All of these principles are to be applied with the best interests of the child as a primary consideration.<sup>40</sup> Sloth-Nielsen<sup>41</sup> explains that a holistic approach to the rights enshrined in the Convention was adopted by the drafters thereof, and says that the Convention supports the notion that all rights are indivisible, interdependent and interrelated. A concern here is that it is not certain who has to decide what is in the best interests of the child, or what criteria have to be used to determine what the best interests of the child are.<sup>42</sup>

The State plays a role when it comes to providing for the best interests of children. However, the State's role is largely confined to situations where something has gone wrong, and the child's parents are unable to serve the child's interests as they should.<sup>43</sup> In terms of article 5<sup>44</sup> children are not children of the State, but part of a unit (parents, extended family or community) which has primary responsibility for their well-being.<sup>45</sup>

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<sup>39</sup> Van Bueren in Davel *Child Law* 203; Mosikatsana 1998 *Michigan Journal of Race & Law* 345. In *M v S* 2007 12 BCLR 1312 (CC) at 1322 the guiding principles were described as survival, development, protection and participation.

<sup>40</sup> Art 3.

<sup>41</sup> Sloth-Nielsen 1995 *SAJHR* 404.

<sup>42</sup> Todres in Freeman *Children's Rights ii* 153. Also see the discussion under "4.2.4 Primacy and paramountcy".

<sup>43</sup> Boshier *World Congress* at <http://www.childjustice.org/docs/boshier2005.pdf>

<sup>44</sup> Art 5: State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

<sup>45</sup> Sloth-Nielsen 1995 *SAJHR* 405.

*Chapter 4: The best interests of the child*

The Convention has also been criticised. Freeman<sup>46</sup> says the Convention must be seen as a real achievement, but also as a spur to further action, and that there is a need for revision, reform and innovation, and an input by children themselves.<sup>47</sup> He criticises the low age encoded in the Convention (fifteen years) as the minimum age of enlistment into armed services<sup>48</sup> and says that there are many children whose interests are inadequately addressed in the Convention (such as disabled children and gay children).<sup>49</sup> Furthermore, he points out that a child's right to refuse medical treatment or to consent to medical treatment has not been addressed, and he believes the failure of the Convention to endorse equality before the law is odd.<sup>50</sup> Viljoen criticises the omission of an individual complaints mechanism, which he says detracts from the potential impact of the Convention on the position of children globally.<sup>51</sup>

Sloth-Nielsen<sup>52</sup> believes that there might be a conflict with regard to article 18(1). By referring to the primary responsibility of parents and legal guardians and providing that the best interests of children must be their basic concern, the Convention underscores the potential for conflict between the best interests of the child and the interests of the adult members of the family.<sup>53</sup>

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<sup>46</sup> Freeman "Future of children's rights" in Freeman *Children's Rights ii* 294-297, 301.

<sup>47</sup> At 294.

<sup>48</sup> At 290-291.

<sup>49</sup> At 294-296.

<sup>50</sup> At 301.

<sup>51</sup> Viljoen 1998 *CILSA* 204.

<sup>52</sup> Sloth-Nielsen 1995 *SAJHR* 401.

<sup>53</sup> At 405.

*Chapter 4: The best interests of the child*

The Convention establishes a Committee on the Rights of the Child,<sup>54</sup> which is empowered to examine reports submitted by States Parties on a regular basis,<sup>55</sup> and the Convention Committee may request States Parties to provide further information relevant to the implementation of the Convention.<sup>56</sup> The functions of the Convention Committee, as will be seen hereunder,<sup>57</sup> are not as powerful as that of the African Charter on the Rights and Welfare of the Child. The Committee is not full-time, it is under-resourced and it has “no real teeth”.<sup>58</sup> Reporting to the Convention Committee is done by States Parties and not by individuals. Freeman says if international children’s rights are to have a future the Convention must be policed more intensively.<sup>59</sup>

As discussed above, though, the Convention is an important international instrument which has served as background to the development of other instruments and, if applied as intended, could improve children’s lives.<sup>60</sup>

**4 2 2 3**      *The African Charter on the Rights and Welfare of the Child*

The Convention was an inspiration for another international instrument<sup>61</sup> that deals with the best interests of the child, namely the African Charter on the

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<sup>54</sup> Hereafter “the Convention Committee”.

<sup>55</sup> Art 44(1).

<sup>56</sup> Art 44(4).

<sup>57</sup> See “4 2 2 3 *The African Charter on the Rights and Welfare of the Child*”.

<sup>58</sup> Freeman “Future of children’s rights” in Freeman *Children’s Rights ii* 302.

<sup>59</sup> Freeman “Future of children’s rights” in Freeman *Children’s Rights ii* 302.

<sup>60</sup> Freeman “Future of children’s rights” in Freeman *Children’s Rights ii* 302 calls it a “beginning”.

<sup>61</sup> Davel 2002 *De Jure* 282.

*Chapter 4: The best interests of the child*

Rights and Welfare of the Child,<sup>62</sup> which entered into force on 29 November 1999. After the Convention, it is the second global and the first regional binding instrument that identifies the child as a possessor of certain rights.<sup>63</sup> South Africa signed it on 10 October 1997 and ratified it on 7 January 2000.

The Convention and the Charter are complementary and both of them provide the framework through which children and their welfare are increasingly discussed in Africa,<sup>64</sup> but this separate Charter for Africa was born out of frustration with the United Nations' drafting process.<sup>65</sup> The failures of the Convention, according to Viljoen,<sup>66</sup> were threefold, namely, underrepresentation of Africans during the drafting process of the Convention; the omission of potentially divisive and emotive issues in the search for consensus between states from diverse backgrounds; and, in order to reach a compromise, specific provisions on aspects peculiar to Africa were left out.<sup>67</sup>

More so than on other continents, African children are in an extremely vulnerable position when it comes to the violation of their human rights, owing to such issues as poverty, famine and HIV/AIDS. The Charter has a specifically "African" flavour.<sup>68</sup> Compared to the Convention, the Charter increases the level of

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<sup>62</sup> See "3 THE CHILD AND THE FAMILY" n 102.

<sup>63</sup> Chirwa 2002 *The International Journal of Children's Rights* 157.

<sup>64</sup> Olowu 2002 *The International Journal of Children's Rights* 128.

<sup>65</sup> Viljoen 1998 *CILSA* 205.

<sup>66</sup> Viljoen 1998 *CILSA* 199.

<sup>67</sup> Viljoen 1998 *CILSA* 205.

<sup>68</sup> Viljoen 1998 *CILSA* 211.

*Chapter 4: The best interests of the child*

protection for children.<sup>69</sup> The strength of the Charter lies in the fact that it expressly proclaims its supremacy over any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the Charter.<sup>70</sup> Article 1(1) of the Charter obliges States to recognise the rights, freedoms and duties enshrined in the Charter, while article 4 deals with the best interests of the child. It declares that in all actions concerning the child the best interests of the child shall be the primary consideration.<sup>71</sup>

The Preamble of the Charter recognises that, for the full and harmonious development of his/her personality, a child<sup>72</sup> should grow up in a family environment in an atmosphere of happiness, love and understanding. The family is the natural unit and basis of society, and enjoys the protection and support of the State for its establishment and development.<sup>73</sup> Every child shall be entitled to the enjoyment of parental care and protection.<sup>74</sup> Article 20 indicates that the primary responsibility for the upbringing and development of children rests upon the child's parents who are required to ensure that the best interests of the child are their basic concern at all times.<sup>75</sup> The State has to assist and support the parents to fulfil this task.<sup>76</sup>

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<sup>69</sup> Viljoen in Davel *Child Law* 224.

<sup>70</sup> Art 1(3); Chirwa 2002 *The International Journal of Children's Rights* 158.

<sup>71</sup> Art 4(1). More will be said about the best interests of the child in terms of this article and the use of the word "primary" under "4.2.4 Primacy and paramountcy".

<sup>72</sup> Defined in art 2 as every human being below the age of 18 years.

<sup>73</sup> Art 18(1).

<sup>74</sup> Art 19(1).

<sup>75</sup> Art 20(1)(a).

<sup>76</sup> Art 20(2).

Interestingly, there is no definition of “family” in the Charter. Perhaps it was a deliberate decision because the concept of a family in Western culture differs so greatly from the concept in traditional African communities.<sup>77</sup> The reality in African culture is that children are to a large extent seen as the property of their parents.<sup>78</sup> Although the omission of a definition of “family” influences the interpretation of the Charter, any decision-maker is compelled to bear in mind, as the primary consideration, the best interests of the child concerned.<sup>79</sup>

In order to promote and protect the rights and welfare of the child, an African Committee of Experts on the Rights and Welfare of the Child, which consists of 11 members,<sup>80</sup> was established within the Organisation of African Unity.<sup>81</sup> The Committee must monitor the implementation and ensure the protection of the rights in the Charter<sup>82</sup> and has the jurisdiction to formulate principles and rules aimed at protecting the rights and welfare of the child.<sup>83</sup> Like the Convention Committee, the African Committee has to examine State reports,<sup>84</sup> but the African Committee “may resort to any appropriate method of investigating any matter falling within the ambit” of the Charter.<sup>85</sup> It may receive and consider communications from any person, group or non-governmental organisation,<sup>86</sup> which means a child will be able to lay a complaint about the violation of his/her

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<sup>77</sup> As also discussed under “3 2 1 5 Family care and international instruments”.

<sup>78</sup> Human 2000 *SAPL* 383.

<sup>79</sup> Art 4(1).

<sup>80</sup> Art 33 (hereafter referred to as “the African Committee”).

<sup>81</sup> Art 32.

<sup>82</sup> Art 42(b).

<sup>83</sup> Art 42(a)(ii).

<sup>84</sup> Art 43.

<sup>85</sup> Art 45(1).

<sup>86</sup> Art 44(1).

rights.<sup>87</sup> This represents a significant advance for the potential enforcement of children's rights.<sup>88</sup> Human says the biggest challenge that the committee faces is to determine which elements of the African culture and tradition should be retained, and which should be done away with.<sup>89</sup>

#### 4 2 2 4      *International instruments and adoption*

Article 12 of the Convention gives children the right to express their views in all matters affecting them.<sup>90</sup> In terms of article 20 a child temporarily or permanently deprived of his/her family environment is entitled to special protection and assistance provided by the State,<sup>91</sup> and such care could include adoption.<sup>92</sup> Article 20 further requires that, when considering solutions, due regard has to be paid, inter alia, to the **desirability of continuity** in a child's cultural background.<sup>93</sup> That means culture will not necessarily be a factor to be considered; it is the possibility of considering the cultural background of the child that is protected.

Article 21 of the Convention specifically deals with adoption. The strongest version of the best interests standard in the Convention is to be found in this

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<sup>87</sup> Human 2000 *SAPL* 383.

<sup>88</sup> Viljoen 1998 *CILSA* 210.

<sup>89</sup> Human 2000 *SAPL* 384.

<sup>90</sup> In terms of art 12(1) the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child.

<sup>91</sup> Art 20(1).

<sup>92</sup> Art 20(3).

<sup>93</sup> Art 20(3).

article,<sup>94</sup> which requires any system of adoption to “ensure that the best interests of the child shall be the paramount consideration”. There is thus no doubt about the importance of the best interests standard when it comes to adoption. Although article 30 of the Convention provides that minorities or persons of indigenous origin may not be denied the right to enjoy their culture, *inter alia*, the wording of article 21 is emphatic.<sup>95</sup> The best interests of the child shall be *the paramount consideration* in adoption proceedings. This does not mean that culture will never be a consideration in adoption proceedings, but because the paramountcy of the best interests standard in the Convention is mentioned **only** in respect of adoption proceedings, my view is that the best interests of the child will always be determinative<sup>96</sup> and that no competing rights (such as the right to culture) can be of greater importance.<sup>97</sup> Further confirmation of this view can be found in the fact that no limitation clause is to be found in the Convention.

The Charter similarly makes the best interests of the child the paramount consideration in adoption.<sup>98</sup> The protection of the best interests of the child in this regard is in line with the protection offered by the Constitution, but unlike the Constitution, and in line with the Convention, no competing rights can be of

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<sup>94</sup> Alston 1994 *International Journal of Law and the Family* 13. Although there is only one “best interests” standard in the Constitution (s 28(2)), this is not the case in the Convention, where increased protection is given to the best interests of the child in the case of adoption over and above the general protection granted in art 3(1).

<sup>95</sup> In *M v S* 2007 12 BCLR 1312 (CC) at 1324 Sachs J held that the word “paramount” is emphatic.

<sup>96</sup> This is also the view of Freeman “Convention” in Freeman *Children’s Rights: a comparative perspective* 105.

<sup>97</sup> See the discussion about art 3(1) above.

<sup>98</sup> Art 24.

greater importance.<sup>99</sup> Although it is not clear to me why it was thought that children only need increased protection under certain circumstances, such as when they are to be adopted, the fact that this increased protection is granted, is obviously welcomed.

Article 21(b)<sup>100</sup> of the Convention provides that intercountry adoption may be considered as an alternative means of childcare 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 Preamble of the Convention clearly states that everyone is entitled to the rights and freedoms in the Convention, irrespective of (inter alia) race. That means that race cannot be a basis for differentiation when the Convention is applied. As explained above, culture will also not necessarily be a factor to be considered. When the Convention thus encourages incountry adoption before intercountry adoption is considered, the message is clear. The best interests of a child will be served if it is possible to keep that child in his/her country of origin. Race and culture cannot be overemphasised at the expense of the best interests of the child when viewed holistically. It is simply about the best interests of the child.<sup>101</sup> The wording of the Charter is even stronger than that of the Convention on the issue of intercountry adoption. In terms of article 24(b) intercountry adoption may be considered **as a last resort** if the child cannot be

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<sup>99</sup> My argument here is similar to what was argued above with regard to the paramountcy principle for adoption proceedings in terms of the Convention. More will be said about competing rights in "5 4 3 Competing rights".

<sup>100</sup> In terms of art 21(b) States Parties shall "recognise that intercountry 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".

<sup>101</sup> As will be discussed under "5 6 3 1 Cultural issues as a factor", this means that interracial/intercultural adoption is generally preferable to intercountry adoption.

placed in the child's country of origin, leaving no doubt about the preference for incountry adoption.

#### 4 2 3 The rights in section 28(1) versus section 28(2)

The best interests standard has formed part of South African common law for a long time, and it has been included in the Constitution.<sup>102</sup> Although it is certain that the best interests standard has to be a determining factor in every matter concerning a child, the scope of the concept of the best interests of the child is unclear.<sup>103</sup> What is clear is that the field of application of the best interests standard is not restricted to proceedings under the children's rights clause.<sup>104</sup>

There has been much debate about the reach of section 28(2) of the Constitution. It is problematic that there is currently no certainty as to how section 28(2) should be interpreted. It is unclear whether the best interests as embodied in section 28(2) constitute a fundamental right. To understand this, one need only look at the jurisprudence, especially Constitutional Court cases, to realise there is no uniformity with regard to the application of section 28(2). In *Christian Education South Africa v Minister of Education*<sup>105</sup> and *Minister of Welfare and Population Development v Fitzpatrick*<sup>106</sup> the Constitutional Court held that section 28(2) is a separate right that is independent of the rights in section 28(1), so, in

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<sup>102</sup> S 28(2).

<sup>103</sup> Davel & de Kock 2001 *De Jure* 274.

<sup>104</sup> Clark 2000 *Stell LR* 3.

<sup>105</sup> 2000 (4) SA 757 (CC) at 781 (also reported in 2000 10 BCLR 1051 (CC)).

<sup>106</sup> 2000 (3) SA 422 (CC) at 428 (also reported in 2000 7 BCLR 713 (CC)).

other words, the reach of section 28(2) is not limited to the rights enumerated in section 28(1).<sup>107</sup> In *Minister of Welfare and Population Development v Fitzpatrick*, however, the court, directly after calling section 28(2) a right, also referred to it as a *standard*.<sup>108</sup> Judge Goldstone held in *Sonderup v Tondelli*<sup>109</sup> that section 28(2), read with section 28(1), establishes a set of children's rights, and called section 28(2) an "expansive guarantee" that a child's best interests will be paramount in every matter concerning the child.<sup>110</sup> The court assumed that section 28(2) is a right because it is subject to section 36 limitation.<sup>111</sup> In *Du Toit v Minister of Population Development*<sup>112</sup> the court referred to section 28(2) as a *principle*. In the Transvaal Provincial Division (now the North Gauteng High Court) in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*<sup>113</sup> the court was quite clear on its view about the meaning of section 28(2) when it said "dat art 28(2) inderdaad die fundamentele reg van elke kind vestig om in die opweging van strydende partye se botsende belange – en dus ook die strydende partye se aansprake op fundamentele regte en die handhawing daarvan - in die eerste gelid te staan", and thus recognised section 28(2) as a fundamental right. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and others*,<sup>114</sup> the Constitutional Court also

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<sup>107</sup> Bonthuys 2006 *International Journal of Law, Policy and the Family* 27 believes that the Constitutional Court has not dealt with the best interests in the way it normally treats other constitutional rights, which creates the impression that best interests are not really a fundamental right. On her view, see further below under this heading.

<sup>108</sup> 2000 (3) SA 422 (CC) at 428-429 (also reported in 2000 7 BCLR 713 (CC)).

<sup>109</sup> 2001 (1) SA 1171 (CC) (also reported as *LS v AT* 2001 2 BCLR 152 (CC)).

<sup>110</sup> At 1184.

<sup>111</sup> At 1184.

<sup>112</sup> 2003 (2) SA 198 (CC) at 207-208.

<sup>113</sup> 2003 (4) SA 160 (T) at 178.

<sup>114</sup> 2004 (1) SA 406 (CC) at 431-432 (also reported in 2003 12 BCLR 1333 (CC)).

referred to section 28(2) as a *right*. After the recent judgement of the Constitutional Court in *M v S*,<sup>115</sup> it is clear that the uncertainty as to the exact meaning and extent of section 28(2) is still very much present. The court referred to section 28(2) as a **right**<sup>116</sup> and a **substantive right**,<sup>117</sup> but also as a **principle**,<sup>118</sup> a **provision**,<sup>119</sup> and a **guideline**.<sup>120</sup> This highlights just how much confusion there really is about the reach of section 28(2), and that the courts have used conflicting terminology and have thus given conflicting messages about the nature of section 28(2).<sup>121</sup>

In their contribution,<sup>122</sup> Anderson and Spijker opine that section 28(2) is regarded as a separate constitutional right,<sup>123</sup> but Bonthuys<sup>124</sup> criticises the use of section 28(2) as an independent constitutional right. She believes that it is unnecessary to classify section 28(2) as an independent constitutional right, as there are other constitutional rights of children which apply more directly,<sup>125</sup> and says that because the Constitutional Court has not dealt with the best interests in the way it normally treats other constitutional rights<sup>126</sup> it creates the impression that it is not

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<sup>115</sup> 2007 12 BCLR 1312 (CC).

<sup>116</sup> At 1321.

<sup>117</sup> At 1323.

<sup>118</sup> At 1320, 1324, 1325.

<sup>119</sup> At 1320.

<sup>120</sup> At 1320.

<sup>121</sup> Also see the discussion under “6 3 3 The Children’s Act and the best interests of the child” below, where Davel points out that there is more certainty about the meaning of “the best interests of the child” as a result of the Children’s Act.

<sup>122</sup> Anderson & Spijker 2002 *Obiter* 365.

<sup>123</sup> At 371.

<sup>124</sup> Bonthuys 2006 *International Journal of Law, Policy and the Family* 26.

<sup>125</sup> Bonthuys 2006 *International Journal of Law, Policy and the Family* 26.

<sup>126</sup> Bonthuys says when a South African court is faced with an argument that a fundamental right has been infringed there are two stages to be followed, namely, whether there has been an infringement of the right and whether such infringement is justified. She argues that the courts do

really a fundamental right.<sup>127</sup> She refers to various cases involving children, such as *Government of the Republic of South Africa v Grootboom*,<sup>128</sup> *Fraser v Children's Court, Pretoria North*<sup>129</sup> and *President of the RSA v Hugo*,<sup>130</sup> where the courts did not refer to the best interests as a right, and she argues that it was not really necessary for the courts to refer to the best interests as a right, because there were other children's rights which applied more directly.<sup>131</sup> Bonthuys believes that the best interests of the child should not be regarded as an independent right,<sup>132</sup> and contends that the wording of section 28(2) suggests that the **interests** of the child should be weighed against the **rights** of other parties.<sup>133</sup> Section 28(2) should only operate when there are no other fundamental children's rights.<sup>134</sup> She believes that the rights of parents and other family members should be considered alongside those of children.<sup>135</sup> She suggests that the best interests principle<sup>136</sup> in the Constitution should play a limited role, operating mainly where there are no other fundamental children's rights.<sup>137</sup>

Although there is not yet any clarity in our law about the exact nature of the best interests of the child, I believe that Bonthuys' view dilutes the importance of this

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not analyse and interpret the contents of the best interests in this way because they simply assert that a particular rule or practice infringes the best interests of the child.

<sup>127</sup> At 27.

<sup>128</sup> 2001 (1) SA 46 (CC) (also reported in 2000 11 BCLR 1169 (CC)).

<sup>129</sup> 1997 2 BCLR 153 (CC) at 161-163.

<sup>130</sup> 1997 (4) SA 1 (CC).

<sup>131</sup> At 26.

<sup>132</sup> Bonthuys 2006 *International Journal of Law, Policy and the Family* 37.

<sup>133</sup> At 28.

<sup>134</sup> At 35.

<sup>135</sup> Bonthuys 2006 *International Journal of Law, Policy and the Family* 39.

<sup>136</sup> This is the term Bonthuys uses when referring to a child's best interests.

<sup>137</sup> Bonthuys 2006 *International Journal of Law, Policy and the Family* 35.

standard. I believe section 28(2) was included in the Constitution to emphasise the importance of the best interests of a child, and that it should always be considered, not only when there are no other avenues to utilise. Just because the rights of parents, family members or any other people have to be considered, does not detract from the importance of section 28(2). It is possible to balance its importance in every matter where it is considered. As discussed below,<sup>138</sup> the best interests standard is not absolute. It will have to be carefully considered in every matter affecting a child, and, where necessary, the child's best interests will have to be balanced against other constitutional rights. I do believe though that it is important to know exactly what the role of section 28(2) is so that South African courts can apply this standard with certainty.

#### **4 2 4 Primacy and paramountcy**

If we consider the wording of the various instruments discussed above that relate to the best interests of the child, it is apparent that the vocabulary that is used when referring to this issue is not consistent. The Convention makes the best interests of the child **a primary consideration**.<sup>139</sup> In terms of the Charter the best interests of the child has to be **the primary consideration**,<sup>140</sup> while the Constitution demands that the best interests of the child are **of paramount importance** in every matter concerning the child.<sup>141</sup>

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<sup>138</sup> See "5 RACE VERSUS CULTURE" and "4 2 4 Primacy and paramountcy".

<sup>139</sup> Art 3(1).

<sup>140</sup> Art 4(1).

<sup>141</sup> S 28(2).

According to McGoldrick<sup>142</sup> it was specifically decided to use the words **a primary consideration** in the Convention because there were strong reservations in the Working Group of the United Nations Human Rights Commission about a proposal to make the best interests of the child **the** primary consideration - it was noted that there were situations in which competing interests should be of at least equal, if not greater, importance than the interests of the child. Alston says that the objective of the word “a” was to ensure that there is sufficient flexibility to enable interests other than those of the child to prevail.<sup>143</sup> According to Todres<sup>144</sup> this desire for flexibility has created a loophole in the Convention, in that it allows judges to consider the child’s best interests and then to make a decision that may not reflect those interests. Freeman believes that this dilutes the paramountcy principle.<sup>145</sup> In my view, this leaves the best interests of a child open to abuse.

When the drafters of the Charter decided to make the best interests of the child **the** primary consideration, more emphasis was placed on the best interests of the child than is the case in the Convention. This is so because the word **the** is obviously stronger than **a** as used in the Convention.<sup>146</sup> Compared to the

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<sup>142</sup> McGoldrick in Freeman *Children’s Rights ii* 108 n 41.

<sup>143</sup> Alston 1994 *International Journal of Law and the Family* 13.

<sup>144</sup> Todres in Freeman *Children’s Rights ii* 176.

<sup>145</sup> Freeman “Future of children’s rights” in Freeman *Children’s Rights ii* 300.

<sup>146</sup> Parker in Alston *The Best Interests of the Child* 28.

Convention, the Charter thus offers increased levels of protection for the child's best interests.<sup>147</sup>

I have already shown that the use of the definite article "the" is stronger than the indefinite article "a". The next step is to determine whether the protection offered to children by the Constitution as far as their best interests are concerned is equally or more comprehensive than that of the two international instruments discussed above. To determine whether there is a difference in meaning with regard to the terms **primary** and **paramount**, a look at the *Oxford Student's Dictionary*<sup>148</sup> shows that "primary" is defined as "of the first importance, chief", while the adjective "paramount" means "more important than anything else". The use of the word **paramount** in the Constitution is emphatic.<sup>149</sup> Arguably then, the word **primary**, which is used in both the Convention and the Charter, is weaker than the word **paramount** (which is the term used in the Constitution).<sup>150</sup> Applied literally, children's interests in the Constitution would trump all other rights and interests, but Bonthuys<sup>151</sup> believes such an interpretation would be unpalatable. It would then become pointless to even consider the rights and interests of other parties.<sup>152</sup> This, in my opinion, is the correct interpretation. Obviously no interests

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<sup>147</sup> Davel 2002 *De Jure* 283; Chirwa 2002 *The International Journal of Children's Rights* 160.

<sup>148</sup> Allen & Delahunty *Oxford Student's Dictionary* 739.

<sup>149</sup> This was confirmed in *M v S* 2007 12 BCLR 1312 (CC) at 1324.

<sup>150</sup> Parker in Alston *The Best Interests of the Child* 28. This is also clear from the way these terms are defined, as discussed above.

<sup>151</sup> Bonthuys 2006 *International Journal of Law, Policy and the Family* 23.

<sup>152</sup> Bonthuys 2006 *International Journal of Law, Policy and the Family* 34.

can be so strong that they are protected at all costs,<sup>153</sup> but the importance of the best interests of a child must never be downplayed or overlooked.

This is also the view of the Constitutional Court. In both *Minister of Welfare and Population Development v Fitzpatrick*<sup>154</sup> and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and others*<sup>155</sup> the court held that section 28(2) is capable of limitation. In *M v S*<sup>156</sup> Judge Sachs held that the word “paramount” is emphatic,<sup>157</sup> and that if this principle “is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting” its objective.<sup>158</sup> The court further held that just because the best interests of the child are paramount, it does not mean that they are absolute.<sup>159</sup> It is always important to take into account the facts of each individual case when making a decision about the best interests of a child. Giving his view of the application of section 28(2) Judge Madala, in his minority judgement, held that a child’s best interests must prevail **unless** the infringement of those rights can be justified in terms of section 36 of the Constitution.<sup>160</sup>

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<sup>153</sup> This viewpoint does not in any way minimise the importance of the best interests of the child.

<sup>154</sup> 2000 (3) SA 422 (CC) at 429 (also reported in 2000 7 BCLR 713 (CC)).

<sup>155</sup> 2004 (1) SA 406 (CC) at 432 (also reported in 2003 12 BCLR 1333 (CC)).

<sup>156</sup> 2007 12 BCLR 1312 (CC).

<sup>157</sup> At 1324.

<sup>158</sup> At 1325.

<sup>159</sup> At 1325.

<sup>160</sup> *M v S* 2007 12 BCLR 1312 (CC) at 1352.

There can be no doubt about the importance of children's rights and particularly the best interests of the child. The issue is to ensure that this strong protection that is offered to children is actually applied.

#### 4 2 5 Criticism of the best interests standard

The best interests of the child, as we have established, are a determining factor in every matter concerning the child. The application of the best interests standard is not that simple though, and has been the source of much criticism. The best interests standard is notoriously vague and indeterminate.<sup>161</sup> It has failed in the past to provide a reliable or determinate standard.<sup>162</sup> It has been said that the vagueness and indeterminacy are a result of the subjective application of the standard and the difficulty in providing an objective assessment, given the rapidly changing social values, standards and customs of our time.<sup>163</sup> Parker<sup>164</sup> cautions against the assumption that there is only one best interests standard. It has been argued, and this is also my view, that the concept "best interests of the child" cannot have a fixed meaning and content that are valid for all communities and all circumstances, but should always remain flexible.<sup>165</sup> The meaning will be determined by the facts and circumstances of each case.<sup>166</sup> Heaton makes the point that this indeterminacy is present in other legal concepts, such as the *boni*

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<sup>161</sup> Bennett 1999 *Obiter* 155; Bennett *Human Rights* 100; Bonthuys 1997 *SAJHR* 636; Mosikatsana 1998 *Michigan Journal of Race & Law* 391; Parker in Alston *The Best Interests of the Child* 26.

<sup>162</sup> Currie & De Waal *Bill of Rights Handbook* 618.

<sup>163</sup> Clark 2000 *Stell LR* 15.

<sup>164</sup> Parker 1994 *International Journal of Law and the Family* 27.

<sup>165</sup> Heaton 1988 *LLM* 16.

<sup>166</sup> *Lubbe v Du Plessis* 2001 (4) SA 57 (C) at 66; Van Heerden "Judicial interference" in Van Heerden *et al Boberg's Law of Persons and the Family* 526; Bekink 2003 *THRHR* 261.

mores, but that it can be applied despite this indeterminacy.<sup>167</sup> In *Minister of Welfare and Population Development v Fitzpatrick* the court held that the best interests standard should be flexible because individual circumstances will determine which factors secure the best interests of a particular child.<sup>168</sup> Flexibility is necessary to take account of all the relevant circumstances of each case and to ensure that, practically, the final outcome is in the best interests of the child concerned.<sup>169</sup> In fact, the Constitutional Court recently held<sup>170</sup> that it is precisely this inherent flexibility of section 28 that constitutes the source of its strength, and that “indeterminacy of outcome is not a weakness”.<sup>171</sup> Although it is clear that there must be some limit to the scope of the operation of the best interests of the child,<sup>172</sup> what is in a child’s best interests requires a value judgement that cannot be determined in abstract or in advance.<sup>173</sup>

A further point of criticism of the best interests standard is that we cannot know incontrovertibly what is in a child’s best interests.<sup>174</sup> There are two major stumbling blocks in reaching a decision on a child’s best interests. They are the inability to predict the consequences of alternative outcomes and the lack of

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<sup>167</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at 428-429; Heaton 1990 *THRHR* 98.

<sup>168</sup> 2000 (3) SA 422 (CC) at 428-429.

<sup>169</sup> Bekink & Bekink 2004 *De Jure* 39.

<sup>170</sup> *M v S* 2007 12 BCLR 1312 (CC).

<sup>171</sup> At 1324.

<sup>172</sup> Bekink & Brand in Davel *Child Law* 195. This is also the view of the Constitutional Court, which was discussed under “4 2 4 Primacy and paramountcy”. Although the authors use the word *principle*, they also use the term *rule* in the same contribution. There has been much confusion about the correct term to use when describing the best interests of a child. This is also evident from court (including Constitutional Court) decisions — see “4 2 3 The rights in section 28(1) versus section 28(2)” above.

<sup>173</sup> *K v M* [2007] 4 All SA 883 (E) at 891; *P v P* 2007 (5) SA 94 (SCA) at 99; Bekink & Bekink 2004 *De Jure* 40.

<sup>174</sup> According to Thomas & O’Kane 1998 *The International Journal of Children’s Rights* 138.

consensus on what criteria to use in evaluating the alternatives.<sup>175</sup> No decision can truly serve the best interests of the child.<sup>176</sup> Any decision can merely be aimed at serving the interests of the child as well as is possible under the specific circumstances. All the options must be known, all the possible outcomes of each option must be known, the probabilities of each outcome occurring must be known and the value attached to each outcome must be known to determine what would be in the best interests of the child.<sup>177</sup> Determining the best interests of a child in a particular case involves a value judgement based on the facts,<sup>178</sup> and all relevant factors have to be taken into account.<sup>179</sup> Furthermore, members of various professions dealing with matters concerning children have different perspectives on the best interests of the child,<sup>180</sup> and the value systems of the decision-makers may also influence the interpretation of the best interests.<sup>181</sup>

Mosikatsana believes that a key question for the success of section 28 is whether its child-centered regime is compatible with the communalism of African culture.<sup>182</sup> I believe that it is indeed compatible.<sup>183</sup> It must be emphasised that, irrespective of section 28's acceptance by followers of customary law, there is no

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<sup>175</sup> Clark 2000 *Stell LR* 18.

<sup>176</sup> *Ex parte H* 1963 80 MN (NSW) at 732 as quoted in Heaton 1988 *LLM* 17.

<sup>177</sup> Heaton 1988 *LLM* 11. This approach is also adopted by Parker in Parker 1994 *International Journal of Law and the Family* 29.

<sup>178</sup> *P v P* 2007 (5) SA 94 (SCA) at 99.

<sup>179</sup> *K v M* [2007] 4 All SA 883 (E) at 891.

<sup>180</sup> Lambiase & Cumes 1987 *SALJ* 706-707; Mudie 1989 *De Rebus* 686.

<sup>181</sup> Alston 1994 *International Journal of Law and the Family* 21. In this context we also have to keep in mind Eekelaar's distinction between objectivisation and dynamic self-determinism – see Eekelaar 1994 *International Journal of Law and the Family* 46.

<sup>182</sup> Mosikatsana 1998 *Michigan Journal of Race & Law* 346-347.

<sup>183</sup> This will be discussed under “6 THE CHILD CARE ACT AND THE CHILDREN’S ACT” and “9 CONCLUSION”.

choice whether the best interests standard has to be applied or not. After all, the paramountcy of the best interests of the child is a constitutional imperative.

Despite the difficulties with this concept, and despite the criticism lodged against it, the courts have thus far been reasonably consistent in their acceptance of section 28(2) as a general standard for the protection of the rights of children<sup>184</sup> and have in fact held that some of the so-called criticisms do not really refer to weaknesses at all, but to strengths.<sup>185</sup>

#### **4 2 6 Parent-centered versus child-centered approach**

As discussed above, article 12 of the Convention gives children the right to participate in decision-making that affects them.<sup>186</sup> This is a significant development in children's rights law, as it "recognizes the child as a full human being, with integrity and personality, and with the ability to participate fully in society".<sup>187</sup> According to Sloth-Nielsen<sup>188</sup> the Convention recognises the growing autonomy of children in article 12, where children are given a say in matters affecting their well-being. This is important because it emphasises the need to allow children to participate in any decisions affecting them where children are

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<sup>184</sup> See *Jooste v Botha* 2000 (2) SA 199 (T) at 210 (also reported in 2000 11 BCLR 187 (T)) and *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at 81 (also reported in 2000 11 BCLR 1169 (CC)).

<sup>185</sup> See *M v S* 2007 12 BCLR 1312 (CC) at 1324.

<sup>186</sup> See n 90 above.

<sup>187</sup> Freeman "Introduction" in Freeman *Children's Rights: a comparative perspective* 3.

<sup>188</sup> Sloth-Nielsen 1995 *SAJHR* 403.

able to do so. As mentioned above,<sup>189</sup> this recognition of the child and the views of the child are contrary to customary beliefs. Adoption in customary law is usually about the needs of the family head, who adopts a boy to be his heir. The focus is on the adult, and there is no express protection for or acknowledgement of the best interests of the child.<sup>190</sup> In fact, quite unlike statutory adoption, adoption in customary law often happens even though the child has suitable biological parents, because the purpose of such adoption is not to protect the best interests of the child, but to look after the interests of the adult.

Article 12 of the Convention does not give children an unequivocal right to be heard. This right is restricted to children who are capable of forming their own views.<sup>191</sup> Also, the best interests of children<sup>192</sup> have to be determined by adult decision-makers.<sup>193</sup> There is thus a necessity for parents to act objectively and in the interests of children when needed. The question is how to deal with the conflict between the wishes of children and those of parents.

It is generally assumed that children do not have the capacity to act in their own long-term welfare.<sup>194</sup> Mosikatsana<sup>195</sup> says a reading of various legislation<sup>196</sup> points to a duality in approach when dealing with children's rights. On the one hand there is a parent-centered standard that views children as dependent and

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<sup>189</sup> See "4 1 INTRODUCTION".

<sup>190</sup> Bennett *Customary Law in SA* 319.

<sup>191</sup> Art 12(1).

<sup>192</sup> As provided for in art 3 of the Convention and s 28(2) of the Constitution.

<sup>193</sup> Barratt in Burman *The Fate of the Child* 150.

<sup>194</sup> Bonthuys 2006 *International Journal of Law, Policy and the Family* 32.

<sup>195</sup> 1998 *Michigan Journal of Race & Law* 391-392.

<sup>196</sup> Although this is not only seen in legislation, Mosikatsana only refers to legislation.

incapable of making independent decisions about their lives. He says that section 28(g) of the Constitution, read with sections 18(c) and 39(4) of the Child Care Act, apply a parent-centered standard in terms of which someone makes the determination as to what is in the child's best interests. Then, he says, there are other provisions which promote autonomous decision-making by children, such as decision-making with regard to abortions. Here, he refers to section 2 of the Choice on Termination of Pregnancy Act,<sup>197</sup> which promotes autonomous decision-making on the part of children. This argument can be applied equally to adoption. An adoption application will only be approved if it will serve the interests and conduce to the welfare of the child.<sup>198</sup> On the one hand, the Child Care Act demands consent from the parent of the child,<sup>199</sup> which is in line with the parent-centered approach, but on the other hand, under certain circumstances an adoption application shall only be granted if the child consents to such adoption.<sup>200</sup> The latter qualification indicates that the child might have to be involved in a decision regarding his/her best interests. Thus, as far as the best interests of a child are concerned, the dual approach applies as well. Although the best interests of a child have to be protected, it is not always certain how this should be done. The important issue is to ensure proper protection for children in all circumstances.

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<sup>197</sup> Act 92 of 1996.

<sup>198</sup> S 18(4)(c).

<sup>199</sup> S 18(4)(d).

<sup>200</sup> S 18(4)(e).

Eekelaar also describes two distinct methods that are used to determine a child's best interests. He refers to these methods as objectivisation and dynamic self-determinism,<sup>201</sup> but they can easily be equated to Mosikatsana's dual approach, as discussed above. Objectivisation is another version of Mosikatsana's parent-centered standard, while dynamic self-determinism is similar to Mosikatsana's description of children as autonomous decision-makers. Using objectivisation, the decision-maker draws on beliefs which indicate conditions which are deemed to be in the child's interests.<sup>202</sup> This, Eekelaar says, is often a process of crude generalisation of how children's well-being will normally be realised within the society in which they will live as a group, without considering each individual case.<sup>203</sup> On the other hand, self-determinism is a way of allowing children to develop their own perceptions of well-being as they enter adulthood, instead of preventing such development. From this point of view, Eekelaar believes that "the best interests principle is not a threat to children's rights",<sup>204</sup> but a mode of enhancing them.<sup>205</sup> The child is placed in an environment which is reasonably secure but which exposes him/her to a wide range of influences. In the case of young children their incomplete personal development of course demands that decisions be taken on their behalf.<sup>206</sup> As the child develops, he/she is encouraged to draw on these influences in such a way that the child contributes

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<sup>201</sup> Eekelaar 1994 *International Journal of Law and the Family* 46.

<sup>202</sup> Eekelaar 1994 *International Journal of Law and the Family* 46.

<sup>203</sup> Eekelaar 1994 *International Journal of Law and the Family* 58.

<sup>204</sup> This is an interesting choice of words by Eekelaar, but, because there is a danger in using either of these methods on its own, he explains that the best response to an issue may be for the child to be given the choice, but to give the child guidance when making that choice.

<sup>205</sup> Eekelaar 1994 *International Journal of Law and the Family* 58.

<sup>206</sup> Eekelaar 1994 *International Journal of Law and the Family* 44.

to the outcome. This outcome is then seen to be in the child's best interests because it has, at least partly, been determined by the child.<sup>207</sup>

Eekelaar emphasises that although dynamic self-determinism does not mean that decisions should simply be delegated to a child,<sup>208</sup> it is a way of "optimally positioning children to develop their own perceptions of their well-being as they enter adulthood".<sup>209</sup> The say of a child in a matter will not necessarily outweigh that of parents or family, but the child is in a position to express him/herself when matters affecting him/her are discussed.<sup>210</sup> In my view, this is an important distinction with regard to the best interests of the child. When the circumstances are as complex as they are in South Africa, with varied cultures, backgrounds, values and perceptions, it is important to take these circumstances into account when a decision regarding the best interests of a child is made. If the decision is taken in line with the objectivisation method, chances are that subjective issues, such as the values and background of the decision-maker, and issues such as the many AIDS orphans and abandoned babies in South Africa, will influence the decision. This will not necessarily be in the best interests of the child. As Parker explains, identical problems will be decided differently if the decision-makers have different knowledges at any of the above stages.<sup>211</sup> If, however, a child is allowed to participate in a decision affecting him/her as much as his/her age and maturity will allow, a more balanced decision can be taken with regard to the best

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<sup>207</sup> Eekelaar 1994 *International Journal of Law and the Family* 47-48.

<sup>208</sup> Eekelaar 1994 *International Journal of Law and the Family* 54.

<sup>209</sup> Eekelaar 1994 *International Journal of Law and the Family* 54.

<sup>210</sup> Sloth-Nielsen 1995 *SAJHR* 406.

<sup>211</sup> Parker in Alston *The Best Interests of the Child* 29.

interests of the child. Ultimately then, I believe a balance has to be maintained with regard to the views and inputs of all parties involved in the process.

Over and above the issue of balancing the views of the child with those of adults to serve the best interests of the child, there is a further issue here, namely, the possible conflict that could exist between the best interests of a child and the interests of parents, which could also play a part in decision-making. Heaton discusses this potential conflict and uses the example of adoption, where the adoption will be in the interest of the child, but the parent does not want to consent to the adoption.<sup>212</sup> She says it has to be considered whether the best interests of a child should be approached from a subjective or an objective point of view. If the solution is to approach the issue from a subjective point of view, the child's, the parents' and other interested parties' subjective opinions would be determinative. If the objective point of view is used, the views of the community at large should be applied. She explains that the problem then is that there is little consensus in the community on what will be in a child's best interests in a particular case,<sup>213</sup> and comes to the conclusion that it is undesirable to choose between the subjective and the objective approach. She says that a combination of both approaches should be used to determine the best interests of a child. As will be discussed under "9 CONCLUSION", I believe that a similar approach should be followed in adoption procedures in South Africa.

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<sup>212</sup> Heaton 1990 *THRHR* 97-98.

<sup>213</sup> Once again, bear in mind the different approaches adopted by statutory law and customary law.

There is still much uncertainty about the extent of a child's involvement in any decision that affects him/her, although it is certain that there has to be some input by the child. Just how much weight should be attached to the wishes and views of the child cannot be determined in advance. Again, the aim is to serve the best interests of the child, and each case should be considered individually. In this regard, I support Heaton's viewpoint above. The best interests of a child need to be determined with reference to all relevant aspects, which could include the opinions of all and any parties that could assist in this regard. This will lead to "a balanced and considered conclusion on what will most probably best serve the interests of the child".<sup>214</sup>

#### **4 2 7 Factors that determine the best interests of the child**

It is not an easy task to determine what the best interests of a child are. Determining these interests will always be a relative task where factors such as age, culture and other individual circumstances have to be considered and judgements made.<sup>215</sup> The question now is which factors should be taken into account. Ultimately, the court is called upon to make a value judgement to determine what is in the best interests of the child, bearing all relevant

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<sup>214</sup> Heaton 1990 *THRHR* 97.

<sup>215</sup> Ryburn *Open Adoption* 77.

considerations in mind.<sup>216</sup> This is the “golden thread” enshrined in section 28(2) of the Constitution which runs through the fabric of our law relating to children.<sup>217</sup>

It is important that **all** relevant factors are taken into consideration to determine the best interests of the child, otherwise a warped picture of these interests may be obtained.<sup>218</sup> The best interests of a child are influenced by the cultural, social, political and economic conditions of the country concerned.<sup>219</sup> Heaton<sup>220</sup> says that the child’s best interests can only be found through a combination of factors like the child’s apparent happiness; his/her moral and/or religious welfare; material welfare or stability; security and intellectual stimulation. She emphasises that there is no single factor that will always carry the most weight. All relevant factors have to be taken into account. Any decision taken can merely aim to serve the interests of the child as well as possible under the specific circumstances.<sup>221</sup>

For the first time in South African legal history, the court in 1994 in *McCall v McCall*<sup>222</sup> made a list of some of the most important factors that have to be taken into account and which serve as a guide to determine the best interests of a

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<sup>216</sup> This is what the court held in *P v P* 2007 (5) SA 94 (SCA) at 99. In *K v M* [2007] 4 All SA 883 (E) at 891 Judge Leach held that all relevant factors have to be taken into account to prevent a warped picture of what is in the child’s best interest.

<sup>217</sup> *Petersen v Maintenance Officer* [2004] 1 All SA 117 (C) at 124 (also reported in 2004 2 BCLR 205 (C)).

<sup>218</sup> *K v M* [2007] 4 All SA 883 (E) at 891.

<sup>219</sup> Van Heerden “Judicial interference” in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 503. This is again important in the South African scenario, and will be discussed in more detail under “5 RACE VERSUS CULTURE”.

<sup>220</sup> Heaton 1988 *LLM* 12.

<sup>221</sup> Heaton 1990 *THRHR* 98.

<sup>222</sup> *McCall v McCall* 1994 (3) SA 201 (C) at 204-205.

child. Although this list of factors only served as a guide, never enjoyed statutory recognition in South African law, and could not be regarded as a *numerus clausus*,<sup>223</sup> these factors have greatly assisted courts and have been referred to in many cases dealing with children. These factors are:

- (a) [T]he love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;

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<sup>223</sup> Bekink & Bekink 2004 *De Jure* 24. Any other relevant factors may be brought before the court.

*Chapter 4: The best interests of the child*

- (l) the desirability or otherwise of applying the doctrine of same sex matching, ... and
- (m) any other factor which is relevant to the particular case with which the Court is concerned.

Subsequently the South African legislature formulated a list of factors that need to be taken into account when determining the best interests of a child. The compilation of this list contained in section 7(1) of the Children's Act is welcomed.<sup>224</sup> This section will be discussed in more detail in another chapter,<sup>225</sup> and will only be referred to in the present chapter, with reference to those aspects that are, in my opinion, relevant to adoption. The list of factors in section 7(1) are:

- (a) the nature of the relationship between—
  - (i) the child and the parents,<sup>226</sup> 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

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<sup>224</sup> On 1 July 2007 certain sections of the Children's Act came into effect. S 7 was one of these. Although reference will be made to relevant parts of this section in this chapter, it will be discussed in more detail under "6 THE CHILD CARE ACT AND THE CHILDREN'S ACT".

<sup>225</sup> See "6 3 3 2 *The Children's Act, adoption and the best interests of the child*".

<sup>226</sup> In this section a parent includes any person who has parental responsibilities and rights in respect of a child – Children's Act s 7(2).

*Chapter 4: The best interests of the child*

- (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;
- (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.

The best interests of a child are not easily determined. These interests are a contentious issue that will be debated as long as decisions about children have to be taken. Ultimately I can only reiterate that a decision about the best interests of a child has to be made by considering all relevant factors and circumstances, whatever these may be at the time.

### **4 3 ATTACHMENT AND ADOPTION**

As discussed elsewhere,<sup>227</sup> the importance of attachment in the development of a child's emotional security cannot be overlooked. Attachment is regarded as one of the most important developmental needs of the child and is therefore vital for the child's best interests.<sup>228</sup> Attachment patterns may be interpreted differently in different cultures,<sup>229</sup> but the development of attachment relationships shows many universal features across cultures.<sup>230</sup>

It is important that attachment with a parent (whether biological or not) is formed as early as possible. The younger the child is when such attachment is formed,

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<sup>227</sup> See "3 3 ATTACHMENT".

<sup>228</sup> Clark 2000 *Stell LR* 19; Patterson *Infancy & Childhood* 227.

<sup>229</sup> Berk *Child Development* 421.

<sup>230</sup> Patterson *Infancy & Childhood* 235; Papalia *et al A Child's World* 225.

the better the child will adjust socially, emotionally and psychologically.<sup>231</sup> Having established that a child needs to form attachments early in life,<sup>232</sup> the next step is to establish whether a child can form an attachment with an adoptive parent.<sup>233</sup> Research shows that successful child rearing does not depend on whether the child is cared for by his/her biological parents.<sup>234</sup> Adoption in the early weeks of an infant's life gives the adoptive parents the chance to develop a psychological parent-child relationship,<sup>235</sup> which may be diminished if adoption occurs at a later stage.<sup>236</sup> Children, when adopted young, seem to have little difficulty in attaching themselves to their new carers,<sup>237</sup> and the majority of people wishing to adopt state a preference for adopting an infant or young child.<sup>238</sup> According to Judge of Appeal Heher,<sup>239</sup> the evidence shows that there is a universal phenomenon that, as a child grows towards the age of five, the prospects of adoption diminish. This does not mean that an older child cannot form attachments or should not be adopted, and the reality is that not only infants, but children of all ages are adopted. It is just a reiteration of the importance of finalising the adoption of a

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<sup>231</sup> Rutter *Maternal Deprivation* 63; Golombok in Gaber & Aldridge *In the Best Interests of the Child* 107. According to Goldstein *et al Beyond the Best Interests* 19 the psychological parent-child relationship is based on day-to-day interaction, companionship, and shared experiences.

<sup>232</sup> This is discussed under "3 3 ATTACHMENT".

<sup>233</sup> S 7(1)(d) of the Children's Act lists the separation of a child from a parent, brother, sister, or care-giver as a factor that is to be taken into account in determining the best interests of the child. As discussed in this part of the chapter, the effects of such separation can be minimised if the child is given the opportunity to form an attachment with an adoptive parent, and the adoption is open or at least has a degree of openness.

<sup>234</sup> Wait 1989 *Welfare focus* 52.

<sup>235</sup> According to Goldstein *et al Beyond the Best Interests* 19 this attachment relationship is based on day-to-day interaction, companionship, and shared experiences.

<sup>236</sup> Goldstein *et al Beyond the Best Interests* 22; Patterson *Infancy & Childhood* 61; Prynne in Treacher & Katz *Dynamics of Adoption* 69; Triseliotis in Treacher & Katz *Dynamics of Adoption* 83. This, however, does not mean that adoption of an older child will inevitably fail.

<sup>237</sup> Triseliotis in Treacher & Katz *Dynamics of Adoption* 83.

<sup>238</sup> Finlay 2006 *Masters* 23. For purposes of adoption studies a baby is defined as a child under six months of age - Howe *Patterns of Adoption* 11.

<sup>239</sup> Judge of Appeal Heher in *De Gree v Webb* 2007 (5) SA 184 (SCA) at 202.

child as quickly as possible. Delay in finding permanent families for children has long been acknowledged as harmful for the child.<sup>240</sup> Howe says that late placement appears to pose a risk of mental health, behavioural and psychiatric problems.<sup>241</sup> Despite this, he makes an important conclusion,<sup>242</sup> namely, that although the levels of adjustment of children who were adopted when they were older are slightly worse than the general population of non-adopted children raised by biological parents and children adopted as babies, their overall levels of adjustment are much better than those of children who remain in institutional settings. Although the preference of adoptive parents for young children is thus understood, it is important that adoptive parents are made aware of the findings with regard to older children and that they be encouraged to adopt, whatever the age of the specific child.

Goldstein *et al*, in fact, feel so strongly about early adoption, that they propose that an adoption decree should be made final the moment a child is placed with the adoptive parents, and that, ideally, infants should be placed even before birth.<sup>243</sup> This does not mean that adoption is not an option for older children. Studies have shown that, even when they were adopted at older ages, adoptees developed much more favourably than children reared in foster homes or those returned to biological mothers who had changed their minds about giving their

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<sup>240</sup> Howe *Patterns of Adoption* 73; Ryburn *Open Adoption* 70.

<sup>241</sup> Howe *Patterns of Adoption* 82.

<sup>242</sup> Howe *Patterns of Adoption* 86.

<sup>243</sup> Goldstein *et al Beyond the Best Interests* 36, 45.

children up for adoption.<sup>244</sup> Finlay<sup>245</sup> comes to the conclusion that children adopted as babies do not differ socially or emotionally from the general population, but says it would appear that the studies show potential problems in the adoption of older children that are sufficient to dissuade the majority of prospective adoptive parents from adopting older children.<sup>246</sup>

According to Golombok<sup>247</sup> the most important factor for a child's development of secure attachments is the quality of interaction between the attachment figures and the child. Adopted children can therefore develop secure attachments to their adoptive parents where the adoptive parents are responsive to them.<sup>248</sup>

An important aspect to bear in mind is that the more secure a child's attachment to a nurturing adult is, the easier it is for the child eventually to become independent of that adult and to develop good relationships with others, which is what we all want for our children. The link between attachment in infancy and characteristics observed years later, underscores the continuity of development and the interrelationship of its various aspects.<sup>249</sup> Papalia *et al*<sup>250</sup> describe in

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<sup>244</sup> Berk *Child Development* 576-577.

<sup>245</sup> Finlay 2006 *Masters* 25.

<sup>246</sup> In customary law there is no preference for adopting an infant, and even an adult may be adopted, as the aim is to institute an heir. In *Zibi v Zibi* 1952 (2) NAC 167 (S) at 170 it was confirmed that an adult can be adopted for the purpose of instituting an heir.

<sup>247</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 109-110.

<sup>248</sup> This was also found in a study by Singer, Brodzinsky, Ramsay, Steir and Waters (1985) "Mother-infant attachment in adoptive families", in *Child Development* 56: 1543-1551, as quoted by Golombok in Gaber & Aldridge *In the Best Interests of the Child* 110.

<sup>249</sup> Papalia *et al* *A Child's World* 228-229.

<sup>250</sup> Papalia *et al* *A Child's World* 228-229.

great detail how securely attached infants develop into confident young adults, while insecurely attached infants often have problems later in life.

Golombok confirms that children who experience a number of foster homes in their early years may fail to form attachments.<sup>251</sup> I have to add that in South Africa it is often only the “lucky” children who will be raised in foster homes. Many children will merely remain in orphanages or institutions until they have grown up, or will end up on the street.

There is evidence of more successful attachment to adoptive families where contact with biological families is maintained.<sup>252</sup> Most adoptive parents believe that contact with the child’s biological parents enhances their relationship with their child, and adoptees report a greater sense of closeness and attachment to their adoptive parents in adulthood if they re-established contact with their biological relatives during childhood.<sup>253</sup>

Judging by what was said above, it is clear that, ideally, a child needs to form attachments to a parent, whether biological or not, as soon as possible after birth. If a child is to be adopted, it is therefore better for the child if the adoption takes place as soon as possible after birth. If a child is adopted later in life<sup>254</sup> the

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<sup>251</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 111.

<sup>252</sup> Ryburn *Open Adoption* 94. Also see “4 4 OPEN VERSUS CLOSED ADOPTION” below; Triseliotis in Treacher & Katz *Dynamics of Adoption* 85-86.

<sup>253</sup> Ryburn *Open Adoption* 95 refers to various studies where this was found to be the case.

<sup>254</sup> This will be where the parents have died, the child has been in an orphanage, or the child has been abused, to name but a few.

adoption will not necessarily be a failure, but when an older child is adopted, the child might not have had the opportunity to form an attachment to a parent at a young age<sup>255</sup> which, as we have established above, could be detrimental for the child. The younger the child is at the time of the adoption, the greater the chance is of an attachment forming with the adoptive parent, and the greater the chance is of a happy, balanced child.<sup>256</sup> The important point is that it is in the child's best interests that any possible adoption has to be finalised as soon as possible, whatever the age of the child involved in the adoption.

#### **4 4 OPEN VERSUS CLOSED ADOPTION**

In general, it is the policy of the law to make the veil between past and present lives of adopted persons as opaque and impenetrable as possible, like the veil which God has placed between the living and the dead.<sup>257</sup>

##### **4 4 1 Introduction**

In the past there was much debate about the desirability of exposing an adopted child to his/her biological parents and/or members of the biological family. In Western culture it was believed that termination of all contact between the

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<sup>255</sup> This would be the case where the child was abandoned shortly after birth, for example.

<sup>256</sup> See "3 3 2 The theory behind attachment".

<sup>257</sup> Griffith *Adoption: procedure, documentation, statistics, New Zealand 1881-1991* 46 as quoted in Ryburn *Open Adoption* 35.

adopted child and the biological family was in the child's best interests.<sup>258</sup> In customary law, however, adoption is the solution sought by a man who has no sons or no heir in a particular house.<sup>259</sup> Where a family head has no sons, he may adopt a boy for the express purpose of making the child his heir and so perpetuate his bloodline.<sup>260</sup> He will usually try to obtain the son of a closely related family head in his own family group,<sup>261</sup> which means that contact is maintained between the child and the biological parents and/or family.<sup>262</sup> Although the focus of customary adoption is adult-centered,<sup>263</sup> and this practice is not conceived to be in the best interests of the child,<sup>264</sup> the openness of the adoption is definitely something that has to be acknowledged as being in line with current beliefs about the best interests of the child.<sup>265</sup>

Triseliotis<sup>266</sup> discovered a link between the absence of information about an adopted child's biological family and a degree of confusion about identity, and suggested that during early childhood the overriding developmental consideration

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<sup>258</sup> Current adoption legislation creates the legal illusion that an adopted child was born to the adoptive parents (see s 20 of the Child Care Act).

<sup>259</sup> Bennett *Customary Law in SA* 319; SALC *Project 110* 25; Bennett *Human Rights* 107; Maithufi 2001 *De Jure* 392.

<sup>260</sup> Bennett *Customary Law in SA* 319.

<sup>261</sup> Bekker *Seymour's Customary Law* 284; Olivier *et al Die Privaatreg van die SA Bantoetaalsprekendes* 462.

<sup>262</sup> It is my view that where a child has biological parents and there is no valid reason, such as abuse or abandonment, why the child should not be raised by the parents, it is not in the best interests of the child to be adopted.

<sup>263</sup> Bennett *Customary Law in SA* 319.

<sup>264</sup> Bennett *Human Rights* 107. In my view, Bennett is correct. The emphasis here is on the needs/wishes of the adult to have an heir. There is no express consideration for the interests of the child.

<sup>265</sup> Unfortunately the situation is not officially monitored and of course there would be cases where continued contact will not necessarily be in the best interests of the child. Also see the discussion under "9 CONCLUSION" and "4 4 2 3 *South African law and open adoption*".

<sup>266</sup> Triseliotis *In Search of Origins* 79-81.

which contributes to the core of identity formation is the quality of children's relationships and attachments to their primary carer(s).<sup>267</sup> Although still vigorously debated, there is undoubtedly a legislative move towards more openness in adoption.<sup>268</sup> The ultimate question is of course not what the biological parents want, or what the adoptive parents would feel comfortable with, or even what the rest of the world thinks about this matter, but only what is in the best interests of the child. This section of the thesis will therefore focus on the desirability (or not) of open adoption within the context of the best interests of the child.

#### **4 4 2 Open adoption**

The principles regarding open adoption<sup>269</sup> apply to children of all ages. To what extent there will be contact, depends on the circumstances of each case, not the age of the child. The discussion in this section is based on the assumption that an adopted child has biological parents, but is equally relevant to the biological extended family. Where the background of the child is known, contact with the biological family can still be arranged, provided that such contact will be in the best interests of the child.<sup>270</sup>

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<sup>267</sup> Triseliotis in Treacher & Katz *Dynamics of Adoption* 92.

<sup>268</sup> In terms of s 242(3) of the Children's Act the adopted child is no longer viewed as if he/she is biologically related to the adoptive parent.

<sup>269</sup> See "4 4 OPEN VERSUS CLOSED ADOPTION".

<sup>270</sup> The fact that the child was abandoned obviously does not bode well as far as any possible relationship with the biological family is concerned, and the facts of the case will have to be carefully scrutinised to determine the involvement, if any, of the family in the abandonment of the child.

Many children in South Africa are not fortunate enough to be raised by their biological parents/family. They grow up on the streets or as heads of households in homes where the parent(s) have for instance died of AIDS. If they are adopted at a stage, their need to have contact with their biological family, where possible, is equally strong. Although the biological parents may not be part of the child's life for whatever reason, there may be other biological family members, such as siblings, and the adopted child can only benefit by contact with these family members. If, however, it is impossible to determine the biological background of the child, the consideration of openness becomes superfluous. In South Africa it often happens that an abandoned child is adopted, in which case the biological parents and/or family will probably not feature in the child's life. In such circumstances, this section of the thesis will not be relevant. The child's need for knowledge about his/her background will however be equally strong regardless of whether or not he/she has biological parents/family. This issue of the child's need for knowledge about his/her background in the context of interracial/intercultural adoption is discussed under "5 RACE VERSUS CULTURE".

#### *4 4 2 1      Forms of open adoption*

Various factors have led to a shift towards more openness in statutory adoption,<sup>271</sup> such as the realisation that secrecy in adoption has an adverse psychological effect on all parties involved, the emergence of a general "children's rights" culture brought about by documents such as the Convention,

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<sup>271</sup> Louw 2003 *De Jure* 252.

pressure on the State to open up birth records, changes in community values, legislation which now allows for the possibility of post-adoption contact and access to adoption records, the increasing number of adoptions of older children with existing relationships with biological family members, and the introduction of the Bill of Rights which enshrines the general principles of equality and non-discrimination and entrenches the child's right, inter alia, to a name and nationality and recognises the paramountcy of the best interests of the child.<sup>272</sup>

A distinction has to be made between open adoption and openness in adoption. In open adoption the biological parent is actively involved in choosing the prospective adopters. Open adoption includes the biological parents and adoptive parents meeting each other, sharing full identifying information, and having ongoing contact over the years.<sup>273</sup> Openness in adoption, or semi-open adoption,<sup>274</sup> refers to various forms of communication between biological parents and adoptive parents, such as the occasional exchange of letters and pictures via an agency or meeting once but not engaging in ongoing contact, in other words the agency provides full, but non-identifying information to the biological parents and the prospective adopters about each other.<sup>275</sup> The two concepts are clearly not the same. However, for the sake of convenience the term contact is used here to include both forms of contact between the adopted child and the

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<sup>272</sup> Louw 2003 *De Jure* 254-256.

<sup>273</sup> Triseliotis in Mullender *Open Adoption* 20; Silber & Dorner *Children of Open Adoption* 9.

<sup>274</sup> Louw 2003 *De Jure* 256. Also known as semi-open adoption or indirect contact. Prynne in Treacher & Katz *Dynamics of Adoption* 75-76 refers to 'letter box' contact where communication with the biological family is done through the mediation of the adoption agency.

<sup>275</sup> Silber & Dorner *Children of Open Adoption* 9; Triseliotis in Mullender *Open Adoption* 20; Howe *Patterns of Adoption* 113; Louw 2003 *De Jure* 256.

biological parents/family, namely, open adoption and openness in adoption, and the term adoption contact is used to refer to both open adoption and openness in adoption.

There are various forms of adoption contact. Flexibility and responsiveness to changing circumstances can be important ingredients in the maintenance of contact.<sup>276</sup> There is no single type of contact that will be right for everyone, and individual circumstances should always be important determinants of levels or degree of contact<sup>277</sup> that the child's best interests require in each adoption. Depending on the best interests of the child, there will also be variation in the frequency and duration of contact.<sup>278</sup>

#### 4 4 2 2 *Benefits of adoption contact*

Adoption is widely regarded as creating inherently contradictory relationships for all parties that are likely to increase the difficulties of identity formation for the adopted child.<sup>279</sup> In the past many adoptive parents were reluctant to tell children they were adopted, which made these children feel embarrassed or "second class" when they realised that they were adopted.<sup>280</sup> Adopted children have increasingly been asking for more adoption contact, and internationally there has

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<sup>276</sup> Ryburn *Open Adoption* 99.

<sup>277</sup> Bridge 1994 *Tolley's journal of child law* 147; Ryburn *Open Adoption* 99.

<sup>278</sup> Ryburn *Open Adoption* 75; Louw 2003 *De Jure* 256.

<sup>279</sup> Ryburn *Open Adoption* 21.

<sup>280</sup> Triseliotis in Mullender *Open Adoption* 17.

been a shift towards a more open model of adoption.<sup>281</sup> As children are now the bearers of rights, it is no longer morally<sup>282</sup> or legally<sup>283</sup> acceptable to deny them the right to know of their origins. Furthermore, studies have shown that being truthful and honest with children about their status, circumstances, roots, genealogy and general background is central to their identity formation and their mental health, and sharing such information with children is therefore in the child's best interests and is not to be a choice, but an obligation for parents and substitute carers.<sup>284</sup>

When a young child or baby is adopted, the degree of contact that the child will have with the biological parents/family can be determined by the parties involved in the adoption. The need for adoption contact in the placement of older children may be even stronger, because these children may have been parented by their biological parents and may already have a relationship with and memories of their biological parents.<sup>285</sup> A child of three to ten years old cannot simply forget his/her biological parents. Even if the child cannot live with them, a relationship can still be maintained with the biological parents, and an older child's chance of success in an adoptive placement can be enhanced by allowing contact to be maintained with the biological family.<sup>286</sup> If the biological parents have been part of

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<sup>281</sup> Louw 2003 *De Jure* 254.

<sup>282</sup> Katz in Treacher & Katz *Dynamics of Adoption* 227.

<sup>283</sup> See the discussion under "4 4 2 3 *South African law and open adoption*" below, where the legal framework of adoption in South Africa is discussed. Furthermore, children have the right to identity in terms of art 8 of the Convention. S 9 of the Constitution grants them the right to equality and non-discrimination, and s 28(1)(a) entrenches their right to a name and nationality.

<sup>284</sup> Triseliotis in Treacher & Katz *Dynamics of Adoption* 84.

<sup>285</sup> Silber & Dorner *Children of Open Adoption* 168.

<sup>286</sup> Silber & Dorner *Children of Open Adoption* 169.

the child's life until the time of the adoption, a relationship between the adopted child and the biological parents/family is important after the adoption. As discussed above,<sup>287</sup> such a relationship has many benefits and will inter alia assist in protecting the culture in which the child grew up.<sup>288</sup>

No matter what the parties to an adoption might think or want, the reality is that an adopted child will always have two sets of parents and/or families, even if the biological family is not known. Biological ties cannot be severed. Contact in adoption acknowledges the child's past. When a family unit breaks down and the breakdown results in divorce, there is no question whether the parents will continue to have contact with their biological children after the divorce. Continuing contact is the norm, which is deviated from only if the child's best interests demand limitation or prohibition of contact. Why then, should it be different when a child is adopted? Studies have further shown that adoption without any contact between the various parties is the least desirable of the range of possible adoptions.<sup>289</sup> Silber and Dorner have compared children of open adoption, or where there is openness in the adoption, with children of closed adoption, and concluded that the adopted children that have contact with their biological families are mentally healthier.<sup>290</sup> Even if the adoption was a closed one, these children will benefit from opening up their adoption during the school-age years, even if the contact simply consists of the sharing of available

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<sup>287</sup> See "4 4 OPEN VERSUS CLOSED ADOPTION".

<sup>288</sup> Also see "5 RACE VERSUS CULTURE", where this will be discussed.

<sup>289</sup> Ryburn *Open Adoption* 99.

<sup>290</sup> Silber & Dorner *Children of Open Adoption* 66.

information.<sup>291</sup> Evidence suggests that older children who are pressurised to abandon existing meaningful relationships with members of their biological family may find it difficult to attach themselves to a new family.<sup>292</sup>

Adopted children often develop a curiosity about their biological families and heritage. This is part of the process of the development of their identity. Identity is important because it determines the ways in, and the degree of confidence with, which we enter our social world.<sup>293</sup> Although development of a child's identity can be complicated by adoption, contact may be of value in fostering the child's identity.<sup>294</sup> It could provide the child with the best of both worlds – security in the placement with the adoptive parents and a sense of self derived from ongoing contact with the biological parents/family.<sup>295</sup> Under "9 CONCLUSION" it will be suggested that there should be systems and programmes in place in South Africa to assist all relevant parties in this regard.<sup>296</sup>

It is the development of a clear sense of personal identity that permits us to enter situations in our lives with a measure of confidence and assurance.<sup>297</sup> At its most basic, identity relates to how we feel about ourselves and how we think other

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<sup>291</sup> Silber & Dorner *Children of Open Adoption* 66.

<sup>292</sup> Triseliotis *et al Adoption* 76.

<sup>293</sup> Ryburn *Open Adoption* 33.

<sup>294</sup> Nicholson 2000 *THRHR* 593; Louw 2003 *De Jure* 255.

<sup>295</sup> Louw 2003 *De Jure* 277.

<sup>296</sup> As will be discussed in the conclusion, social workers should be trained and should be very involved in this process, both before and after the adoption. Similarly, the adoptive parents, the biological parents and the child where he/she is of an age and maturity to understand the nature and importance of the adoption should be prepared for and informed about the options available and the impact of contact on an adoption.

<sup>297</sup> Ryburn *Open Adoption* 73.

people see us.<sup>298</sup> There are twin aspects to identity. They are self-identity and self-esteem. How we understand at a cognitive level who we are is called self-identity. A child's self-identity develops from a very early age, primarily through the daily interactions that the child experiences.<sup>299</sup> His/her emotional, intellectual and moral capacities prosper within family relationships, and these relationships determine his/her social reactions.<sup>300</sup> Our identity depends on the amount of information we have about ourselves,<sup>301</sup> which for adopted children includes the amount of information that is available about their biological families and background. With an interracial adoption, the level and nature of the contact that are required may be complicated even more by the race dimension.<sup>302</sup>

When and how they learn about being adopted, and the degree of clarity about their adoptive status, is something that can create a major challenge to an adopted child's existing self-identity or to the development of self-identity.<sup>303</sup> Adopted children need to know that they are adopted.<sup>304</sup> Conveying this knowledge has to happen as early as possible so that children can feel that they always knew,<sup>305</sup> but they also have to understand and integrate this knowledge and its meaning into their developing selves.<sup>306</sup>

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<sup>298</sup> Triseliotis in Treacher & Katz *Dynamics of Adoption* 89.

<sup>299</sup> Landman 1985 *Welfare Focus* 17.

<sup>300</sup> Goldstein *et al Beyond the Best Interests* 10.

<sup>301</sup> In "3 1 INTRODUCTION" the importance of growing up in a family environment is stressed.

<sup>302</sup> Mallows in Mullender *Open Adoption* 87. This aspect is discussed in detail under "5 RACE VERSUS CULTURE", especially "5 6 3 2 Physical appearance as a factor".

<sup>303</sup> Ryburn *Open Adoption* 36.

<sup>304</sup> Triseliotis in Treacher & Katz *Dynamics of Adoption* 85.

<sup>305</sup> Triseliotis in Treacher & Katz *Dynamics of Adoption* 85.

<sup>306</sup> Triseliotis in Treacher & Katz *Dynamics of Adoption* 85.

Self-identity has to be distinguished from self-esteem. Self-esteem is the tendency to feel good about oneself and to conform to others' views about what a mature individual should be,<sup>307</sup> or the way that a child sees him/herself or how he/she feels about this self-understanding, which makes it a subjective experience.<sup>308</sup> Self-identity and self-esteem exist in a dynamic and reflexive relationship. Our self-esteem is determined by the messages that are received and understood in our social environment. Where self-identity and self-esteem are clear and positive, negative messages can be shrugged off or accommodated.<sup>309</sup>

Adoption can lead to negative messages that can be received or perceived, with resultant damaging effects on self-identity and self-esteem. Firstly, the personal loss of genetic continuity brings with it the loss of many issues such as personal qualities and characteristics that others take for granted in the development of their self-identity. Secondly, the meaning and value that society attributes to continuity creates more general difficulties in the acquisition of a clear and positive sense of personal identity.<sup>310</sup> To lose connection with the past can be, in our society, to lose one's self.<sup>311</sup>

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<sup>307</sup> Katz in Treacher & Katz *Dynamics of Adoption* 218.

<sup>308</sup> Landman 1985 *Welfare Focus* 17.

<sup>309</sup> Ryburn *Open Adoption* 33.

<sup>310</sup> Ryburn *Open Adoption* 34.

<sup>311</sup> Ryburn *Open Adoption* 35.

Richards<sup>312</sup> makes a distinction between social and personal identity. Although it is not an absolute distinction, he believes that it is an important one. Personal identity is founded in the quality of early emotional relationships with others. It is forged in the encounter between the infant's needs for nurture and the emotional qualities of the care-givers. Social identity, on the other hand, includes categories such as class and race. Critics of interracial adoption, he says, collapse personal identity into social identity.<sup>313</sup>

Who then is adoption contact beneficial for? The answer is all the parties involved in the adoption process. Biological families can suffer more in the adoption process if there is no contact.<sup>314</sup> Even though they choose adoption,<sup>315</sup> they still experience a loss and grieve for it.<sup>316</sup> If the adoption is an open one, they can deal with the guilt. They are much more at peace with their decision and are better able to process their feelings of grief.<sup>317</sup> The biological parents also want the child's understanding and forgiveness.<sup>318</sup>

Although, traditionally, adoptive parents have been seen as the ones with the most to lose from continuing contact in adoption,<sup>319</sup> available research indicates that there can be significant advantages to adoptive parents in parenting their

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<sup>312</sup> Richards in Treacher & Katz *Dynamics of Adoption* 101.

<sup>313</sup> Richards in Treacher & Katz *Dynamics of Adoption* 106.

<sup>314</sup> Ryburn *Open Adoption* 84.

<sup>315</sup> This choice is often not one they wish to make, but it is in the best interests of the child, or it is the only one that the biological parent can make.

<sup>316</sup> Silber & Dorner *Children of Open Adoption* 22.

<sup>317</sup> Silber & Dorner *Children of Open Adoption* 15; Triseliotis in Mullender *Open Adoption* 26.

<sup>318</sup> Triseliotis in Mullender *Open Adoption* 26.

<sup>319</sup> Triseliotis in Mullender *Open Adoption* 27.

children where there is contact.<sup>320</sup> They feel reassured by knowing that their children's placements have been approved by the biological parents.<sup>321</sup> In their study, McRoy and her colleagues<sup>322</sup> concluded that there is a positive relationship between contact and the extent to which adoptive parents feel a sense of "entitlement" to their children. Most adoptive couples decide after a while that they are comfortable with more contact than they originally thought.<sup>323</sup>

Adopted children grow up with the knowledge that their adoptions originated in a personal agreement between biological and adoptive parents,<sup>324</sup> and they feel a sense of belonging with the adoptive parents since those adoptive parents were selected to parent them.<sup>325</sup> Adoption contact enhances the identity of adopted children.<sup>326</sup> It encourages better mental health for children by encouraging communication within the family on the subject of adoption, and the child is allowed to care about both sets of parents without feeling guilty.<sup>327</sup> Research also shows that a child's attachment is not "some limited quantity that has to be divided up amongst people".<sup>328</sup>

The discussion above clearly shows how the best interests of the child are served by adoption contact. Prynne, however, believes that contact may be

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<sup>320</sup> Ryburn *Open Adoption* 87.

<sup>321</sup> Ryburn *Open Adoption* 99; Silber & Dorner *Children of Open Adoption* 16.

<sup>322</sup> McRoy *et al Openness in adoption: new practices, new issues* (1988) as quoted in Ryburn *Open Adoption* 87.

<sup>323</sup> Silber & Dorner *Children of Open Adoption* 40.

<sup>324</sup> Ryburn *Open Adoption* 99.

<sup>325</sup> Silber & Dorner *Children of Open Adoption* 15.

<sup>326</sup> Triseliotis in Mullender *Open Adoption* 21.

<sup>327</sup> Silber & Dorner *Children of Open Adoption* 15.

<sup>328</sup> Triseliotis in Mullender *Open Adoption* 24.

beneficial to the adopted child whose feelings about the biological parents are “ambivalent, fearful or murderous”, but that it is also a constant reminder to adoptive parents and adopted children that they are “unreal” or “unnatural”.<sup>329</sup> This point of view has to be criticised. Circumstances change, and decisions have to be made. This is life. It does not mean that the past can simply be erased. When people get divorced, the legal relationship between the parents is terminated, but the biological link between the parent and child remains and the parent will continue to have contact with the child. In the same way, the biological link between a child and a biological parent cannot be erased in the case of adoption, and although legally the biological parent will no longer be the child’s parent, the biological link makes contact between the parent and the child essential.

Silber and Dorner explain the relationship between the adoptive family and the biological family. They say that when there is contact with the biological family, the biological family is extended family, like other relatives within the adoptive family.<sup>330</sup> This, I believe, is a logical view. If the mind shift can be made to see the biological family as extended family, it will go a long way towards removing the negative connotation that is often still associated with adoption. In fact, as Silber and Dorner explain, when biological parents are accepted as relatives, it

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<sup>329</sup> Prynne in Treacher & Katz *Dynamics of Adoption* 76.

<sup>330</sup> Silber & Dorner *Children of Open Adoption* 9.

becomes very natural to incorporate them into the child's life.<sup>331</sup> It is important, though, that a distinction is made between the various families, and that the biological family should never be seen as fulfilling the same role as the adoptive family. The adoptive parents must remain the ones responsible for the upbringing of the child. As Louw says, if a scheme of multiple parenting exists, it could jeopardise the stability of the child and open up endless possibilities for disputes between the various "parents".<sup>332</sup>

Of course there is also criticism of adoption contact. As with any relationship, there can be disappointments, such as differences in lifestyles and values, or minor relationship problems, but we have to recognise that there is no perfect adoption, just as there are no perfect biological families.<sup>333</sup> There have to be appropriate degrees of contact.<sup>334</sup> Ryburn says those who argue that adoption contact can be confusing are applying adult thinking to the situations of children, because children consider the person(s) who raise them as their parents.<sup>335</sup> He says that secrecy "is the failure to celebrate difference, born of the fear that to do so will breach the relationship between adopters and their children".<sup>336</sup> In my opinion, secrecy creates the idea that there is something to hide, something to be ashamed of, and this is certainly not a healthy situation. What is important, I believe, is that any contact with biological parents/family has to be monitored

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<sup>331</sup> Silber & Dorner *Children of Open Adoption* 10. At the same time, the extended family of the adoptive parents also play an important role in the child's life, as discussed in more detail under "3.2.2 Parental care".

<sup>332</sup> Louw 2003 *De Jure* 277.

<sup>333</sup> Silber & Dorner *Children of Open Adoption* 17.

<sup>334</sup> Mallows in Mullender *Open Adoption* 87.

<sup>335</sup> Ryburn *Open Adoption* 83.

<sup>336</sup> Ryburn *Open Adoption* 181.

carefully. In this regard, it is important that there is a close relationship with a social worker, who has to assist in this regard. The emphasis here is on contact. The biological parent is no longer in a position to make decisions for and about the child. This is now the responsibility of the adoptive parent. The biological parent fulfils a completely different role in the child's life. All parties involved need to understand and accept this.

Finally, it is important to mention that even if there is agreement about the need of an adopted child to maintain contact with the biological family, a very serious concern in the South African context is financial constraints. The reality is that South Africa is a poor country. The Children's Act acknowledges this by including as part of section 7,<sup>337</sup> which contains the factors that have to be taken into consideration when the best interests of the child have to be determined, the practical difficulty<sup>338</sup> and expense of a child having contact with the parent(s).<sup>339</sup> In this regard, government assistance<sup>340</sup> will be crucial.

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<sup>337</sup> See s 7(1)(e).

<sup>338</sup> This could include logistical difficulties, transport problems, unavailability of postal services and/or technology, to name but a few.

<sup>339</sup> "Parents" in this context refers to the biological parents of an adopted child.

<sup>340</sup> See "6 3 3 2 *The Children's Act, adoption and the best interests of the child*" and "9 CONCLUSION".

4 4 2 3 South African law and open adoption

The provisions of section 20 of the Child Care Act create the legal fiction that an adopted child is the child of the adoptive parents.<sup>341</sup> In the past, the accepted adoptive practice in most countries, including South Africa, was closed adoption, where neither biological parents nor adoptive parents were permitted contact with each other or access to any information about each other and the biological origins of the adopted child were kept from him/her, even after adulthood.<sup>342</sup> The effect of section 20 was probably at least partly to blame for this situation. Louw says the possibility of post-adoption contact in South Africa is to a large extent determined by the legal effect of adoption, in that all the legal rights and obligations between the adopted child and any person who was his/her parent immediately prior to such adoption are legally terminated.<sup>343</sup>

An agreement to effect adoption contact, although possible, is currently very difficult to enforce in South Africa, and may lead to some stress for all parties involved. Furthermore, access to adoption records in South Africa can only be obtained by the adoptive parent from the date on which the adopted child reaches the age of 18 years,<sup>344</sup> or the adopted child from the date on which he/she reaches the age of 21 years.<sup>345</sup> Although the Registrar may in his/her

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<sup>341</sup> In terms of s 20(2) an adopted child is deemed in law to be the legitimate child of the adoptive parent, as if he/she was born to that parent.

<sup>342</sup> Louw 2003 *De Jure* 253-254.

<sup>343</sup> Louw 2003 *De Jure* 258.

<sup>344</sup> GG 10546 of 12 December 1986, Government Notice R 2612 reg 28(1)(a).

<sup>345</sup> GG 10546 of 12 December 1986, Government Notice R 2612 reg 28(1)(b). Although the age of majority has been lowered from 21 years to 18 years in terms of the Children's Act, Government

discretion at any time furnish information regarding an adoption to any person who in the opinion of the Registrar has sufficient reason to obtain the information,<sup>346</sup> the identity of the child, his/her biological parents or adoptive parents may not be revealed.<sup>347</sup>

Fortunately, there has been an international shift towards more transparency in adoption in recent times.<sup>348</sup> In keeping with this shift, the implementation of the adoption chapter of the Children's Act will do away with the artificial situation that was created by the Child Care Act. In terms of section 242(3) of the Children's Act the child will no longer be regarded as if he/she was born to the adoptive parent. Instead, an adopted child will for all purposes be regarded as the child of the adoptive parent and the adoptive parent will for all purposes be regarded as the parent of the adopted child. Furthermore, in terms of section 234 post-adoption agreements will be provided for. These agreements can be entered into by the biological parent or guardian of the child and the prospective adoptive parent of the child to provide for communication and the provision of information.<sup>349</sup>

Section 7(1)(f)(i) of the Children's Act makes reference to the need for a child to **remain in the care of** his/her parent, family and extended family. As we have

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Notice R 2612 is not linked to the age of majority, but specifically stipulates the age at which an adopted child may access adoption records as 21 years. Until such time as regulations changing this age are published, a child will not be able to access adoption records until the age of 21 years.

<sup>346</sup> Presumably, this would be for medical reasons, research, etc.

<sup>347</sup> GG 10546 of 12 December 1986, Government Notice R 2612 reg 28(4).

<sup>348</sup> Louw 2003 *De Jure* 254. Also see the discussion under “4 4 2 2 *Benefits of open adoption or openness in adoption*” above.

<sup>349</sup> Also see “6 6 3 Post-adoption agreements” where s 234 is discussed.

already established, it is not always possible for a child to remain in the care of a biological parent. In such a case, in order to protect the best interests of a child, it is important to **maintain contact with** his/her family or extended family where possible, as provided for in section 7(1)(f)(ii) of the Children's Act.

The right of a child to maintain contact with biological parents is also provided for in both the Convention and the Charter.<sup>350</sup> The United Nations 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<sup>351</sup> provides that the child's need for knowledge of family background should be recognised, **unless such knowledge is contrary to the child's best interests.**<sup>352</sup> This principle, I believe, should be further extended to include that *contact* with the child's biological family is also not recommended where there are circumstances that indicate that such contact would be contrary to the child's best interests. An example would be where there was, for instance, physical or mental abuse of the child. I mention this here, because this is definitely something that South African legislation can benefit by. In terms of section 234 of the Children's Act the biological parent and the adoptive parent of the child may enter into a post-adoption agreement. If it is in the best interests of

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<sup>350</sup> Art 9(3) of the Convention and art 19(2) of the Charter. Unfortunately neither the Convention nor the Charter provides directly for contact of an adopted child with biological parents/family, but the articles referred to above, which deal with children who are separated from their parents, are relevant here.

<sup>351</sup> Adopted by General Assembly resolution 41/85 of 3 December 1986. Hereafter referred to as "the UN Declaration".

<sup>352</sup> Art 9.

the child, the court may confirm such post-adoption agreement.<sup>353</sup> Although in terms of section 7(1)(h) of the Children's Act account must be taken of the child's physical and emotional security in determining the best interests of the child, and in terms of section 7(1)(l) the need to protect the child from any physical or psychological harm is recognised, this may not be enough. I would suggest that section 234(4) should read as follows:

A court may, when granting an application in terms of section 239 for the adoption of the child, confirm a post-adoption agreement if it is in the best interests of the child but, in doing so, the court should bear in mind that there are cases where contact between the child and the biological parents is not in the best interests of the child and is therefore not recommended.

Although the system is certainly not without its faults, customary adoption can serve as an example of how contact after adoption can be in the best interests of the child. As I have already indicated,<sup>354</sup> the aim of adoption in customary law is adult-centered. However, the process is such that there is ongoing contact between the child and the biological family. As I shall indicate in "9 CONCLUSION", the problems in the customary adoption system could be overcome by applying the principles of adoption contact in a more formalised way, where there is a post-adoption agreement that will be monitored by a social worker who will protect the interests of the child.

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<sup>353</sup> S 234(4).

<sup>354</sup> See "4 4 1 Introduction".

More security for all parties involved that contact will continue after the adoption may result in some children, who would not otherwise be placed in adoption, being adopted. Where a biological parent loves a child but is unable to fulfil his/her parental tasks for whatever reason,<sup>355</sup> the parent may not be favourably disposed towards adoption, with the result that the child remains in circumstances where his/her best interests are not properly served. If, however, the parent is secure in the knowledge that he/she could still be a part of the child's life,<sup>356</sup> he/she may find it easier to come to terms with and consent to an adoption that will be in the best interests of the child.

## **4 5 CONCLUSION**

Even though the best interests standard has been part of our law for a long time, the discussion above should indicate how much uncertainty and controversy still exists with regard to it. What is clear is that children are vulnerable and that they need to be protected. It has been established that children's best interests have to be determined by taking into account the specific circumstances of the particular case. Ultimately, the child's present and future best interests must remain uppermost in an evaluator's mind.<sup>357</sup> Furthermore, it is in the best

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<sup>355</sup> These could inter alia include drug or alcohol abuse by the parent, psychological problems and serious long-term illness.

<sup>356</sup> This will be the position when s 234 of the Children's Act comes into operation. As discussed in "9 CONCLUSION", it is important to bear in mind that the relationship of the adopted child with the biological parent(s) is not the same as the child's relationship with the adoptive parent(s).

<sup>357</sup> Strous 2007 *SA Journal of Psychology* 239.

*Chapter 4: The best interests of the child*

interests of the child to form attachments as early as possible in life, and the discussion above makes it clear that the best interests of the child can further be served by allowing for contact after an adoption.

In the next chapter, I shall look specifically at the issues of race and culture and the influence thereof on adoption.

## 5 RACE VERSUS CULTURE

<b>5 1 INTRODUCTION</b> .....	152
<b>5 2 DEFINITIONS</b> .....	155
<b>5 2 1 Race</b> .....	155
5 2 1 1 <i>The prevalent view of race</i> .....	155
5 2 1 2 <i>A different view of race</i> .....	156
<b>5 2 2 Culture</b> .....	158
5 2 2 1 <i>Culture</i> .....	158
5 2 2 2 <i>Tradition and culture</i> .....	162
<b>5 3 RACE AND CULTURE — IS THERE A DIFFERENCE?</b> .....	163
<b>5 3 1 Introduction</b> .....	163
<b>5 3 2 Making a distinction</b> .....	164
<b>5 4 CONSTITUTIONAL ISSUES</b> .....	170
<b>5 4 1 The Constitution, race and culture</b> .....	170
5 4 1 1 <i>Introduction</i> .....	170
5 4 1 2 <i>The protection of culture by the Constitution</i> .....	172
5 4 1 3 <i>Culture and equality</i> .....	177
<b>5 4 2 Culture and the child</b> .....	179
<b>5 4 3 Competing rights</b> .....	184
5 4 3 1 <i>Introduction</i> .....	184
5 4 3 2 <i>How does the Constitution deal with competing rights?</i> ..	185
5 4 3 3 <i>Which conflicts are we dealing with?</i> .....	196
5 4 3 4 <i>The child's competing rights</i> .....	199
<b>5 4 4 Conclusion</b> .....	202

<b>5 5 INTERNATIONAL INSTRUMENTS</b> .....	203
<b>5 5 1 Introduction</b> .....	203
<b>5 5 2 The Convention</b> .....	203
<b>5 5 3 The Charter</b> .....	204
<b>5 5 4 Conclusion</b> .....	206
<b>5 6 ARGUMENTS FOR AND AGAINST INTERRACIAL/INTERCULTURAL ADOPTION</b> .....	206
<b>5 6 1 Introduction</b> .....	206
<b>5 6 2 Arguments against intercultural adoption</b> .....	207
<b>5 6 3 Arguments in favour of intercultural adoption</b> .....	214
5 6 3 1 <i>Cultural issues as a factor</i> .....	214
5 6 3 2 <i>Physical appearance as a factor</i> .....	222
5 6 3 3 <i>Studies conducted</i> .....	224
5 6 3 4 <i>Conclusion</i> .....	227
<b>5 7 CONCLUSION</b> .....	228

## 5 1 INTRODUCTION

[T]hey grow up in foster care, institutional facilities, or ... are bounced back and forth between foster care and biological parents who are incapable of adequately caring for them. ... [S]uch devastating conditions are not justified in light of the alternative: transracial adoption...<sup>1</sup>

Much has been said about the advantages and/or disadvantages of interracial/intercultural adoptions. It has been argued that to consider race in

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<sup>1</sup> Swize 2002 *Virginia Law Review* 1080.

adoption is a perpetuation of old prejudices, but it has also been argued that a race-conscious society mandates consideration of race as a factor.<sup>2</sup> In my view, in South Africa race is not a factor that should have any relevance in adoption applications.<sup>3</sup> As customary adoption usually takes place between close family members,<sup>4</sup> it occurs within the same race and culture. It is therefore safe to assume that interracial/intercultural adoption does not happen in customary law.<sup>5</sup> In statutory adoptions race as a factor has been removed from the Child Care Act.<sup>6</sup> Culture is, however, still a relevant factor in terms of the legislation governing adoption in South Africa. Section 40 of the Child Care Act provides that, in an adoption, regard shall be had to the religious and cultural background of the child concerned and of his/her parents as against that of the person in whose custody the child is to be placed or transferred.<sup>7</sup> Most troublesome about this section, is the emphasis that is placed on cultural backgrounds, as this has resulted in strong opposition to interracial/intercultural adoption. The perception

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<sup>2</sup> Perry 1990-1991 *J Fam L* 52.

<sup>3</sup> See “5 3 2 Making a distinction”.

<sup>4</sup> Bennett *Customary Law in SA* 319. Olivier *et al Die Privaatreg van die SA Bantoetaalsprekendes* 462.

<sup>5</sup> Mosikatsana 1995 *SALJ* 616 says interracial adoption is fairly new in South Africa. He gives figures since 1991, and those figures relate only to adoption under the Child Care Act. His statement and figures imply that interracial adoption does not form part of customary law.

<sup>6</sup> In terms of s 40(b) racial classification was an important aspect to consider, but this section was repealed by the Child Care Amendment Act 86 of 1991. In 1988 the Law of Evidence Amendment Act 45 of 1988 deleted any mention of race from the terms for recognising customary law and s 1(1) made customary law applicable to any court in the country, with the result that the courts could apply customary law to Whites. However, customary law has remained associated with race. See Bennett *Customary law in SA* 42. S 1(1): “Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice ...”

<sup>7</sup> S 40: “... 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”. S 18(3) provides that the children’s court shall have regard to the matters mentioned in s 40 of the Act in considering an application for adoption. Also see “6 7 1 The Child Care Act, adoption and culture”.

that people of the same race belong to the same culture, aggravates the opposition to interracial/intercultural adoption.

With our history of apartheid, South Africans in the past usually associated with people from similar backgrounds to themselves. This led to them often being extremely rigid in their ways of thinking, and racial background was often associated with an obvious difference in culture,<sup>8</sup> in other words, the perception often existed that people of the same race necessarily belong to the same culture.<sup>9</sup>

The aim of this chapter is to explore this belief and to investigate the role of race and culture in adoption within the context of our constitutional dispensation. Firstly, I shall consider the definitions of race and culture and analyse the differences between them. Next, I shall look at the Constitution. In this regard I shall investigate the role of race and culture in the Constitution as well as the role of these concepts with regard to interracial/intercultural adoption. After that, the conflicting rights relevant to this thesis will be considered, as well as the appropriate international instruments. Lastly, I shall discuss the arguments in favour of and against interracial/intercultural adoption.

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<sup>8</sup> Joubert 1993 *SALJ* 738.

<sup>9</sup> Zaal 1994 *SAJHR* 378.

## 5 2 DEFINITIONS

### 5 2 1 Race

#### 5 2 1 1 The prevalent view of race

The term “race” has long been, and remains, controversial.<sup>10</sup> The *Collins English Dictionary* defines race as:

a group of people of common ancestry, distinguished from others by physical characteristics, such as hair type, colour of eyes and skin, stature, etc.<sup>11</sup>

In the *Oxford Student’s Dictionary*, race is defined as:

each of the major divisions of humankind with certain inherited physical characteristics in common, e. g. colour of skin, type of hair, shape of eyes and nose.<sup>12</sup>

*Websters Online Dictionary* defines the term race as:

a type of classification used to group living things based on such elements as language, heredity, physical attributes and behavior.<sup>13</sup>

Church defines race in similar terms, namely, as each of the major divisions of humankind, having distinct physical characteristics or genetic traits.<sup>14</sup>

Ledderboge likewise believes that race refers to physical characteristics which

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<sup>10</sup> *Websters* at <http://www.websters-online-dictionary.org/definitions/race>.

<sup>11</sup> *Collins English Dictionary* 1269.

<sup>12</sup> Allen & Delahunty *Oxford Student’s Dictionary* 843.

<sup>13</sup> *Websters* at <http://www.websters-online-dictionary.org/definitions/race>.

<sup>14</sup> Church 1996 *LLM* 10.

people share, such as facial features, skin colour and hair texture.<sup>15</sup> According to Fredrickson, race refers to stable and presumably unchangeable characteristics.<sup>16</sup> Leiris says that a race may be defined as a group whose members' physical characteristics conform, on average, to those arbitrarily selected as differentials, and says that there will be overlapping between peoples.<sup>17</sup>

From the definitions one can conclude that race is merely a matter of physical characteristics. It is something that we have no control over, and is determined by the genetics of our birth.

#### 5 2 1 2      *A different view of race*

Over the past few years a new concept of race has been put forward. Social scientists have begun to study multiracial people as distinct from the black population.<sup>18</sup> They argue that race is not an unalterable characteristic of an individual.<sup>19</sup> They believe that there is evidence that race is not based in biological reality<sup>20</sup> and that the movement away from strictly defined, singular racial identities is a shift towards a more contextualised understanding of realities.<sup>21</sup> Sociologists thus tend to favour the social constructionist

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<sup>15</sup> Ledderboge 1997 *Social Work* 334.

<sup>16</sup> Fredrickson *Racism* 52-53.

<sup>17</sup> Leiris *Race and Culture* 14-15.

<sup>18</sup> Brunsmas & Rockquemore 2002 *Crit Sociol* 108.

<sup>19</sup> Brunsmas & Rockquemore 2002 *Crit Sociol* 115.

<sup>20</sup> Brunsmas & Rockquemore 2002 *Crit Sociol* 113, 114.

<sup>21</sup> Brunsmas & Rockquemore 2002 *Crit Sociol* 113.

perspective,<sup>22</sup> which treats race as an individual attribute.<sup>23</sup> They see race as a variable which must be placed within a social context.<sup>24</sup>

This approach has to be criticised. The argument of the sociologists is not a criticism of race *per se*. It is only because of the reality that multiracialism exists that the sociologists are of the opinion that the biological categorisation of race is problematic. Clearly the problem is not race. It is the definition of race that should be criticised. If it is true that people are categorised as black when there is knowledge of any black ancestry, no matter how remote,<sup>25</sup> there is a problem with the definition and perception of race, not with the categorisation thereof. In my opinion, race in itself is something which cannot be challenged. Race is and always will be a matter of genetics. As Leiris points out, from a genetic point of view, “it would appear impossible to regard the world population of today as other than more or less a hodgepodge”.<sup>26</sup> This statement was made more than 50 years ago, and would certainly be even more apt today. Spencer recognises this when he says that even those who favour the social construction view of race use the underlying conception of biological race as a basis.<sup>27</sup> That of course does not mean that determining someone’s race is necessarily simple or easy.

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<sup>22</sup> Brunσμα & Rockquemore 2002 *Crit Sociol* 114-115, 118.

<sup>23</sup> Zuberi as quoted in Brunσμα & Rockquemore 2002 *Crit Sociol* 115-116.

<sup>24</sup> Brunσμα & Rockquemore 2002 *Crit Sociol* 116.

<sup>25</sup> Brunσμα & Rockquemore 2002 *Crit Sociol* 104 explain the “one drop rule”, in terms of which individuals with any known knowledge of black ancestry have no choice other than to identify as black.

<sup>26</sup> Leiris *Race and Culture* 14-15.

<sup>27</sup> Spencer as quoted in Brunσμα & Rockquemore 2002 *Crit Sociol* 115.

We now return to the argument of the sociologists with regard to people of mixed race. The reality is that people of different races do procreate. Maybe the categorisation of such people into a specific race is a problem. I have no expert knowledge in the field of sociology. If categorisation of people of mixed race is indeed a problem, this problem falls outside the scope of my research, but it does not alter the fact that the argument against biology as the basis for classification of race cannot stand.

As race is an inherent characteristic over which one has no control, it should not *per se* be relevant in respect of adoption. Different people from different backgrounds are meeting, mixing, and procreating on a daily basis. As a result people are constantly exposed to new and different cultures. Culture may be a factor to consider in regard to adoption.

## **5 2 2 Culture**

### *5 2 2 1 Culture*

Defining a concept as multi-faceted as culture is not easily achieved.<sup>28</sup> Race and culture go hand in hand, and in an attempt to find the meaning of culture, we firstly have to consider some definitions.

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<sup>28</sup> See the remarks of Judge O'Regan in *MEC for Education: Kwazulu-Natal, Thulani Cele: School Liaison Officer, Anne Martin: Principal of Durban Girls' High School, Fiona Knight: Chairperson of the Governing Body of Durban Girls' High School v Navaneethum Pillay*,

The *Oxford Illustrated Dictionary* defines culture as:

improvement or refinement of mind, manners, etc., by education and training; condition of being thus trained and refined; particular form or type of intellectual development or civilization.<sup>29</sup>

In the *Oxford Student's Dictionary* culture is defined as:

the customs, traditions, and civilisation of a particular society or group of people.<sup>30</sup>

Sir Edward Burnett Tylor, a British anthropologist,<sup>31</sup> defines culture as that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits *acquired* by man as a member of society (my emphasis). Beukes indicates that Tylor's definition involves three important characteristics of culture.<sup>32</sup> Culture is acquired by people through a process of acculturation; a person acquires a culture as a member of society; and culture is a complex whole. According to Beukes<sup>33</sup> culture is a concept that is so rich in meaning that it makes it difficult to reflect in one single definition. She says that no definition of culture is, or ever can be, exhaustive.<sup>34</sup> She also focuses on the process of a change in culture (*kultuurverandering*) because of contact between

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*Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute* 2008 2 BCLR 99 (CC) at 141 (hereafter *MEC for Education v Pillay*).

<sup>29</sup> *Oxford Illustrated Dictionary* 409.

<sup>30</sup> Allen & Delahunty *Oxford Student's Dictionary* 246.

<sup>31</sup> As quoted in Devenish 1999 *THRHR* 203.

<sup>32</sup> Beukes 1991 *LLD* 43-44.

<sup>33</sup> Beukes 1991 *LLD* 39.

<sup>34</sup> Beukes 1991 *LLD* 85.

different groups,<sup>35</sup> a process known as acculturation, which is especially important in a country such as South Africa where different communities live together. Thaman believes that culture is a shared way of living of a group of people, which includes their accumulated knowledge and understandings, skills and values, and which is perceived by them to be unique and meaningful.<sup>36</sup> Pieterse says the term “culture” denotes a range of things, from a particular lifestyle, to the totality of a group’s historical and social heritage.<sup>37</sup> He says culture can manifest itself in a number of ways, including manner of dress, art, language and peculiar social practices. Fishbayn defines culture as “a fluid, open-textured narrative which can and does make sense of new developments such as gender equality while retaining a sense of narrative quality”.<sup>38</sup>

Most of the definitions indicate that, as Ledderboge says, culture is a product of the socialisation process.<sup>39</sup> Culture thus consists of learnt ways of acting, feeling and thinking, rather than biologically determined ways (which determine race). It is not something which people are born with, but something gained through normal social interaction.<sup>40</sup>

The definitions also link up with Bennett’s view, namely, that culture implies high intellectual or artistic endeavour. A “right to culture” in this sense can be

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<sup>35</sup> Beukes 1991 *LLD* 43.

<sup>36</sup> Thaman in Wilson & Hunt *Culture, Rights, and Cultural Rights* 1.

<sup>37</sup> Pieterse 2001 *SAJHR* 391.

<sup>38</sup> Fishbayn 1999 *International Journal of Law, Policy and the Family* 147.

<sup>39</sup> Ledderboge 1997 *Social Work* 334.

<sup>40</sup> Thornton in Boonzaaier & Sharp *South African Keywords* 22.

juridically construed to mean the freedom — akin to freedom of expression — to perform or practice the arts and sciences. However, culture may also denote a people's entire store of knowledge and artefacts, especially the languages, systems of belief, and laws that give social groups their unique characters.<sup>41</sup>

According to Venter, culture is fundamental to the self-understanding of a person and groups with whom such a person is, or wants to be, associated. In other words, we are dealing with the identity of individuals and their social associations.<sup>42</sup> He comes to the conclusion that we are dealing with traditional, intellectual and spiritual attributes of specific groups of people in society.<sup>43</sup> Culture is constantly subject to change,<sup>44</sup> and is extremely complex.

The definitions all point to the fact, firstly, that culture is acquired (in other words it is not inherent like race), and, secondly, that tradition features prominently in the acculturation process. In defining culture, the Constitutional Court<sup>45</sup> has also indicated that culture generally relates to the traditions and beliefs developed by a community. It is thus important to look at the meaning of **tradition**.

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<sup>41</sup> Bennett *Human Rights* 23-24.

<sup>42</sup> Venter 1998 *SAPL* 442.

<sup>43</sup> Venter 1998 *SAPL* 441.

<sup>44</sup> Beukes 1991 *LLD* 31; Thornton in Boonzaaier & Sharp *South African Keywords* 25.

<sup>45</sup> In *MEC for Education v Pillay* 2008 2 *BCLR* 99 (CC) at 114.

5 2 2 2 Tradition and culture

Whereas race is strictly a question of heredity, culture is essentially one of *tradition* in the broadest sense, which includes the formal training of the young in a body of knowledge or a creed, the inheriting of customs or attitudes from previous generations, the borrowing of techniques or fashions from other countries, the spread of opinions through propaganda or conversations, the adoption — or ‘selling’ — of new products or devices, or even the circulation of legends or jests by word of mouth. In other words, tradition in this sense covers provinces clearly unconnected with biological heredity and all alike consisting in the transmission, by word of mouth, image or mere example, of characteristics which, taken together, differentiate a milieu, society or group of societies throughout a period of reasonable length and thus constitute its culture.<sup>46</sup>

As can be seen in this quote,<sup>47</sup> tradition forms an integral part of culture. Tradition is the transmission of culture, opinion, belief or custom handed down orally or by practice, or the passing down of beliefs or customs which humans need in social interaction from one generation to another.<sup>48</sup>

Tradition can thus be defined as the passing down of elements of a culture from generation to generation, especially by oral communication.<sup>49</sup> When we speak of culture, we have to consider tradition at the same time, as tradition is basically the channel that passes on culture.

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<sup>46</sup> Leiris *Race and Culture* 21.

<sup>47</sup> Also see “5 2 2 Culture”.

<sup>48</sup> Sykes *Concise Oxford Dictionary* 1135; Allen & Delahunty *Oxford Student’s Dictionary* 1119; Spiegel & Boonzaaier in Boonzaaier & Sharp *South African Keywords* 40.

<sup>49</sup> Dictionary.com at <http://dictionary.reference.com/search?q=tradition>; Bennett *Customary Law in SA* 22.

### 5 3 RACE AND CULTURE — IS THERE A DIFFERENCE?

#### 5 3 1 Introduction

In a country such as South Africa, racial background is often associated with an obvious difference in culture, which makes it easier to understand why race and culture are, to some, the same thing, or are often confused. As was indicated above,<sup>50</sup> race is defined as each of the major divisions of humankind that have distinct physical characteristics or genetic traits, or a group whose members' physical characteristics conform, on average, to arbitrarily selected differentials. Race is thus an inherent, static biological characteristic. Culture, on the other hand, is acquired by people living in a specific environment. Culture (including tradition) constantly evolves.<sup>51</sup> It develops when and where a person grows up.<sup>52</sup> Thus, whereas race is strictly a question of biological heredity, culture is essentially one of **tradition** in the broadest sense.<sup>53</sup> Consequently, while race is an issue that can be determined in a fairly objective biological manner, determining culture is dependent on various issues and has to be ascertained by looking at the facts of each specific case.

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<sup>50</sup> See “5 2 1 Race” and “5 2 2 Culture”.

<sup>51</sup> Van Bueren in Douglas & Sebba *Children's Rights* 17.

<sup>52</sup> See the definitions under “5 2 2 Culture” above.

<sup>53</sup> Leiris *Race and Culture* 21. For a discussion of the difference between race and culture, also see Ferreira 2006 *THRHR* 665-670.

### 5 3 2 Making a distinction

Race and culture are two distinct concepts that have to be treated as such. In the context of adoption and the determination of the best interests of a child, race on its own is not, or at least should not be, an issue that is relevant in any way.

Article 1(2) of the UNESCO<sup>54</sup> Declaration on Race and Racial Prejudice provides that “[a]ll individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. However, the diversity of life styles and the right to be different may not, in any circumstances, serve as a pretext for racial prejudice...”.<sup>55</sup> In other words, differences in culture may not serve as a pretext for racial prejudice.

Fredrickson believes that there is a substantial grey area in respect of race and culture, in that culture can be either a concept antithetical to that of race (if we think of culture as historically constructed, fluid, variable in time and space, and adaptable to changing circumstances), or it can be essentialised to the point where it becomes the functional equivalent of race.<sup>56</sup> Van Wyk says it is clear that an intertwinement of race, culture and ethnicity has taken place.<sup>57</sup> It is this

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<sup>54</sup> United Nations Educational, Scientific and Cultural Organisation.

<sup>55</sup> Art 1(2) of the UNESCO Declaration on Race and Racial Prejudice 27 November 1978.

<sup>56</sup> Fredrickson *Racism* 7.

<sup>57</sup> Van Wyk 1991 *Stell LR* 199. Also see Roodt 2000 *LLD* 222.

confusion that needs to be addressed. Although these concepts have been explained,<sup>58</sup> further investigation of the differences between them is needed.

The “essentialist view of racial identity, namely, that there is one clear and authentic set of ‘black characteristics’” is largely based on “ideologically dated assumptions or methodologically problematic research”.<sup>59</sup> Pieterse suggests that culture has replaced race as the primary distinguishing factor.<sup>60</sup> He explains that there is an ideology that assumes that indigenous culture is the same across the designated racial/cultural group and ignores variations of culture between individuals as well as between different subgroups within the broader group.<sup>61</sup> He warns that we must remain wary of dichotomising and reinforcing racial “difference” through engagement with culture.<sup>62</sup> This statement reflects the essence of the problem regarding the confusion between race and culture. We have established that race and culture are not synonymous.<sup>63</sup> Leiris’ conclusions that a given culture is not the creation of a particular race, but normally of several,<sup>64</sup> and also that no given race necessarily practices a single culture,<sup>65</sup> would thus seem to be correct. I firmly agree with the views of Pieterse and Leiris. It should be clear that there is no homogeneous culture that can be identified by simply determining the race of a person. Culture is a complex issue quite separate from race.

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<sup>58</sup> See “5 2 1 Race” and “5 2 2 Culture” above.

<sup>59</sup> Patel 2007 *Adoption & Fostering* 32.

<sup>60</sup> Pieterse 2001 *SAJHR* 367.

<sup>61</sup> Pieterse 2001 *SAJHR* 373.

<sup>62</sup> Pieterse 2001 *SAJHR* 389.

<sup>63</sup> See “5 2 1 Race”, “5 2 2 Culture” and “5 3 1 Introduction”.

<sup>64</sup> Leiris *Race and Culture* 31.

<sup>65</sup> Leiris *Race and Culture* 32.

To illustrate the complexity of distinguishing between race and culture, consider the example of the birth of a child. It is often said that someone is born into a specific culture. If this is so, race and culture must surely be synonymous, but we have established that this is not so.<sup>66</sup> Race and culture are not the same, and birth is no indication of culture. Furthermore, when a child is born in a specific environment it is certainly no guarantee of the culture to which the child will belong. In other words, if a child is born to a white mother and a white father, will the child have a “white” culture, and if so, what does this mean? In the case of a white mother from an Afrikaans background and a white father from an English background, or a black mother who grew up in Johannesburg while the black father grew up on a farm in Mpumalanga, will they have the same cultural background? This certainly seems unlikely. What about a child born to a black mother and a black father, where the mother comes from a Zulu background and the father from a Sepedi background, or a white mother from Namibia and a white father from Egypt? If the parents are not of the same race, this might complicate matters even further. Where, for instance, a white woman and a black man marry and have a baby, what is the child’s culture? Our law does not prohibit people like those illustrated above from having a child and raising him/her the way they see fit, which obviously includes exposing the child to the culture they choose.<sup>67</sup>

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<sup>66</sup> See “5 2 1 Race”, “5 2 2 Culture” and “5 3 1 Introduction”.

<sup>67</sup> A law that attempted to prohibit mixed-race or mixed-culture couples from having a child would be futile and clearly unconstitutional.

The legislature clearly views race and culture as two distinct concepts. Before section 40(b) of the Child Care Act was repealed<sup>68</sup> it stated that a child could not be placed in or transferred to the custody of any person whose classification in terms of the Population Registration Act<sup>69</sup> (that is, whose racial classification) was not the same as that of the child, except where such person was the parent or guardian of the child. Section 40(a) of the Child Care Act provided that regard had to be had to the religious and cultural background of the child. The separation of race and culture into two subsections suggests that the legislature acknowledged the difference between race and culture. Section 40(b) of the Child Care Act, which disallowed interracial adoption, has been removed from the legislation.<sup>70</sup> As discussed under this heading above, section 40 as it is now formulated is neutral on the question of race.

In many cases the question of race has influenced decisions about adoption in various ways.<sup>71</sup> In the United States of America the general approach of the courts has been that race cannot be an obstacle to adoption or even a decisive factor, but that it must be merely one of the factors to be weighed.<sup>72</sup> I do not support this view. If race is at all considered in an adoption application, it opens the door for abuse of the system. Joubert<sup>73</sup> says the question of racial preference would most obviously be considered in the case of competing applications for the

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<sup>68</sup> By the Child Care Amendment Act 86 of 1991.

<sup>69</sup> Act 30 of 1950.

<sup>70</sup> See “5 3 2 Making a distinction”.

<sup>71</sup> Zaal 1994 *SAJHR* 378.

<sup>72</sup> Joubert 1993 *SALJ* 732.

<sup>73</sup> Joubert 1993 *SALJ* 732.

adoption of a child by parents from the same racial background as the child and by parents from a different racial background. He argues<sup>74</sup> that often the same decision could be reached if the whole matter of race were ignored, simply because there are numerous criteria and some of them may predicate the same decision. It is important to bear in mind that “race matching” does not guarantee “culture matching”, and it does not guarantee a successful adoption and a happy child.

Sometimes there is a “mild preference” for same-race adoption. Bartholet explains that the “mild preference” with regard to the role of race in adoption entails that agencies that have qualified black and white families waiting to adopt take race into account in deciding how to allocate the children waiting for homes.<sup>75</sup> She warns that it is not certain whether it is possible to create a genuinely “mild” preference for same-race placement,<sup>76</sup> and that enormous weight might in fact be given to race.<sup>77</sup> As I indicated in the previous paragraph, I do not agree that race should be considered at all when a placement is made.

As was pointed out above, race is no longer a factor in adoption applications in South Africa, but culture is.<sup>78</sup> In the case of cultural difference the “mild preference” rule should in my view be applied. An attempt has to be made to

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<sup>74</sup> Joubert 1993 *SALJ* 733.

<sup>75</sup> Bartholet in Gaber & Aldridge *In the Best Interests of the Child* 181.

<sup>76</sup> Same-race placement is also often referred to as inracial placement.

<sup>77</sup> Bartholet in Gaber & Aldridge *In the Best Interests of the Child* 183.

<sup>78</sup> See s 40 of the Child Care Act. In s 240(1)(a) of the Children’s Act the approach to the role of culture in an adoption is far more balanced than in s 40 of the Child Care Act. This is discussed under “6 7 2 The Children’s Act, adoption and culture”.

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,<sup>79</sup> 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.<sup>80</sup>

It must furthermore be borne in mind that even if the child and the prospective adoptive parents are of the same race it does not mean that they will necessarily have the same cultural background. When a child is adopted by parents of the same race, is culture ever considered? Cultural difference only seems to become an issue when there is a racial difference. Surely this is not acceptable!

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<sup>79</sup> Joubert 1993 *SALJ* 732.

<sup>80</sup> Quinton & Selwyn 2006 *Child and Family Law Quarterly* 469.

## 5 4 CONSTITUTIONAL ISSUES

### 5 4 1 The Constitution, race and culture

#### 5 4 1 1 Introduction

The Preamble to the Constitution proclaims that South Africa belongs to all who live in it, united in our diversity, and recognises 11 official languages<sup>81</sup> — a clear reference to our racial and cultural heterogeneity. The richness in cultural qualities makes our country one of the most cosmopolitan in the world.<sup>82</sup> In fact, South Africa is often referred to as a “rainbow nation”.

As the Constitution is our supreme law, it is important to determine how race and culture are reflected in it. The constitutional values form the foundation or basis of the South African state<sup>83</sup> and should be considered first — all aspects of the Constitution are to be interpreted within the meaning of the founding values of the Constitution<sup>84</sup> that are to be found primarily in section 1. The legitimacy of the

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<sup>81</sup> S 6(1).

<sup>82</sup> Devenish 1999 *THRHR* 209.

<sup>83</sup> Kroeze 2001 *Stell LR* 271.

<sup>84</sup> *S v Williams* 1995 (3) SA 632 (CC) at 650 (also reported in 1995 7 BCLR 861 (CC)); s 1 of the Constitution provides that the Republic of South Africa is a “sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness”.

Constitution depends upon these values, and the legitimacy of the Constitution determines the stability of the state.<sup>85</sup>

The Constitution does not define the terms “race” or “culture”, but makes provision for both and makes a clear distinction between the two concepts. Non-racialism is a founding value of the Constitution, entrenched in section 1(b), and unfair discrimination based on race is prohibited in the Constitution.<sup>86</sup> This non-racialism is re-iterated by not extending the right of freedom of expression to the advocacy of hatred that is based on race.<sup>87</sup>

Culture clearly forms an integral part of society and is a concept that, in itself, requires protection. Although culture is not a founding value,<sup>88</sup> it greatly contributes towards the identity of the individual. Unfair discrimination on the ground of culture is prohibited,<sup>89</sup> and cultural rights,<sup>90</sup> cultural life,<sup>91</sup> cultural community<sup>92</sup> and cultural heritage<sup>93</sup> are protected. As Pieterse says, the constitutional right to culture mandates the accommodation of cultural principles, practices and values in the legal system in a manner that promotes the spirit, purport and objects of the Bill of Rights.<sup>94</sup>

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<sup>85</sup> Venter 1998 *SAPL* 446. Kroeze 2001 *Stell LR* 271 says that the purpose of these objective values is to constrain judicial subjectivity.

<sup>86</sup> S 9(3) & (4) – see n 101.

<sup>87</sup> S 16(2)(c).

<sup>88</sup> See “5 4 1 The Constitution”.

<sup>89</sup> S 9(3) & (4).

<sup>90</sup> Ss 31, 185 & 186.

<sup>91</sup> S 30.

<sup>92</sup> S 31.

<sup>93</sup> S 235.

<sup>94</sup> Pieterse 2001 *SAJHR* 402.

It should by now be clear that, in my view, race should be ignored in any decisions regarding the best interests of a child, and specifically in the case of adoption, and hence most of what follows will focus on culture within the context of our constitutional dispensation. The quest is to promote a democratic, equal, non-racial society,<sup>95</sup> and race will only be referred to when necessary for the discussion.

**5 4 1 2**      *The protection of culture by the Constitution*

Just as culture is not a factor which should be excluded from the human rights equation, so too must it not be accorded the status of a metanorm which trumps rights.<sup>96</sup>

The founding constitutional values do not include an express reference to culture. This, of course, should not be interpreted to mean that culture is not a very important constitutional right. In fact, culture is expressly protected in the Constitution,<sup>97</sup> and the Constitutional Court has said that cultural practices are central to human dignity.<sup>98</sup> This emphasises the importance of culture, but it does not mean that culture is elevated above the other rights in the Constitution. The circumstances of each case will determine its relevance.

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<sup>95</sup> S 1.

<sup>96</sup> Alston 1994 *International Journal of Law and the Family* 20.

<sup>97</sup> See “5 4 1 The Constitution, race and culture”.

<sup>98</sup> *MEC for Education v Pillay* 2008 2 BCLR 99 (CC) at 118.

There are various references to culture in the Constitution. There is a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,<sup>99</sup> while there is also a reference to cultural heritage.<sup>100</sup> Unfair discrimination on the ground of culture is prohibited by section 9(3) and (4)<sup>101</sup> of the Constitution, and the right to a cultural life is protected in sections 30 and 31.<sup>102</sup> Here the term **culture** means a particular way of life of an identifiable group of people.<sup>103</sup>

It is clear that the Constitution caters for both individual and collective self-identities.<sup>104</sup> The reference to culture in section 30 should be distinguished from the protection of cultural rights enshrined in section 31.<sup>105</sup> Culture is defined by reference to a group, but the right to culture in section 30 of the Bill of Rights is an individual, not a collective, right.<sup>106</sup> Section 30 guarantees the right to

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<sup>99</sup> Ss 185 & 186. In terms of s 181(1) this is one of the state institutions meant to strengthen constitutional democracy in the Republic.

<sup>100</sup> S 235.

<sup>101</sup> S 9: “(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.”

<sup>102</sup> S 30: “Everyone has the right to ... participate in the cultural life of their choice, but no one exercising [this right] may do so in a manner inconsistent with any provision of the Bill of Rights.”

S 31: “(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

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

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

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

<sup>103</sup> Currie & De Waal *Bill of Rights Handbook* 629.

<sup>104</sup> Devenish 1999 *THRHR* 213.

<sup>105</sup> Mireku 1999 *SAPL* 450.

<sup>106</sup> Van der Meide 1999 *SALJ* 105; Mireku 1999 *SAPL* 450.

participate in the cultural life of one's choice: "**Everyone** has the right ... to participate in the cultural life of **their** choice ..." (my emphasis).<sup>107</sup>

Section 31 provides inter alia that persons belonging to a cultural community may not be denied the right, with other members of that community, to enjoy their culture and to form, join and maintain cultural associations. This section is for the benefit of persons "belonging to a cultural community", in other words the right is not for the benefit of everyone. It is restricted.

Section 31 does not refer to culture in general, but to "their culture", and is thus understood as a source of identity.<sup>108</sup> This viewpoint is confirmed in *MEC for Education v Pillay*,<sup>109</sup> where the court said that cultural identity is one of the most important parts of a person's identity because it comes from belonging to a community and not from personal choice or achievement; in other words, individuals who draw meaning and their sense of cultural identity from a group with whom they share cultural identity and with whom they associate.<sup>110</sup> The court defined culture as relating to traditions and beliefs **developed by a community** and stated that cultural beliefs do not develop in a vacuum.<sup>111</sup>

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<sup>107</sup> Van der Meide 1999 *SALJ* 105; Mireku 1999 *SAPL* 450.

<sup>108</sup> Currie & De Waal *Bill of Rights Handbook* 629.

<sup>109</sup> 2008 2 BCLR 99 (CC) at 116.

<sup>110</sup> *MEC for Education v Pillay* 2008 2 BCLR 99 (CC) at 143.

<sup>111</sup> At 114.

Section 31 thus introduces a collective dimension. It is about a practice pursued by individuals as part of a community,<sup>112</sup> in other words, this is the right of a collection of people “belonging to a ...community”.<sup>113</sup> The question now is what would be considered a “community”.

A community can be defined as the people living in one place or country and considered as a whole; or as a group with similar interests or origins.<sup>114</sup> According to Currie and De Waal, who believe that defining **community** is difficult, it can mean simply an aggregation of people at its most general, or, more precisely, the modern usage of the word denotes an aggregation of people with a particular quality of relationship, held together by something in common, and that it is the quality of the relationship that is important. They conclude that a community for purposes of section 31 should be an identifiable group, united by a common religion, language or culture that is self-consciously communal, in other words, the members of the community should identify themselves as part of the group, and they should be identifiable by other members as such.<sup>115</sup> They further believe that the enjoyment of culture “presupposes the existence of a community of individuals with similar rights”, and “an individual right of enjoyment of culture assumes the existence of a community that sustains a particular culture”.<sup>116</sup>

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<sup>112</sup> *MEC for Education v Pillay* 2008 2 BCLR 99 (CC) at 144.

<sup>113</sup> Devenish 1999 *THRHR* 212; Mireku 1999 *SAPL* 450.

<sup>114</sup> Allen & Delahunty *Oxford Student's Dictionary* 201.

<sup>115</sup> Currie & De Waal *Bill of Rights Handbook* 626-627.

<sup>116</sup> Currie & De Waal *Bill of Rights Handbook* 624. Also see Currie in Chaskalson *et al Constitutional Law of SA* 35-13.

The phrase “[p]ersons **belonging** to a cultural ... community” (my emphasis) in section 31(1) indicates that the right is not a right of just simply anybody, but that claimants have to prove that some tie exists between them and their group.<sup>117</sup> An individual’s right of participation in cultural life will be impugned if some harm comes to the cultural community in which that individual takes part.<sup>118</sup>

An important point<sup>119</sup> is that section 31 seeks to protect ties of affinity rather than genealogy, and that culture is more a matter of shared experience than a matter of genetics. This, again, shows us that the issue is not race, but culture. Currie and De Waal confirm this viewpoint, stating that ethnic origin is far less important than ties of affinity with an ethnic group and that the important issue is that membership of a cultural community is proved by demonstrating a history of shared experience and identification with the cultural community in question.<sup>120</sup>

I have explained that culture is a complex issue and that it is not easy to determine what a person’s culture is. In *MEC for Education v Pillay*<sup>121</sup> reference was made to “a multicultural South Africa where vastly different cultures exist side by side”.<sup>122</sup> This richness in cultural qualities makes our country one of the most cosmopolitan in the world but, as Devenish<sup>123</sup> says, the kaleidoscope of

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<sup>117</sup> Currie in Chaskalson *et al Constitutional Law of SA* 35-17.

<sup>118</sup> Currie & De Waal *Bill of Rights Handbook* 624.

<sup>119</sup> See Currie in Chaskalson *et al Constitutional Law of SA* 35-17.

<sup>120</sup> Currie & De Waal *Bill of Rights Handbook* 627.

<sup>121</sup> 2008 2 BCLR 99 (CC).

<sup>122</sup> At 130.

<sup>123</sup> Devenish 1999 *THRHR* 202.

cultural, linguistic and religious heterogeneity, is also a source of potential conflict.

5 4 1 3      *Culture and equality*

The right to equality before the law and equal protection and benefit of the law is the first substantive right in the Bill of Rights and is contained in section 9(1).<sup>124</sup> Goldblatt and Albertyn believe that the right to equality is the core value of the Constitution.<sup>125</sup> As Deputy President Mohamed said in *Fraser v Children's Court, Pretoria North*<sup>126</sup> “[t]here can be no doubt that the guarantee of equality lies at the very heart of the Constitution”.<sup>127</sup> The achievement of equality is one of the founding values of the Constitution,<sup>128</sup> but the reality is that tension can and does arise between constitutional values,<sup>129</sup> and equal protection does not preclude differentiation for purposes of the law.<sup>130</sup>

Discrimination is a particular form of differentiation. An important issue is to distinguish between the protection of culture in section 30 and the prohibition of discrimination on the basis of culture, as provided for in section 9. Section 9(5) of

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<sup>124</sup> S 9(1): “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

<sup>125</sup> Albertyn & Goldblatt 1998 *SAJHR* 254.

<sup>126</sup> 1997 (2) SA 261 (CC) at 272 (also reported in 1997 2 BCLR 153 (CC)).

<sup>127</sup> This was reiterated in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at 394 (also reported in 1998 3 BCLR 257 (CC)).

<sup>128</sup> *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 1 BCLR 1 (CC) at 19.

<sup>129</sup> *Du Preez v Minister of Justice and Constitutional Development* 2006 9 BCLR 1094 (SE) at 1105.

<sup>130</sup> See in this regard *S v Ntuli* 1996 (1) SA 1207 (CC) at 214 (also reported in 1996 1 BCLR 141 (CC)) where the judge emphasised that “[i]t is trite ... that differentiation does not amount *per se* to unequal treatment in the constitutional sense”.

the Constitution states that discrimination on a ground listed in subsection (3)<sup>131</sup> is unfair, unless it is established that the discrimination is fair. The prohibition of unfair discrimination may prove to be particularly useful when dealing with children, since it presumes that discrimination based on inter alia race, culture and age is unfair.<sup>132</sup>

The protection of culture and the prohibition of unfair discrimination may overlap.<sup>133</sup> Where there is interference with a person's right to culture,<sup>134</sup> there may be discrimination.<sup>135</sup> The question will be whether the discrimination was fair or unfair.<sup>136</sup> The equality clause does not prohibit discrimination, but rather unfair discrimination.<sup>137</sup> Here the argument of the Constitutional Court in *MEC for Education v Pillay*<sup>138</sup> is relevant. The court weighed the purpose of the discrimination against the marginalising effect thereof on a certain portion of society.<sup>139</sup> The more substantial the inroad into fundamental rights is, the more persuasive the grounds of justification must be.<sup>140</sup>

In *President of the Republic of South Africa v Hugo*<sup>141</sup> Judge Goldstone said that the prohibition on unfair discrimination seeks to promote the establishment of a

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<sup>131</sup> See n 101.

<sup>132</sup> See n 101.

<sup>133</sup> *MEC for Education v Pillay* 2008 2 BCLR 99 (CC) at 113.

<sup>134</sup> As provided for in s 30.

<sup>135</sup> As provided for in s 9(4).

<sup>136</sup> See *MEC for Education v Pillay* 2008 2 BCLR 99 (CC) at 113.

<sup>137</sup> In *Flynn v Farr* 2009 (1) SA 584 (CPD) at 599 it was held that the discrimination between children who are adopted *de lege* and those who are adopted *de facto* is not inconsistent with the provisions of s 9 of the Constitution.

<sup>138</sup> 2008 2 BCLR 99 (CC).

<sup>139</sup> At 124.

<sup>140</sup> *S v Bhulwana; S v Gwadiiso* 1996 (1) SA 388 (CC) at 395. This is also what s 36 stipulates.

<sup>141</sup> 1997 (4) SA 1 (CC) at 22-23 (also reported in 1997 6 BCLR 708 (CC)).

society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The importance of human dignity<sup>142</sup> has repeatedly been emphasised by the Constitutional Court,<sup>143</sup> and this court has ruled that dignity is not merely a value, but a right that must be respected.<sup>144</sup> If culture has to be infringed in order for a child to be treated equally to other children and with dignity, that is a small price to pay.

#### **5 4 2 Culture and the child**

With regard to children, it now has to be established whether a child has a culture and, if so, to which culture a child belongs. In other words, it has to be established how he/she acquires culture. Does he/she automatically follow his/her parents' culture or does a child have a right to his/her own culture?

The race or the country of birth of a person is an unchangeable fact which will always be part of the child and about which there can be no doubt. As far as the culture of a child is concerned, this is less "fixed" or exact. When a child is born, he/she becomes part of a specific culture by virtue of the fact that this is the culture of which the biological parents are part. This, however, does not mean

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<sup>142</sup> S 10 of the Constitution: "Everyone has inherent dignity and the right to have their dignity respected and protected."

<sup>143</sup> See *S v Makwanyane* 1995 (3) SA 391 (CC) at 451; *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at 961.

<sup>144</sup> *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at 962.

that the child will remain part of that culture. In fact, chances are that the child may choose not to be a part of that cultural environment even if he/she is raised by his/her biological parents.<sup>145</sup>

An aspect that comes to mind when dealing specifically with children is whether children have a right to self-determination.<sup>146</sup> Section 30 of the Constitution,<sup>147</sup> which deals with the right to participate in the cultural life of your choice, is not restricted to a particular class of beneficiary, in other words, everybody has the right to a cultural life. This obviously means that section 30 applies to children, who have legal capacity from birth.<sup>148</sup> According to Wald<sup>149</sup> age has historically been accepted as the only basis for withholding certain rights from children, which means that infants might be treated differently from older children when it comes to their rights. The question whether children are entitled to choose, for instance, their own culture, is not an easy one, as it requires a balance to be struck between the interests of children, parents and the state.<sup>150</sup> Eekelaar<sup>151</sup> stresses that self-determination has to relate to the question of legal competence.

According to Wald<sup>152</sup> it must first be determined what types of skills a person needs to make a given decision and to what degree children possess the

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<sup>145</sup> A good example of this, in my opinion, is found in indigenous groups, where the child is often raised in a tribal environment with certain cultural values. When the child grows up, he/she often moves to an urban area to find employment, and is thus exposed to new and different cultures.

<sup>146</sup> This is the scope for children to determine what their best interests are.

<sup>147</sup> See n 102.

<sup>148</sup> Heaton *Law of Persons* 37.

<sup>149</sup> Wald 1979 *Davis Law Review* 265.

<sup>150</sup> Currie & De Waal *Bill of Rights Handbook* 601.

<sup>151</sup> Eekelaar in Alston *Best Interests of the Child* 54-55.

<sup>152</sup> Wald 1979 *Davis Law Review* 274.

required abilities. He says<sup>153</sup> research shows that younger children (under 10 to 12 years old) lack the cognitive abilities and judgmental skills necessary to make decisions about events which could severely affect their lives. Although children have legal capacity, surely, they cannot decide which community they wish to belong to until they have achieved a certain level of intellectual development.

Heaton<sup>154</sup> says if 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. This has to be the correct view. In the case of children, limitation of their rights becomes more difficult to justify as they grow older, since the responsibilities of parents and the state towards a child are linked to the child’s age and therefore diminish as the child gets older.<sup>155</sup> The Child Care Act states that a child over the age of 10 years who understands the nature and import of such consent has to consent to an adoption, and the Children’s Act requires that a child aged ten years or older has to consent to his/her adoption.<sup>156</sup> This seems to be an indication, *inter alia*, that the child may at that stage have formed ties with a particular culture which should not be disrupted without the child’s consent.<sup>157</sup> If it is clear that the child has formed ties of his/her own with a specific culture, it will become increasingly

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<sup>153</sup> Wald 1979 *Davis Law Review* 274.

<sup>154</sup> Heaton 1988 *LLM* 97.

<sup>155</sup> Currie & De Waal *Bill of Rights Handbook* 601.

<sup>156</sup> S 18(4)(e) of the Child Care Act 74 of 1983 and s 233(1)(c) of the Children’s Act 38 of 2005. Also see “6 5 2 1 *The Child Care Act and the consent of the child*” and “6 5 2 2 *The Children’s Act and the consent of the child*”.

<sup>157</sup> S 233(1)(c) of the Children’s Act contains a similar requirement, as well as an additional requirement of consent of a child under the age of 10 years who is of an age, maturity and stage of development to understand the implications of such consent. This issue is discussed under “4 5 2 Consent to adoption”.

difficult to ignore culture in the adoption process, and there may be cases where the limitation of such a child's right to culture becomes unjustifiable. The most important policy consideration is that an adoption must be in the best interests of the child, and removing a child from an environment where he/she has formed cultural ties may not be in his/her best interests.<sup>158</sup> For an older child, culture may be more important than for an infant.

Age — more specifically the distinction between infants and older children — thus becomes very important. Young children are not able to determine what their best interests are. In the context of adoption, the child's age, not the issue of whether the adoption is an interracial/intercultural one, has the most significant impact on the child's development and adjustment.<sup>159</sup> As explained above,<sup>160</sup> the importance of a child growing up in a family environment and bonding with a parent is crucial in the development of a child, and the younger the child is when this happens, the more beneficial it is for the child. An older child will obviously have been exposed to a specific culture, whether that be the culture of the biological parents or not. Thus, when an older child is considered for adoption, culture has to be kept in mind and will certainly have some significance. However, culture should not be over-emphasised. Ultimately, again, culture, on its own, should never be considered more important than the best interests of a child as a whole which, as I have consistently argued, are served by allowing a

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<sup>158</sup> Joubert 1993 *SALJ* 731.

<sup>159</sup> Simon *et al* *The Case for Transracial Adoption* 57.

<sup>160</sup> See "3 THE CHILD AND THE FAMILY", specifically "3 3 2 3 *When are attachments formed?*" above.

child to grow up as part of a family. As Pintens says, there are more important impediments to overcome than cultural differences,<sup>161</sup> and we do not give up our identity when cultural changes occur.<sup>162</sup> Of course cultural differences are realities which must be taken into account, but assumptions and fears about problems that may arise as a result of cultural differences can be illusory and must not be taken into account merely because they exist, unless the problems manifest themselves as realities in a particular case.<sup>163</sup>

Bonthuys and Pieterse<sup>164</sup> are of the opinion that parents' constitutional right to freedom of religion is interpreted so as to encompass the right to influence the religious choices of their children, whereas the ambit of children's right to freedom of religion is in turn determined by their level of maturity and the religious direction provided by their parents. This view is equally applicable to culture, in other words parents influence their children when it comes to a choice of culture. Young children, until they reach some level of maturity, are not in a position to decide which culture they choose. They simply follow the culture of their parents. My submission is thus that, although (young) children are part of a culture (their parents' culture), they have no control over or their own will about that particular culture until they reach an age where they can make an independent decision about maintaining ties with that cultural group. Until such

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<sup>161</sup> Pintens 2008 *CILSA* 160.

<sup>162</sup> Pintens 2008 *CILSA* 159.

<sup>163</sup> Joubert 1993 *SALJ* 738. This article is based on the American experience, but the point of departure should be the same in South Africa, although undoubtedly it has to be borne in mind that racial background in South Africa might also be associated with differences in language and culture.

<sup>164</sup> Bonthuys & Pieterse 2001 *SALJ* 223.

time, they are part of the cultural community chosen by their parents, whether their parents are biological parents or not.

What about the situation where a child's culture is not known, for instance in the case of an abandoned child, or where we have a child of mixed race who is available for adoption? It will be impossible to consider the child's culture where such a child is put up for adoption. Any attempt to do so will just be a pretext for racial matching. The child will develop a culture in the environment where he/she grows up.

### **5 4 3 Competing rights**

#### *5 4 3 1 Introduction*

There are obviously many instances when rights might compete. Children are the bearers of various rights, which include the right "to family care or parental care, or to appropriate alternative care when removed from the family environment",<sup>165</sup> the right to equality, and the right to culture.<sup>166</sup> These rights may at times compete, such as when an adoption is considered and the child and the prospective adoptive parents are from different cultures. In order to serve the best interests of the child, the solution is to try to balance these competing

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<sup>165</sup> S 28(1)(b) of the Constitution.

<sup>166</sup> Ss 30 & 31 – see n 102.

constitutional rights. Although this may sound simple, the complexity of this issue cannot be denied. It requires a value judgement.<sup>167</sup>

5 4 3 2      *How does the Constitution deal with competing rights?*

It has to be remembered that no right is absolute, and that fundamental rights may be limited under certain circumstances.<sup>168</sup> The question now is whether the child's right to culture may be limited in order to provide a child with **appropriate alternative care** in the form of adoption when removed from the family environment.

The rights in the Bill of Rights are independently guaranteed. The courts will attempt to harmonise conflicting provisions,<sup>169</sup> but there are many instances where different fundamental rights compete and cannot be reconciled in the relevant circumstances. The proper application of the limitation clause will be critical in striking a balance between these rights and reasonable limitations thereof. A balancing exercise has to be undertaken on a case by case basis.<sup>170</sup>

Various rights come into play when consideration is given to a child's constitutional rights in the context of this research. The child's right to culture, the best interests of the child, the child's right to family care, parental care and

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<sup>167</sup> *Du Preez v Minister of Justice and Constitutional Development* 2006 9 BCLR 1094 (SE) at 1106.

<sup>168</sup> Currie & De Waal *Bill of Rights Handbook* 185 – the infringement has to be for a compellingly good reason.

<sup>169</sup> See *S v Rens* 1996 (1) SA 1218 (CC) at 1222-1223.

<sup>170</sup> *M v S* 2007 12 BCLR 1312 (CC) at 1329; *S v Makwanyane* 1995 (3) SA 391 (CC) at 436.

alternative care<sup>171</sup> and the rights to equality and dignity all play some part. Most of the rights in the Bill of Rights are textually unqualified, and there is no constitutional hierarchy of rights.<sup>172</sup> A few rights, however, are qualified by language which specifically demarcates their scope.<sup>173</sup> Carpenter<sup>174</sup> speaks of “internal modifiers”, which she defines as words or phrases that form an integral part of the definition of a particular right. Such qualifications can be termed demarcations of the right. According to Currie and De Waal<sup>175</sup> these demarcations place certain conditions on the use of the right and come into play when the nature and scope of the right in question are determined. The task of the courts is to “generously accommodate cultural liberty while assuring [that culture] is not involved as a cheap excuse for every conceivable form of self-indulgence”.<sup>176</sup> As we have established, rights may be limited. In the process of balancing rights and determining which rights should be limited, each case will have to be considered on its merits.

The limitation of constitutional rights involves the weighing up of competing interests and, ultimately, an assessment based on proportionality.<sup>177</sup>

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<sup>171</sup> As argued above (see “3 2 3 2 *The role of the State and the Constitution*”), adoption is a form of alternative care that provides the child with the opportunity to experience parental care.

<sup>172</sup> *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) at 347-348; *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) at 546; *Johncom Media Investments Ltd v M* unreported case CCT 08/08, 17 March 2009 (CC) at par 19.

<sup>173</sup> Currie & De Waal *Bill of Rights Handbook* 186.

<sup>174</sup> Carpenter 1995 *SAPL* 261; this phrase is also used by Bekink 2003 *THRHR* 246 n 34.

<sup>175</sup> Currie & De Waal *Bill of Rights Handbook* 187.

<sup>176</sup> Devenish 1999 *THRHR* 215.

<sup>177</sup> See eg *S v Makwanyane* 1995 (3) SA 391 (CC) at 436; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at 31 (also reported in 1998 12 BCLR 1517 (CC)); *Phillips v Director of Public Prosecutions* 2003 (4) BCLR 357 (CC) at 365 (also reported in 2003 (3) SA 345 (CC)); *Johncom Media Investments Ltd v M* unreported case CCT 08/08, 17 March 2009 (CC) at par 24.

Proportionality requires, by definition, the balancing of different interests.<sup>178</sup> What has to be considered is the proportionality<sup>179</sup> between the infringement and the purpose, effect and importance of the infringing provision.<sup>180</sup> To determine whether a limitation is permissible section 36 of the Bill of Rights, the general limitation clause, sets out the specific criteria for the restriction of the fundamental rights in the Bill of Rights.<sup>181</sup>

The application of these criteria can only be done on a case by case basis.<sup>182</sup>

Section 36 reads as follows:

(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;

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<sup>178</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) at 436.

<sup>179</sup> This is also the term used by Chief Justice Langa in *MEC for Education v Pillay* 2008 2 BCLR 99 (CC) at 126.

<sup>180</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at 31 (also reported in 1998 12 BCLR 1517 (CC)).

<sup>181</sup> In *S v Makwanyane* 1995 (3) SA 391 (CC) (also reported in 1995 (6) BCLR 665 (CC)) this approach was already adopted by the Constitutional Court as a standard reference when the court considers the legitimacy of a limitation – see Currie & De Waal *Bill of Rights Handbook* 177. Woolman in Chaskalson *et al Constitutional Law of SA* 12-1 says that the limitation clause has a fourfold purpose - to serve as a reminder that the rights in the Constitution are not absolute; to remind us that the rights may only be limited where and when the objective behind the restriction is designed to reinforce the values which animate this constitutional project; the limitation clause should provide us with a mechanism for balancing competing fundamental values and it represents an attempt to solve the problem of judicial review by establishing a test which determines the extent to which government may limit our constitutionally protected rights.

<sup>182</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) at 436 (also reported in 1995 (6) BCLR 665 (CC)). President Chaskalson said that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.

*Chapter 5: Race versus culture*

(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.

Any rule of law limiting constitutionally protected rights otherwise than in conformity with the constraints enunciated in section 36(1) is invalid.<sup>183</sup>

The Child Care Act, which presently regulates adoption, is a “law of general application” as required by section 36(1).<sup>184</sup> The next question is whether the limitation of cultural rights is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.<sup>185</sup> This means that a law that restricts a fundamental right may do so only if the law in question serves a constitutionally acceptable purpose, and there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law).<sup>186</sup> As Rautenbach<sup>187</sup> puts it, there must be a particular relation between a limitation and the purpose of the limitation, and it must be a relation that one would find in a particular kind of society, namely, “an open and democratic society based on human dignity, equality and freedom”,<sup>188</sup> and not in a closed,

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<sup>183</sup> S 36(2) of the Constitution read with s 2; see also s 172(1)(a).

<sup>184</sup> This means that the limitation must be authorised by a law which, according to Judge Mokgoro in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at 43-46 includes rules of legislation, delegated legislation and common law.

<sup>185</sup> S 36(1).

<sup>186</sup> Currie & De Waal *Bill of Rights Handbook* 176.

<sup>187</sup> Rautenbach in *Bill of Rights Compendium* 1A-71.

<sup>188</sup> Also see *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at 777.

undemocratic society in which human dignity is not cherished and people are not treated as free and equal human beings. Once it has been established that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, it is necessary to consider each of the factors of section 36 individually in the context of intercultural adoption.

(a) The nature of the right: A court has to assess what the importance of a particular right is in the overall constitutional scheme. A right that is of particular importance to the constitutional ambition to create an open and democratic society based on human dignity, freedom and equality will carry a great deal of weight in the exercise of balancing rights against their infringement.<sup>189</sup>

*Example:* The right to alternative care (as can be provided by adoption) is fundamental to a child's development,<sup>190</sup> while the right to culture, on the other hand, is not quite as important.<sup>191</sup> I shall explain. When there is an interracial/intercultural adoption, it might infringe a child's cultural rights. As fundamental rights are protected, this means that for such an adoption to be constitutional the limitation of the cultural rights of the child has to be reasonable and justifiable. The purpose and the benefits of the adoption would have to be balanced against the harm it could do (the infringement). According to Currie and De Waal<sup>192</sup> the first consideration in this balancing

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<sup>189</sup> Currie & De Waal *Bill of Rights Handbook* 178.

<sup>190</sup> In this regard, the discussion under "3 3 ATTACHMENT" illustrates the importance for a child of growing up as part of a family.

<sup>191</sup> See "3 3 2 2 *How are attachments formed?*". This statement is not an attempt to deny the importance of culture, but merely to place the importance of culture in the context of intercultural adoption in perspective.

<sup>192</sup> Currie & De Waal *Bill of Rights Handbook* 178.

exercise is the importance of the right in an open and democratic society based on freedom and equality. Section 28 of the Constitution creates specific rights for children. As argued above, the purpose of adoption is to comply with the constitutionally entrenched right of each child to grow up as part of a family and experience parental care. This is one of the special rights afforded to children in section 28.<sup>193</sup> Further, section 28(2) provides that the best interests of the child are of paramount importance in every matter concerning the child. The best interests rule has been established in our law and is always, as far as children are concerned, all-important.<sup>194</sup> Furthermore, human dignity and equality, both of which are part of the founding values of the Constitution,<sup>195</sup> can better be served by providing a child with a family than by trying to protect the concept of culture. Furthermore, sections 30<sup>196</sup> and 31(2)<sup>197</sup> of the Bill of Rights specifically state that cultural rights may not be exercised in a manner inconsistent with any provision in the Bill of Rights, thus implying that these rights may be subordinate to the other rights in the Bill of Rights under certain circumstances and that they may therefore be limited under those circumstances.<sup>198</sup>

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<sup>193</sup> S 28(1)(b).

<sup>194</sup> *Fraser v Naude* 1999 (1) SA 1 (CC) at 5 (also reported in 1998 11 BCLR 1357 (CC)); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at 429 (also reported in 2000 7 BCLR 713 (CC)).

<sup>195</sup> S 1(a).

<sup>196</sup> See n 102.

<sup>197</sup> See n 102.

<sup>198</sup> See Haysom & Kathla in Davis *et al Fundamental Rights in the Constitution* 292; Bekink 2003 *THRHR* 250.

(b) The importance of the purpose of the limitation: At a minimum, reasonableness requires the limitation of a right to serve some purpose, while justifiability requires the purpose to be one that is worthwhile and important in a constitutional democracy.<sup>199</sup>

*Example:* Intercultural adoption might violate a child's right to culture. It thus needs to be determined whether such adoption would serve a purpose that an open and democratic society based on freedom and equality would consider worthwhile and important.<sup>200</sup> The purpose of an intercultural adoption is to serve the best interests of the child by providing him/her with a family environment in which to grow up. This is an extremely important purpose<sup>201</sup> which would, I believe, justify the limitation of the right to culture. Where a child is in need of a family to love and protect him/her but **suitable** parents<sup>202</sup> of the same culture<sup>203</sup> as the child's biological mother and/or father are not available, will it serve the child's best interests if this child is denied the constitutional right to alternative care (adoption) that can be provided by allowing the child to be raised by a loving family of a different culture? In other words, could the child's best interests be curbed to protect the right to culture? It is submitted that it would never be in the best interests of a child not to have a normal family life. Denying a child a family life would also infringe the child's right to equality. Moreover, a healthy permanent family is preferable

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<sup>199</sup> Currie & De Waal *Bill of Rights Handbook* 179.

<sup>200</sup> Currie & De Waal *Bill of Rights Handbook* 179.

<sup>201</sup> See "3 3 ATTACHMENT".

<sup>202</sup> It would be a mistake to accept any parents of the same race/culture as the child.

<sup>203</sup> In my view race is not the issue, but rather culture.

to an institution or foster home in meeting a child's emotional needs,<sup>204</sup> which inevitably leads one to the conclusion that cultural rights may be infringed in order to provide a child with a family.<sup>205</sup> Protecting family life is a purpose that is important not only for the child personally, but also for the healthy development of our future generations. Cultural rights may be infringed when the purpose is worthwhile and important,<sup>206</sup> and this is such a case. If the adoption would otherwise be in the best interests of the child, the infringement of cultural rights is justifiable because the purpose is to comply with section 28(1)(b) and section 28(2) of the Constitution by providing a child with appropriate alternative care when removed from the family environment, thereby granting the child a family life and serving the child's best interests.

(c) The nature and extent of the limitation: The infringement of a right should not be more extensive than is warranted by the purpose the limitation seeks to achieve.<sup>207</sup> It is necessary to assess whether there is proportionality between the harm done by the infringement and the purpose it is designed to achieve – the more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.<sup>208</sup>

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<sup>204</sup> See “3 3 1 Introduction” and “3 3 2 2 How are attachments formed?”.

<sup>205</sup> Forde-Mazrui 1994 *Michigan Law Review* 967.

<sup>206</sup> In terms of s 31(2) culture may not be exercised in a manner inconsistent with any provisions of the Bill of Rights.

<sup>207</sup> Currie & De Waal *Bill of Rights Handbook* 181-182.

<sup>208</sup> In *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC) at 395 (also reported in 1995 12 BCLR 1579 (CC) and [1996] 1 All SA 11 (CC)) Judge O'Regan said “the court places the purpose, effect and importance of the infringing legislation on one side of the scales and the nature and effect of the

*Example:* All rights are important and every attempt obviously has to be made to infringe any right as little as possible. The child's right to a cultural life might have to be infringed in order to provide a family environment for the child. I believe such infringement is warranted by the best interests of the child. Furthermore, it is submitted that the infringement of the right to culture will be limited in scope,<sup>209</sup> especially in the case of a very young child or an infant, who may not yet have an established culture.<sup>210</sup> As Marx says, not all adopted children have a cultural identity and the younger the child is when an adoption takes place, the less important culture is.<sup>211</sup> Even where there is an established culture, the culture shock which an uprooted child may experience fades and seems inconsequential when balanced against the child's improved quality of life.<sup>212</sup> Thus, even where there is infringement of this right, such infringement is not as damaging to the child as the denial of the right to alternative care, namely adoption, would be to the child.

- (d) The relation between the limitation and its purpose: There must be a good reason for the infringement, and this reason must tend to serve the purpose that it is designed to serve. In the absence of proportionality between the harm done

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infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be".

<sup>209</sup> See my argument under "5 2 2 Culture" and "5 4 2 Culture and the child".

<sup>210</sup> See the discussion under "5 4 2 Culture and the child".

<sup>211</sup> Marx 2008 *Emory Int'l L. Rev* 379.

<sup>212</sup> Marx 2008 *Emory Int'l L. Rev* 379.

by the infringement and the beneficial purpose that it is meant to achieve, the infringement cannot be reasonable.<sup>213</sup>

*Example:* The purpose of interracial/intercultural adoption is to comply with a child's right to alternative care when removed from the family environment by providing him/her with family life and a family environment in which to grow up. Furthermore, the purpose is to protect the child's dignity and to ensure that such a child is treated like children who are part of a family. There is thus a rational connection between means and end. The only way that a family environment can be enjoyed by a child in need of alternative care may be to arrange an intercultural adoption.

(e) Less restrictive means to achieve the purpose: The question that is asked is whether other means could be employed to achieve the same ends that would either not restrict the right at all, or would not restrict it to the same extent.<sup>214</sup> If another method existed for achieving the same purpose that would be less restrictive but equally effective,<sup>215</sup> a limitation would not be considered reasonable.<sup>216</sup> If a way could be found to restrict a fundamental right as little as possible, it has to be employed.

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<sup>213</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at 429 (also reported in 2000 7 BCLR 713 (CC)); Currie & De Waal *Bill of Rights Handbook* 183. Woolman in Chaskalson *et al Constitutional law of SA* 12-50 believes that this factor should be placed after the second factor, because once the legitimacy of the limitation's objective is established it makes sense to ask whether the means employed to achieve the objective are rationally related to achieving that objective, and, if not, there can be no good reason to permit the infringement of the right; see also Rautenbach in *Bill of Rights Compendium* 1A-72, where he emphasises that s 36 does not prescribe any particular order in which the factors must be considered.

<sup>214</sup> Rautenbach in *Bill of Rights Compendium* 1A-81.

<sup>215</sup> *S v Manamela* 2000 (3) SA 1 (CC) at 41 (also reported in 2000 5 BCLR 491 (CC)).

<sup>216</sup> Currie & De Waal *Bill of Rights Handbook* 183-184.

*Example:* If a child grows up without the opportunity of living in a family environment, the child's best interests are not served. If an adoption is possible where the child could be placed with parents of the same cultural background as the child, it would usually be preferable (if the parents are suitable),<sup>217</sup> but when that becomes impossible, there is only one way to provide the child with a family environment, and that is intercultural adoption. This, of course, does not mean that the limitation of the child's cultural rights will necessarily be very restrictive. The adoptive parents might make an effort to expose the child to the culture of his/her biological background, where this is known. It also has to be remembered that parents are merely there to guide a child with regard to future choices. In other words, as the child grows up, he/she will increasingly make independent decisions about which culture he/she wishes to follow.

The court in *MEC for Education v Pillay*<sup>218</sup> held that it is helpful to separate the enquiry about possible limitation into its constitutive parts, namely whether there is a legitimate purpose, whether the limitation achieves this purpose, and whether there are less restrictive means available to achieve the purpose.<sup>219</sup> The legitimate purpose of limiting a child's right to culture is to provide a child with a family and the opportunity to grow up in a family environment. As we have already established, this is a right that every child is entitled to, and which can only be achieved by allowing a child who cannot be raised by his/her biological

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<sup>217</sup> Also see "5 3 2 Making a distinction" above, where the "mild preference" rule is discussed.

<sup>218</sup> 2008 2 BCLR 99 (CC).

<sup>219</sup> At 129.

family to be raised in an alternative family. The only way this can be achieved in some cases, is to ignore the culture that a child was born into where no suitable parents with the same cultural background as the child are available to adopt the child. Of course, it has to be stressed that the child will not necessarily lose his/her cultural background entirely. Whether the child's cultural background will be upheld will depend on the willingness and ability of the adoptive parents.

*5 4 3 3 Which conflicts are we dealing with?*

Now that we have established that there are constitutional rights which may compete, and that the Constitution provides guidelines about how to deal with these competing rights, the next step is to decide who is/are involved in these competing rights. Various possible scenarios have to be considered. Should the child's right to family care or parental care, or to appropriate alternative care when removed from the family environment be weighed up against the community's right to ensure that cultural rights are upheld; should the child's right to family care or parental care, or to appropriate alternative care when removed from the family environment be weighed up against the other rights of the child, such as the right to culture, dignity and equality; or should the child's right to family care or parental care, or to appropriate alternative care when removed from the family environment be weighed up against the right to culture as seen from the perspective of the parents, such as the biological parents' cultural rights or the rights of the prospective adoptive parents to be considered on an equal

footing to other applicants?<sup>220</sup> In other words, the essential issue is to determine whose constitutional rights compete.

The right to culture is granted to “everyone” and this right may be exercised with “other members of that community”. It is therefore an individual right, and in other words, the child’s right to family care or parental care, or to appropriate alternative care when removed from the family environment has to be weighed up against the child’s right to culture. This is in keeping with the view of the court in *MEC for Education v Pillay*.<sup>221</sup> The court was of the opinion that the importance of a cultural practice depended mainly on the importance of the practice to that person.<sup>222</sup> It is therefore not the importance of the culture for a specific cultural community that is relevant.<sup>223</sup> In the context of this research it is an important point, because when a young child is adopted it is unlikely that he/she at that stage attaches any importance to culture. It is only when the child is older that this becomes a possibility, but even where the child has already become part of a specific culture, it has been argued throughout this chapter that culture is subordinate to the right to grow up in a family environment.

Quinton & Selwyn say young people make up their own minds on the importance they attach to cultural features and that they identify with different aspects of their heritages for different purposes. It would be a positive **personal** outcome if

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<sup>220</sup> In this regard, the argument of Quinton & Selwyn below under the same heading is relevant.

<sup>221</sup> 2008 2 BCLR 99 (CC).

<sup>222</sup> At 124.

<sup>223</sup> Malherbe 2008 *TSAR* 370-371.

interracially placed children were content with their ethnic identity,<sup>224</sup> even if that identity was weaker than that of racially matched children, but such an outcome would be negative if the criterion were the maintenance of a culture as a whole.<sup>225</sup> In other words the question here is whether the relevance of culture has to be determined by considering the rights and wishes of the child, or whether it is more important to bear in mind the wishes of the community and the preservation of culture for the benefit of the community. I think this might be one of the most important arguments thus far.<sup>226</sup> Ultimately, adoption is not about the community or the adults involved in the process, but the best interests of the child.<sup>227</sup> If we can accept that a child could be satisfied with his/her cultural identity, whether that corresponds with the culture of his/her biological parents or not, the realisation that it is not about the culture, the community or the parents, but about the well-being of the **child**, will follow. Ultimately, the competing considerations are the well-being that results from a permanent home and growing up in a family environment weighed against the harmful delay and possible total denial of the opportunity to grow up in a family environment that results from a decision to deny an intercultural adoption.

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<sup>224</sup> This refers to the rights of the child that may compete.

<sup>225</sup> Quinton & Selwyn 2006 *Child and Family Law Quarterly* 469-470. This refers to the conflict between the right of the child and the right of the community.

<sup>226</sup> Although Quinton & Selwyn do not discuss this, I mentioned above that there is a further possible conflict – that of the child and the parents, whether biological or adoptive.

<sup>227</sup> Although the views of Heaton (see “4.2.6 Parent-centered versus child-centered approach”) should be kept in mind, namely, that all relevant aspects, including the opinions of all relevant parties, should be employed to determine the best interests of the child, ultimately these are only guidelines and the important issue is the child, not the parents or the community.

5 4 3 4      *The child's competing rights*

Where conflicts occur between rights pertaining to a single bearer of these rights, how should the conflicts be resolved? Under the previous heading I made it quite clear that in the context of adoption the only relevant rights are those of the child him/herself and the competition that often occurs between these rights. In chapter three I said that the right of children to family care or parental care serves as an acknowledgement of the importance for a child to grow up within a family environment.<sup>228</sup> On the other hand, we are also dealing with the child's right to culture. Bennett<sup>229</sup> argues the right to culture is expressly subordinated to the other fundamental rights, since "no one exercising [the rights to culture] may do so in a manner inconsistent with any provision of the Bill of Rights".<sup>230</sup> Although it can no longer be stated that one right is subordinate to another,<sup>231</sup> there are circumstances in which one right will take precedence over others.<sup>232</sup> I believe Bennett's argument that culture may not be exercised in a manner inconsistent with any provision in the Bill of Rights supports my argument that culture may be limited in order to serve the best interests of the child. His viewpoint is also in line with that of Alston, who says it has to be accepted that cultural considerations will have to yield whenever a clear conflict with human rights norms becomes

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<sup>228</sup> Robinson 1998 *Obiter* 335, as referred to under "3 1 INTRODUCTION".

<sup>229</sup> Bennett 1999 *Obiter* 155.

<sup>230</sup> S 30.

<sup>231</sup> This was decided by the Constitutional Court — see *Mthembu-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) at 347-348; *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) at 546; *Johncom Media Investments Ltd v M* unreported case CCT 08/08, 17 March 2009 (CC) at par 19.

<sup>232</sup> *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) at 546.

apparent.<sup>233</sup> Section 28(1)(d)<sup>234</sup> as well as section 9(3)<sup>235</sup> and section 10<sup>236</sup> are crucial when we follow this argument. A child who is left in an institution in order to protect that child's cultural background may face neglect in the form of emotional neglect (such as a lack of affection and love) or physical neglect (such as a need for clothing or food). Section 9(3) expressly says that the state may not unfairly discriminate on certain grounds.<sup>237</sup> If we apply these rules to adoption, and a decision not to allow an adoption is made because of a child's cultural background, such a child may have been unfairly discriminated against on the grounds of race, ethnic or social origin, colour, culture and birth,<sup>238</sup> to name but a few. Any inroad into the right to alternative care would therefore be much bigger than an inroad in respect of the culture of a child who is interculturally adopted would entail.

Clearly, the child's culture plays a role in the assessment of a child's best interests. The child's culture should be given due consideration in relation to the needs of the particular child on a case by case analysis.<sup>239</sup> In this way a balance can be found between sections 9(3), 28(1)(b) and 28(2).<sup>240</sup>

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<sup>233</sup> Alston 1994 *International Journal of Law and the Family* 21.  
<sup>234</sup> S 28(1): "Every child has the right – ...  
(d) to be protected from maltreatment, neglect, abuse or degradation".  
<sup>235</sup> See n 101.  
<sup>236</sup> See n 142.  
<sup>237</sup> See n 101.  
<sup>238</sup> S 9(3) of the Constitution.  
<sup>239</sup> Bennett 1999 *Obiter* 156; Knoetze 2002 *Obiter* 354.  
<sup>240</sup> Nicholson & Politis 2001 *De Jure* 602.

Furthermore, sections 30<sup>241</sup> and 31(2)<sup>242</sup> expressly state that they may not be exercised in a manner inconsistent with any provision of the Bill of Rights. Although the rights in the Bill of Rights are all important and each case has to be considered individually to determine whether a limitation is possible, I believe the proviso in sections 30 and 31(2) is of great significance, as it tells us that there are other rights that may have preference and could justify a limitation of culture. Section 28 contains no *proviso*, which indicates that the rights granted to children in this section should get preference when having to “choose” between section 28 on the one hand and sections 30 and 31 on the other. When we also consider the argument that culture is often confused with race, and Joubert’s argument with regard to race,<sup>243</sup> there can be no doubt that the child’s right to culture may be limited in order to comply with section 28(1)(b). Section 28(1)(b) (together with section 9(3)) places a positive obligation on the state to view the best interests of the child holistically rather than to emphasise cultural differences.

Finally, it is important to bear in mind that — as Triseliotis *et al*<sup>244</sup> point out — whether or not cultural identity is preserved, all children grow up in a dual world and are so extensively exposed to other cultures that a mixed pattern may emerge in any case. They say that a person need not have a single culture as a reference group to avoid identity confusion.

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<sup>241</sup> See n 102.

<sup>242</sup> See n 102.

<sup>243</sup> Joubert 1993 *SALJ* 732-733, as explained under “5 3 2 Making a distinction”.

<sup>244</sup> Triseliotis *et al Adoption* 179.

#### 5 4 4 Conclusion

Perhaps it is time to consider the issues of race and culture in adoption from a different angle. The discussions and studies about the impact of interracial/intercultural adoption focus mainly on racial differences between the child and the adoptive parent, and the result thereof with regard to culture, but there is in fact no evidence that black parents do a better job than white parents (or *vice versa*) of raising black children with a sense of pride in their racial culture and heritage.<sup>245</sup> Ultimately a statement by an interracially adopted child, who says that “[p]rejudice comes from ignorance”,<sup>246</sup> sums up the situation well.

It is my view that culture has to be considered, but it may never carry more weight than other relevant factors when considering an intercultural adoption. Cultural rights have to be protected, but certainly not at all costs. Should intercultural adoption be denied, we are contributing towards keeping South Africa a divided nation, instead of working together towards a united rainbow nation. If more people looked at the positives, rather than the negatives, they might realise that intercultural adoption can be one of the means of showing the community how to bridge our differences, how to link different cultures and generally just how to get along better.

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<sup>245</sup> Barholet in Gaber & Aldridge *In the Best Interests of the Child* 167.

<sup>246</sup> Simon *et al The Case for Transracial Adoption* 104.

## **5 5 INTERNATIONAL INSTRUMENTS**

### **5 5 1 Introduction**

As I have already indicated,<sup>247</sup> international law and foreign law are important in the interpretation of the Constitution. It is thus necessary to analyse the contents of relevant international instruments in order to determine how the issues of race and culture, specifically with regard to children and their best interests, are interpreted in these instruments.

### **5 5 2 The Convention**

Cultural values are referred to in the Preamble of the Convention.<sup>248</sup> This serves as confirmation of the importance of culture for an individual, but does not elevate culture above any other values in the Convention. When considering the role of culture, the Convention states that due regard has to be paid *inter alia* to the child's cultural background when alternative care is considered for such child.<sup>249</sup> A child's right to enjoy his/her culture in community with other members of his/her group is protected in the Convention,<sup>250</sup> and article 31(2) requires States Parties to promote the right of a child to participate fully in cultural life. It is not clear that the culture referred to in these articles is that of the biological parents of the child.

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<sup>247</sup> See "4 2 2 International instruments".

<sup>248</sup> "Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child".

<sup>249</sup> Art 20(3).

<sup>250</sup> Art 30.

It could also be a reference to the group or environment in which the child is raised.

Culture is an element of a child's life which obviously has to be taken into account when any decision regarding the best interests of that child has to be made. It is, however, not elevated above any of the other elements that form part of the child's life and should not be given more weight than was intended by the Convention. Freeman says that article 3 (which makes the best interests of the child a primary consideration instead of **the** primary consideration)<sup>251</sup> creates a loophole which invites states parties to find other equally weighty primary considerations, such as culture.<sup>252</sup> This may be so, but such an argument should not lead to the conclusion that culture is more important than other rights in the Convention. Snow & Covell believe that culture should not be elevated above other elements in the Convention that relate to the child.<sup>253</sup>

### 5 5 3 The Charter

The Preamble of the Charter refers to cultural circumstances of African children<sup>254</sup> and takes the virtues of their cultural heritage into consideration in respect of the rights and welfare of the child.<sup>255</sup> Article 12 grants a child the right

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<sup>251</sup> See "4 2 4 Primacy and paramountcy".

<sup>252</sup> Freeman "Future of children's rights" in Freeman *Children's Rights* ii 300.

<sup>253</sup> Snow & Covell 2006 *The International Journal of Children's Rights* 115.

<sup>254</sup> "... the situation of most African children, remains critical due to the unique factors of their ... cultural ... circumstances ...".

<sup>255</sup> "**Taking into consideration** the virtues of their cultural heritage ... which should inspire and characterize their reflection on the concept of the right and welfare of the child" (my emphasis).

to participate in cultural life,<sup>256</sup> and the child has the duty to “strengthen African cultural values” in his/her relations with other members of society.<sup>257</sup> There is, however, no indication in article 12 that the culture has to be that of the biological parents of the child. In fact, in my view this article actually emphasises the right of a child to choose when it comes to culture. It is further unclear what is meant by “African cultural values”. There is obviously more than one culture in Africa. Perhaps this reference is aimed at minority culture, or perhaps by “African” the intention is to refer to “black” culture. This is unclear, but as I have argued,<sup>258</sup> there is in any event not only one distinct black culture. The references to culture in this document are vague. Although they should not be ignored, too much emphasis cannot be placed on culture under these circumstances.

In support of my view article 3, the non-discrimination article, entitles children to the enjoyment of certain rights and freedoms. There is, however, no reference to culture here. This does not mean that culture is not protected, but it is (again) a confirmation of the lesser role of culture.

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<sup>256</sup> Art 12: “States Parties recognize the right of the child ... to participate freely in cultural life and the arts”. In view of the discussion under “5 2 2 Culture” and the different interpretations of culture, I believe that the intention of art 12 is more in line with the protection of the artistic aspect of culture than the traditions and customs that can also be associated with culture.

<sup>257</sup> Art 31(d).

<sup>258</sup> See “5 3 2 Making a distinction”.

#### **5 5 4 Conclusion**

A common thread in the international instruments is the recognition that a child, for the full and harmonious development of his/her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. There can thus be no doubt about the importance of affording a family environment to a child, even at the expense of the child's biological culture.

Having considered the limitation of constitutional rights within the context of intercultural adoption and the approach to culture in international instruments, I shall now set out some of the arguments for and against interracial/intercultural adoption in more detail.

### **5 6 ARGUMENTS FOR AND AGAINST INTERRACIAL/INTERCULTURAL ADOPTION**

#### **5 6 1 Introduction**

The arguments regarding the desirability or undesirability of interracial/intercultural adoption focus mainly on the issue of culture and whether intercultural adoption will result in the loss of a child's biological culture. There

are very strong arguments both in favour of and against interracial/intercultural adoption. Although my research focuses mainly on culture, undoubtedly there is a close link between race and culture in the context of adoption. When an interracial adoption takes place, it will almost certainly also be an intercultural adoption. As a result I consider it important to touch on some racial issues, such as the difference in appearance between the adoptive parents and the child.

### **5 6 2 Arguments against intercultural adoption**

The issue of race matching and the preservation of culture in the context of interracial adoption is not unique to South Africa. In Canada the practice has been to keep Aboriginal children in their communities because of the Aboriginal belief that the rights of the community supersede the rights of the individual child. This belief is similar to that of the indigenous people of South Africa. Children are viewed as communal resources and what is in the best interests of the child tends to be defined in terms of blood ties rather than living conditions.<sup>259</sup> A similar belief is shared in customary law in South Africa, where adoption is adult-centered.<sup>260</sup> Although the validity of customary adoption is not denied in any way, the aim of customary adoption is completely different to that of statutory adoption.<sup>261</sup> As I shall argue in “9 CONCLUSION”, I believe that the legislature should take account of customary practices and incorporate positive aspects of

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<sup>259</sup> Snow & Covell 2006 *The International Journal of Children's Rights* 110.

<sup>260</sup> The purpose of adoption in customary law is to provide a man with an heir – Bennett *Customary Law in SA* 318.

<sup>261</sup> See “2 4 2 2 *Development of adoption in customary law*” above.

these adoption practices into legislation. However, the belief that children are viewed as communal resources and that their best interests should be subordinate to those of the community should, in my view, not be adopted in South African legislation as it puts the interests of the community before the interests of the child.<sup>262</sup> The best interests of the child should not be determined by considering anyone other than the individual child.<sup>263</sup> If the child is put first, the result will be that any decision taken will be in the best interests of the child, and of no one else.

An argument that is raised against intercultural adoptions is that these adoptions are a threat to the existence/continuation of culture.<sup>264</sup> The validity of this argument is doubtful as intercultural adoptions make up a very tiny percentage of all adoptions. The percentage of children who are adopted interculturally is so small that it “poses no realistic threat to the existence of that community or the preservation of its culture”.<sup>265</sup> Clearly, in the greater picture, there is no significant effect, especially on the culture of a community. Furthermore, this argument again judges interracial/intercultural adoption from the viewpoint of the community and not from that of the best interests of the child. Even if there is a slight effect, my view is that opponents of intercultural adoption incorrectly focus on cultural concerns at the expense of the child’s best interests.

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<sup>262</sup> See “5 4 3 3 Which conflicts are we dealing with?”.

<sup>263</sup> This can be seen, inter alia, in s 28(2) of the Constitution and s 7(1) of the Children’s Act. Also see my discussion under “4 2 7 Factors that determine the best interests of the child”.

<sup>264</sup> Also see the discussion under “5 6 3 1 Cultural issues as a factor”.

<sup>265</sup> Bartholet in Gaber & Aldridge *In the Best Interests of the Child* 172; Forde-Mazrui 1994 *Michigan Law Review* 967.

Opponents of interracial adoption argue that the child's racial identity suffers and that the child's culture is diminished when he/she is raised outside of his/her racial group.<sup>266</sup> Mosikatsana is the strongest voice against interracial adoption in South Africa. He<sup>267</sup> argues that interracial adoptions are not in the best interests of a child, and believes that they do not conduce to the welfare of the child. He suggests that the repeal of section 40(b)<sup>268</sup> of the Child Care Act should not preclude the courts from disallowing interracial adoptions as part of the best interests analysis of section 18(4)(c) of the Child Care Act,<sup>269</sup> and that the courts may exercise their discretion to prohibit interracial adoptions pursuant to section 40 of the Child Care Act<sup>270</sup> on the basis of prospective cultural or religious incompatibility of the child and the prospective adoptive parent.<sup>271</sup> His argument is that interracial adoptees may suffer identity crises resulting from loss of racial or cultural identity, and a child who is interracially adopted may suffer racial prejudice from his/her adoptive parents or the community in which the adoptive parents live, which may damage the child's self-concept. He is of the opinion that if such a child is socially ostracised by the racial group of the adoptive parent(s), he/she may not be able to affiliate with any racial, cultural or linguistic group. He argues that cultural disparities create a likelihood of a failed interracial adoption policy.

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<sup>266</sup> Swize 2002 *Virginia Law Review* 1081.

<sup>267</sup> Mosikatsana 1995 *SALJ* 611, 613-614.

<sup>268</sup> See n 4 and "5 3 2 Making a distinction".

<sup>269</sup> S 18(4): "A children's court to which application for an order for adoption is made ... shall not grant the application unless it is satisfied—

(c) that the proposed adoption will serve the interests and conduce to the welfare of the child".

<sup>270</sup> See n 7.

<sup>271</sup> Mosikatsana 1995 *SALJ* 611, 615-616.

I do not think anybody would deny that interracial adoptions may sometimes be problematic or difficult, but I also believe that Mosikatsana's is a fairly cynical outlook on life. His views are totally hypothetical. One may just as well say that a child **may** be abused, neglected or assaulted by his or her biological parent(s) or adoptive parent(s) of the same racial or cultural group. What about the child who has a physical handicap? Such a child **may** also be socially ostracised or **may** suffer prejudice because of his or her disability. This is all pure speculation, which should not be used in support of the view that interracial adoption is undesirable.

Mosikatsana's line of thinking is, in my view, flawed and negative. Acceptance of his argument could also quite easily result in a continuation of race-matching (which was certainly not the intention of section 40) as a requirement for adoption.<sup>272</sup> In the USA Supreme Court case, *Palmore v Sidoti*,<sup>273</sup> the court accepted that deviation from the norm often brings ridicule and criticism, but rejected the notion that this is necessarily the "basis for implanting neuroses". Forde-Mazrui supports this view. He asks whether a parent must have "worn glasses, been fat, worn braces, or been short in order to help her child who, while on the playground, is called 'four eyes,' 'fatso,' 'tinsel teeth,' or 'shrimp'".<sup>274</sup>

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<sup>272</sup> See in this regard Zaal 1994 *SAJHR* 378.

<sup>273</sup> 466 US 429 (1984), as quoted in Schneider 2003 *Law Quadrangle Notes* 77.

<sup>274</sup> Forde-Mazrui 1994 *Michigan Law Review* 954.

When Mosikatsana<sup>275</sup> interviewed social workers from the Johannesburg Child Welfare Society about interracial placements, they reported that the adoptive parents received unfavourable remarks from community members of the same race as their adoptive children, and that there tended to be more resistance from the black community. I believe that unfavourable remarks and community resistance do not provide a sound foundation for rejecting interracial adoption. The community may have some prejudices about interracial adoption, but this is certainly no reason to argue that interracial adoption is inevitably not in the best interests of a child. As Perry says:

To deny a child a home ... on the basis of speculation about potential racial difficulties sometime in the future, virtually ignores the value to the child of growing up in a family setting.<sup>276</sup>

Furthermore, in *S v Makwanyane*,<sup>277</sup> President Chaskalson said that if public opinion were to be decisive, there would be no need for constitutional adjudication.<sup>278</sup>

Mosikatsana believes that post-apartheid South Africa continues to be a race-conscious society, and that race relations in post-apartheid South Africa are still tense. If it were not for class and racial tension, interracial adoptions would take

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<sup>275</sup> Mosikatsana 1995 *SALJ* 616.

<sup>276</sup> Perry 1990-1991 *J Fam L* 82.

<sup>277</sup> 1995 (3) SA 391 (CC).

<sup>278</sup> At 431.

place without even attracting a modicum of attention.<sup>279</sup> This leads us to the conclusion that it is the prejudices of people that stand in the way of interracial/intercultural adoption. The logical inference is that the problem does not lie with the parties to an interracial adoption. It may, however, be necessary to educate the general public about such adoptions.

Mosikatsana hypothesises that adoption procedures and agency practices contain a class and racial bias in that they target mainly white middle class families as prospective adoptive parents.<sup>280</sup> He says that adoption in South Africa is a service provided by voluntary adoption agencies to childless white couples, and suggests that a solution would be to change agency policies and practices.<sup>281</sup> He submits<sup>282</sup> that the primary objective of adoption is not to satisfy the parenting needs of childless couples, but to regulate the placement of children in accordance with their rights and best interests (a view which, I believe, everyone shares). I am of the opinion that his argument does not lead one to the conclusion that interracial adoption is wrong or inevitably not in the best interests of the child. His argument is not one that goes against interracial adoptions. Rather, it deals with social prejudices and procedural failures in the adoption process. What it does show, is that there may be a serious problem with the methods used by adoption agencies when placing children with prospective adoptive parents. That, of course, is a different issue to whether interracial

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<sup>279</sup> Mosikatsana 1997 *SAJHR* 604.

<sup>280</sup> Mosikatsana 1997 *SAJHR* 610.

<sup>281</sup> Mosikatsana 1997 *SAJHR* 620.

<sup>282</sup> Mosikatsana 1997 *SAJHR* 611. See also Mosikatsana in Keightley *Children's Rights* 131 and Rautenbach in *Bill of Rights Compendium* 3E-14.

adoption serves children, and is one that falls outside the scope of this research, although it certainly needs serious consideration.

It is my view that when seen from the point of view of the **child**, the value and necessity of interracial/intercultural adoption seems clear. I believe that Mosikatsana's opposition to interracial/intercultural adoption is rooted in his personal belief, which is that of the communalism of African culture,<sup>283</sup> in other words, I believe that he analyses statutory adoption from the point of view of customary law, in terms of which the focus is generally on the community rather than on the individual.<sup>284</sup> I have already explained my belief that customary law has a different view of adoption and that the aim of customary adoption<sup>285</sup> is different to that of statutory adoption.<sup>286</sup> Although the importance of customary adoption is not denied, I shall argue in "9 CONCLUSION" that current customary adoption is not necessarily in the best interests of the child, and that there should be an adoption procedure that is valid and acceptable to all who live in South Africa. Customary law is an integral and important part of the South African legal system, and the customary-law principles that are in line with the best interests of the child should be included in statutory adoption legislation. However, any adoption procedure should have as its starting point the best interests of the child.

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<sup>283</sup> Mosikatsana 1998 *Michigan Journal of Race & Law* 346.

<sup>284</sup> Mosikatsana 1998 *Michigan Journal of Race & Law* 346. Also see "2 4 2 Customary law and adoption".

<sup>285</sup> Namely, to provide a man with an heir.

<sup>286</sup> Namely, to serve the best interests of the child and provide the child with a loving, suitable family.

### 5 6 3 Arguments in favour of intercultural adoption

#### 5 6 3 1 Cultural issues as a factor

I believe that the approach followed by those opposed to all interracial/intercultural adoption is that “race matching” in the adoption process is preferred because it leads to “culture matching”. This argument assumes the existence of a homogeneous black culture and community, distinct and different from a supposedly homogeneous white culture, which is of course just not true. One could recognise the importance of racial and cultural difference without subscribing to separatism.<sup>287</sup> Zaal believes that the statutory requirement of considering culture in an adoption<sup>288</sup> promotes a continuation of race matching in child placements.<sup>289</sup> He bases this view on the extent of the applicability of the “matching” procedure:<sup>290</sup> Religious and cultural differences must be taken into account in all situations where children are to be lawfully placed in the custody of persons other than the child’s biological parents. He concludes that courts and child care workers are required to treat cultural differences as a negative factor where applications are made to adopt children. He stresses however<sup>291</sup> that “culture” and “race” differences should not be automatically applied as negative factors where children find themselves in need of a new care-giving institution or

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<sup>287</sup> Bartholet in Gaber & Aldridge *In the Best Interests of the Child* 180.

<sup>288</sup> S 40 of the Child Care Act.

<sup>289</sup> Zaal 1992 *Journal of SA Studies* 400.

<sup>290</sup> Zaal 1992 *Journal of SA Studies* 400.

<sup>291</sup> Zaal 1994 *SAJHR* 383.

person. He submits<sup>292</sup> that the requirement of matching up cultural backgrounds is particularly unsatisfactory. He says it is merely a legal camouflage for *de facto* apartheid to continue and at best the “cultural” requirement promotes a continuation of race-matching in child placements. These remarks by Zaal were made many years ago — in fact some of them were made even before our Interim Constitution was enacted. Since then, South Africa and its people have undergone major change. People have become more tolerant of each other and have at least partially learnt to live together in one integrated society.<sup>293</sup> It is because so much of what Zaal said is still true today, though, that his statements are included here. I believe most people in our country have moved on from the atrocities of the pre-constitutional era, but care has to be taken not to create a situation where some of those racial issues might surface again. It is hard to imagine that interracial adoption is more threatening to culture than interracial marriage or integration in public education.<sup>294</sup> Surely interracial marriage and integration in public education pose no less of a “threat” to cultural rights, but they are regarded as acceptable. In my view culture seems to be considered as a factor only under certain circumstances, such as when there is an interracial adoption, and this could result in a situation where race is considered when an application for an intercultural adoption is made. It needs to be said that if race and culture are treated as one and the same thing, it could lead to a continuation of using culture as a smokescreen for racial factors.

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<sup>292</sup> Zaal 1994 *SAJHR* 378; Zaal 1992 *Journal of SA Studies* 400.

<sup>293</sup> Of course, there are exceptions, but, generally, society has changed dramatically over the past years.

<sup>294</sup> Bartholet in Gaber & Aldridge *In the Best Interests of the Child* 172.

Zaal suggests<sup>295</sup> that section 40 of the Child Care Act<sup>296</sup> has become an impediment to many a child's right to parental care<sup>297</sup> and says that the concept of "culture matching" must be entirely removed from the Child Care Act so that the welfare officials and children's courts involved in the placement of children are never distracted or directed away from the central task of seeking the best available haven for such children. I agree with this view. As long as culture is over-emphasised in our legislation, the rights and best interests of children might suffer. My argument is certainly not that culture must be ignored completely. The right to culture is after all one of the rights that a child has, but as culture is just one factor to be considered in the adoption process, elevating it by including it in a separate section creates the idea that it is "more special" than other rights.<sup>298</sup> As we have also seen,<sup>299</sup> the limitation of culture is justified in order to allow the child's right to alternative care to prevail.

My argument can be supported by what has been held in our Constitutional Court. In *AD v DW*<sup>300</sup> Judge Sachs held that a child's need for a permanent home

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<sup>295</sup> Zaal 1994 *SAJHR* 384.

<sup>296</sup> See n 7.

<sup>297</sup> Zaal specifically refers to the relevant provision of the Interim Constitution, namely s 30(1)(b). It is worth mentioning here that parental care was not a concept that was part of our Interim Constitution. Undoubtedly its inclusion in s 28(1)(b) of the Constitution was a huge step forward for the rights of children. In the context of adoption it is alternative care that is relevant, not parental care. However, as I have argued (see my discussion under "3 2 FAMILY CARE, PARENTAL CARE OR APPROPRIATE ALTERNATIVE CARE" about the difference between these terms) alternative care in the form of adoption will provide a child with the opportunity to be part of a family and experience parental care.

<sup>298</sup> Also see "6 7 1 The Child Care Act, adoption and culture" and "6 7 2 The Children's Act, adoption and culture".

<sup>299</sup> See "5 4 3 2 How does the Constitution deal with competing rights?".

<sup>300</sup> 2008 4 BCLR 359 (CC).

and family can in certain circumstances be greater than their need to remain in the country of their birth.<sup>301</sup> He further held that there will be circumstances in which intercountry adoption will be preferable for a child over institutional care in the country of birth.<sup>302</sup> I believe these statements have to apply with equal force when it comes to intercultural adoption. A child's need for a family is greater than his/her need to maintain the culture of his/her biological parents. I will go even further than Judge Sachs and state that a child's need for a permanent home and family will usually be greater than his/her need to retain his/her culture.

Simpkins *et al*<sup>303</sup> say that the need-fulfilment of the child must take priority over all else and there is nothing wrong (morally or ethically) with placing a child in need with **any** adoptive parents who can satisfy that need. This is in line with my argument thus far. However, I submit that the wishes of all parties involved in the adoption process also have to be considered. As I shall argue below in "9 CONCLUSION", the preference expressed by the biological parents is a factor that the court must take into account, like all other relevant factors. On the other hand, the wishes of the prospective adoptive parents have to be respected, and children who are old enough to express their views should also be heard about what role culture should play in the adoption process. The older a child is when he/she is adopted, the more difficult it will be for him/her to identify with parents of a different population group.<sup>304</sup> The feelings of the people involved in the

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<sup>301</sup> At 376.

<sup>302</sup> At 376-377.

<sup>303</sup> Simpkins *et al* 1990 *Social Work* 272.

<sup>304</sup> Heaton 1989 *SALJ* 716.

adoption process cannot be disregarded. Under no circumstances should an interracial/intercultural adoption take place if the prospective adoptive parents indicate that they would prefer to adopt a child of the same race and/or culture.<sup>305</sup> Faced with an interracial/intercultural adoption, prospective adoptive parents have to be willing to commit themselves to bringing up the child in such a way as to make all attempts to make the child aware of and even possibly maintain the child's cultural identity, where at all possible. Similarly, an adoption cannot proceed where the child, who is capable of expressing his/her views, is not committed to the process, as will be the case where an intercultural adoption proceeds despite the child's objections.

A further issue that needs discussion is that of prejudice. Article 1(2) of the UNESCO Declaration on Race and Racial Prejudice provides that “[a]ll individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. However, the diversity of life styles and the right to be different may not, in any circumstances, serve as a pretext for racial prejudice...”.<sup>306</sup> I think opponents of interracial adoption who base their views on the loss of culture are doing precisely that — using culture as a pretext for racial prejudice. Culture and race may never be used in such a way that the best interests of the child — viewed holistically — are neglected. Care should always be taken not to place too much emphasis on one specific right at the expense of other rights, and ultimately it must always be kept in mind what the best interests

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<sup>305</sup> This is also the view of Tizard in 1994 *Tolley's Journal of Child Law* 54.

<sup>306</sup> Art 1(2) of the UNESCO Declaration on Race and Racial Prejudice, which was adopted and proclaimed on 27 November 1978.

of a child in the circumstances are. The best interests of a child who is in need of parental care will be served by creating a situation where the child will be able to experience such parental care through adoption. As we have seen,<sup>307</sup> a child who does not grow up in a family environment is in a far worse position than a child who experiences a loss of culture. Research has in fact shown that delay in the placement of a child is a far more significant factor in adoptive adjustment than racial matching.<sup>308</sup>

Research shows that adoptive families provide a child with a healthier environment than foster families or institutional facilities.<sup>309</sup> Golombok advocates that in deciding where to place a child it is crucial that the child's attachment history is taken into account.<sup>310</sup> Although Golombok is of the view that, generally, the best placement for a child is with a same-race family from the outset, she acknowledges that this cannot always be achieved and may result in the child either remaining in a foster home for several years or being moved from one foster home to another, both of which circumstances are likely to be harmful to the attachment process.<sup>311</sup> Aldridge<sup>312</sup> says that in spite of what is known about the attachment needs of the child and the importance of early placement, it is still often thought necessary to keep a child waiting indefinitely for an ethnically

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<sup>307</sup> See "3 THE CHILD AND THE FAMILY" and "4 BEST INTERESTS OF THE CHILD".

<sup>308</sup> Bartholet in Gaber & Aldridge *In the Best Interests of the Child* 168-169. Also see the discussion under "4 5 3 Attachment and the age of the child".

<sup>309</sup> Swize 2002 *Virginia Law Review* 1082.

<sup>310</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 111. Also see the discussion under "4 3 ATTACHMENT AND ADOPTION".

<sup>311</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* 111.

<sup>312</sup> Aldridge in Gaber & Aldridge *In the Best Interests of the Child* 189.

matched family, which frequently results in the child growing up without a family of his/her own.<sup>313</sup>

Further, I believe that the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption<sup>314</sup> offers an analogous argument in support of interracial/intercultural adoption. The Hague Convention endorses international adoption as a viable alternative for a child in need of a family when domestic placement options have been exhausted. The Preamble states 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”. International adoption should therefore only be considered if domestic adoption by a **suitable** family<sup>315</sup> is not possible. This leads one to conclude that **any** domestic adoption by a suitable family, which obviously includes interracial/intercultural adoption, is preferable to international adoption. A child’s need for a permanent home and family is greater than the child’s need to remain in his/her country of birth.<sup>316</sup> This argument, I believe, applies equally with regard to a child’s “biological” or “inborn” culture. The need to be part of a family is greater than the need to preserve an (often unknown) “biological” or “inborn” culture.

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<sup>313</sup> See “4 3 ATTACHMENT AND ADOPTION” and “3 3 2 The theory behind attachment”.

<sup>314</sup> Hereafter referred to as “the Hague Convention”. It entered into effect on 1 May 1995. South Africa acceded to it on 21 August 2003, and it entered into force in this country on 1 December 2003.

<sup>315</sup> A suitable family does not necessarily refer to one of the same race/culture.

<sup>316</sup> Marx 2007 *Emory Int’l L. Rev* 402-403.

Zaal is of the opinion<sup>317</sup> that culture matching may create an avenue for challenging placements after the child has already bonded with a new parent figure. According to him,<sup>318</sup> even if it is argued that an interracial placement is not ideal, it is often “the least detrimental alternative” that is available. Goldstein *et al* propose that “the least detrimental available alternative for safeguarding the child’s growth and development” should be the standard used to determine placements of children.<sup>319</sup> I am hesitant to use the phrase “least detrimental alternative”, as it creates the impression that the child’s best interests are not protected. This viewpoint will be discussed in “9 CONCLUSION”.

Forde-Mazrui<sup>320</sup> believes that children may actually benefit from interracial placement, as it may assist them with social integration and provide them with access to more than one culture, which may increase understanding through integration.<sup>321</sup> Swize also argues very strongly in favour of interracial/intercultural adoption. She believes that advocates of interracial adoption should not emphasise the negatives, but rather the positives of this kind of adoption.<sup>322</sup> She is of the opinion that a child’s visible dissimilarity may encourage the adoptive parents to make greater efforts to explore their child’s distinct culture.<sup>323</sup> This

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<sup>317</sup> Zaal 1992 *Journal of SA Studies* 402.

<sup>318</sup> Zaal 1992 *Journal of SA Studies* 403.

<sup>319</sup> Goldstein *et al Beyond the Best Interests* 53-64.

<sup>320</sup> Forde-Mazrui 1994 *Michigan Law Review* 964-966.

<sup>321</sup> Although Forde-Mazrui does distinguish between race and culture, she seems to fall into the trap of believing that there is a distinct white culture as opposed to a distinct black culture — see “5 3 2 Making a distinction”, where I explain that there is no distinct white culture or black culture.

<sup>322</sup> Swize 2002 *Virginia Law Review* 1084-1086, 1097.

<sup>323</sup> Swize 2002 *Virginia Law Review* 1100.

physical difference between the child and the adoptive parent is an important issue that needs to be discussed.

5 6 3 2      *Physical appearance as a factor*

Although the main focus of this research is on culture in adoption and not on race, and they are two very different issues,<sup>324</sup> an intercultural adoption is often also an interracial one. When a child of a different race to the adoptive parents is adopted, there is of course the (often) very obvious difference in appearance between the adoptive parents and the child. Society has been conditioned to believe that “the ties that bind us are ties of blood”.<sup>325</sup> With same-race adoption or racial “matching” there is no genetic relationship between the parents and the child, but there is the appearance of a biological relationship, which represents the “typical family structure”.<sup>326</sup>

“Matching” makes it easy to conceal an adoption.<sup>327</sup> Interracial adoption, on the other hand, is the most open adoption there is. Interracial adoptive parents are more open to discussing adoption with a child,<sup>328</sup> and acceptance by a child of his/her adoptive status contributes to a healthy self-esteem.<sup>329</sup> The fact that the child was adopted is apparent to the whole world. Swize refers to this as the

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<sup>324</sup> See “5 3 2 Making a distinction” and “5 4 1 The Constitution, race and culture”.

<sup>325</sup> Bartholet *Family Bonds* 53.

<sup>326</sup> Swize 2002 *Virginia Law Review* 1088-1089.

<sup>327</sup> Swize 2002 *Virginia Law Review* 1088.

<sup>328</sup> Bartholet in Gaber & Aldridge *In the Best Interests of the Child* 168.

<sup>329</sup> Swize 2002 *Virginia Law Review* 1104.

“unblinkable difference”.<sup>330</sup> She says the obvious difference in appearance between the adoptive parents and the child may actually be an affirmation to the child that he/she was wanted and chosen. As an interracial adopted child is more likely than a same-race adoptee to openly identify him/herself as adopted, he/she will benefit from positive thoughts about being adopted.<sup>331</sup>

Further, the child, because of not sharing racial similarities with the adoptive parents, is likely to have freedom to develop his/her own individuality.<sup>332</sup> Although she recognises that this difference in appearance may cause difficulties for the child,<sup>333</sup> Swize believes such difficulties are countered both by the potential benefits of the difference and by the significant harm that results when a child is delayed from becoming part of a permanent family.<sup>334</sup> She goes as far as to compare adoption to a disability – it can be hidden or obvious.<sup>335</sup> If, she explains, it is hidden,<sup>336</sup> this could lead to psychological harm because this hides the true identity of the individual.<sup>337</sup> As in the case of an exposed disability, hiding it is not an option in the case of an interracial adoption.<sup>338</sup> Interracial adoption appears to provide the opportunity for a child to develop an awareness of race, a respect for

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<sup>330</sup> Swize 2002 *Virginia Law Review* 1101.

<sup>331</sup> Swize 2002 *Virginia Law Review* 1104.

<sup>332</sup> Swize 2002 *Virginia Law Review* 1087, 1100.

<sup>333</sup> The child may for instance want to look like his/her parents.

<sup>334</sup> Swize 2002 *Virginia Law Review* 1106.

<sup>335</sup> Swize 2002 *Virginia Law Review* 1112.

<sup>336</sup> This is referred to as “passing”.

<sup>337</sup> Swize 2002 *Virginia Law Review* 1114.

<sup>338</sup> Swize 2002 *Virginia Law Review* 1115.

the physical differences imposed by race and an ease with his/her own racial characteristics.<sup>339</sup>

In my opinion this is an issue that has to be handled carefully, because when the appearance of the child is so different from that of the parents, the child may feel insecure. The parents thus have a responsibility to provide the child with a strong sense of belonging and the ability to deal with any possible negative remarks. If this is done, I agree that the child actually has an advantage in that he/she is fully aware of the difference between him/her and the parents and further that he/she is in a position to develop a healthy self-identity.<sup>340</sup>

### 5 6 3 3      *Studies conducted*

For the same reasons as given above,<sup>341</sup> studies conducted about interracial adoption are relevant to this thesis. Empirical studies support interracial adoption. Singer *et al*<sup>342</sup> did a study in the United States of America where they examined a group of families with infants of the same race as the adoptive parents, as well as those of a different race from the adoptive parents (interracial). No difference in the quality of attachment was found between the same-race and interracial adoptive infants.

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<sup>339</sup> Simon *et al* *The Case for Transracial Adoption* 86.

<sup>340</sup> See “3 3 1 Introduction”.

<sup>341</sup> See “5 6 3 2 *Physical appearance as a factor*”.

<sup>342</sup> Singer, Brodzinsky, Ramsay, Steir and Waters (1985) *Mother-infant attachment in adoptive families*, *Child development* 56: 1543-51 as quoted by Golombok in Gaber and Aldridge *In the Best Interests of the Child* 111.

Triseliotis *et al*<sup>343</sup> explain that findings of studies of interracially adopted children in both the United States of America and Britain<sup>344</sup> indicate that 20 to 25 percent of these children experience moderate to severe problems in adjustment to family, school or community, but that this proportion is about the same as the proportion of adopted children in same-race homes who experience problems of the same intensity. According to them interracially adopted children appear similar to adopted children in same-race homes on measures of self-esteem and they show pride in their racial heritage.<sup>345</sup>

Simon & Alstein published the results of extensive studies of interracial adoptions that were undertaken across the United States of America between 1974 and 1999 and their findings, as well as the results of a comprehensive study which they conducted over a period of twenty years between 1971 and 1991.<sup>346</sup> The findings included the following:

- Interracially adopted children make as successful an adjustment in their adoptive homes as other children had in previous studies.

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<sup>343</sup> Triseliotis *et al Adoption* 167.

<sup>344</sup> These studies were of interracially adopted children of colour placed in the 1960s and 1970s.

<sup>345</sup> Triseliotis *et al Adoption* 167.

<sup>346</sup> Simon & Altstein *Adoption across Borders* 49-53. These include studies by Grow and Shapiro in 1974, Ladner in 1977, Zastrow in 1977, Feigelman and Silverman in 1981, McRoy and Zurcher in 1983, Shireman and Johnson in 1988, Vroegh in 1992, Barth in 1988, Bagley in 1993 and Brooks and Barth in 1999.

- There are whites who are capable of rearing emotionally healthy black children.
- The child's age, not the interracial adoption, had the most significant impact on development and adjustment.
- The quality of parenting was more important than whether the child had been adopted interracially.<sup>347</sup>
- Interracial adoptions were no more likely to be disruptive than other types of adoptions.
- Racial differences between the adoptees and their parents did not affect overall adjustment patterns.
- Interracial adoption appears to provide the opportunity for children to develop an awareness of race and a respect for physical characteristics, whatever they may be.

Although not all feedback in the studies mentioned above was positive, it seems that children of all ages who are adopted interracially can make a successful adjustment in their adoptive homes and that the younger the child is when

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<sup>347</sup> See also Triseliotis *et al Adoption* 171, who observe that research has shown that the quality of parenting may be the paramount factor, rather than racial matching.

adopted, the better the chances are of raising a happy, well-adjusted child.<sup>348</sup> The evidence seems to “indicate uniformly that transracial adoptees do as well on measures of psychological and social adjustment as ... children raised inracially in relatively similar socio-economic circumstances ... This evidence provides no basis for concluding that ... there are any problems inherent in transracial placement”.<sup>349</sup> There can, in my opinion, be little doubt that interracial adoption can serve the best interests of children.<sup>350</sup>

#### 5 6 3 4 Conclusion

The discussion above shows that intercultural adoption is a very viable and positive option when a child is in need of a family. Much of the discussion above has focussed on the question whether parents of one culture are able to successfully convey a positive identity to a child of another culture and, in my opinion, the arguments in favour of intercultural adoption clearly support this. I believe that a child’s cultural identity may be considered by agency staff when making adoption placements, but this should never be given any greater consideration than other factors.<sup>351</sup> Furthermore, studies support this finding and even the obvious difference in appearance between the adoptive parents and the child in the case of an interracial adoption is not a factor that should be considered. In my view, there can be no doubt that intercultural adoption does

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<sup>348</sup> See “3 3 ATTACHMENT”, especially “3 3 2 3 *When are attachments formed?*”.

<sup>349</sup> Simon & Altstein *Adoption across Borders* 78. I use the term “interracial” and not “transracial” — see “1 4 TERMINOLOGY”.

<sup>350</sup> This is also the conclusion that Simon & Altstein *Adoption across Borders* 141 come to.

<sup>351</sup> Also see O’Halloran *Welfare of the Child* 264.

not have to be considered any less of an option than same-culture adoption when it comes to the best interests of a child, even if the adoption is also interracial.

## **5 7 CONCLUSION**

In the fifteen years since democracy South Africa has changed dramatically, and so have the beliefs, views and mindsets of its people. The country is experiencing a period of restructuring. South Africa is a multi-ethnic country, and people from different backgrounds, of different races, with different beliefs and cultures, to name but a few, mix on a regular basis with the result that there is an intertwinement of cultures, religion, beliefs etcetera taking place. South Africans are being exposed to a variety of cultural influences, which has resulted in acculturation between groups, and cultures that have existed for centuries are slowly being eroded and diluted.

The importance of cultural rights is not denied in any way, but there is no homogeneous black culture that is distinct and different from a supposedly homogeneous white culture. As people are exposed more regularly to different races and different cultures it will also, I hope, go a long way towards eradicating the (erroneous) belief that race and culture are the same. In my opinion culture will become even less defined in the future, with the result that the arguments that are used to oppose intercultural adoption will gradually fade away

completely. Simon emphasises that black children adopted and raised in white families have a positive sense of their black identity and knowledge of their history and culture.<sup>352</sup> Such children believe that race is not the most important factor in defining who they are or who their friends should be.<sup>353</sup> If more people could have this outlook on life, I believe there would be no discussion about the desirability or not of interracial/intercultural adoption. It would just happen.

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<sup>352</sup> Simon in Gaber & Aldridge *In the Best Interests of the Child* 149. This is confirmed by Bartholet in Gaber & Aldridge *In the Best Interests of the Child* 163.

<sup>353</sup> Bartholet in Gaber & Aldridge *In the Best Interests of the Child* 165.

## 6 THE CHILD CARE ACT AND THE CHILDREN'S ACT

<b>6 1 INTRODUCTION</b> .....	233
<b>6 2 GROWING UP IN A FAMILY ENVIRONMENT</b> .....	234
<b>6 2 1 Introduction</b> .....	234
<b>6 2 2 The Child Care Act and growing up in a family environment</b> .....	235
<b>6 2 3 The Children's Act and growing up in a family environment</b> .....	237
<b>6 3 THE BEST INTERESTS OF THE CHILD</b> .....	246
<b>6 3 1 Introduction</b> .....	246
<b>6 3 2 The Child Care Act, adoption and the best interests of the child</b> .....	247
<b>6 3 3 The Children's Act and the best interests of the child</b> .....	249
6 3 3 1 <i>General</i> .....	249
6 3 3 2 <i>The Children's Act, adoption and the best interests of the child</i> .....	254
6 3 3 3 <i>Register of Adoptable Children and Prospective Adoptive Parents</i> .....	271
<b>6 4 QUALIFICATIONS OF THE APPLICANTS</b> .....	274
<b>6 4 1 Who may adopt?</b> .....	274
6 4 1 1 <i>Who may adopt under the Child Care Act?</i> .....	274
6 4 1 2 <i>Who may adopt under the Children's Act?</i> .....	275
<b>6 4 2 The financial means of the applicant(s)</b> .....	278
6 4 2 1 <i>The Child Care Act and the financial means of the applicant(s)</i> .....	278

6 4 2 2 <i>The Children's Act and the financial means of the applicant(s)</i> .....	278
<b>6 5 CONSENT AND CHILD PARTICIPATION</b> .....	284
<b>6 5 1 The consent of the parent</b> .....	284
6 5 1 1 <i>The Child Care Act and the consent of the parent</i> .....	284
6 5 1 2 <i>The Children's Act and the consent of the parent</i> .....	285
<b>6 5 2 The consent of the child</b> .....	290
6 5 2 1 <i>The Child Care Act and the consent of the child</i> .....	290
6 5 2 2 <i>The Children's Act and the consent of the child</i> .....	296
<b>6 6 ADOPTION CONTACT</b> .....	303
<b>6 6 1 The Child Care Act and adoption contact</b> .....	303
<b>6 6 2 The Children's Act and adoption contact</b> .....	305
<b>6 6 3 Post-adoption agreements</b> .....	308
<b>6 6 4 Customary law and adoption contact</b> .....	311
<b>6 7 CULTURAL ASPECTS</b> .....	312
<b>6 7 1 The Child Care Act, adoption and culture</b> .....	312
<b>6 7 2 The Children's Act, adoption and culture</b> .....	313
<b>6 8 CUSTOMARY LAW, ADOPTION AND THE BEST INTERESTS OF THE CHILD</b> .....	317
<b>6 9 CONCLUSION</b> .....	319

## 6 1 INTRODUCTION

The Child Care Act<sup>1</sup> was drafted during the apartheid era with little or no recognition of international children's rights or of the main challenges facing the majority of South African children.<sup>2</sup> The South African Law Reform Commission began to research and develop new legislation for children in 1997. The result of this, the Children's Act,<sup>3</sup> will eventually replace the Child Care Act.<sup>4</sup> To date, only some sections of the Children's Act have come into operation.<sup>5</sup> The chapter on adoption is yet to come into force. Until it does, the Child Care Act will regulate adoption in South Africa.

In chapter 2 of this thesis the Child Care Act and the Children's Act were discussed briefly.<sup>6</sup> The aim of the present chapter is not to cover every aspect of the best interests of the child or the adoption process as provided for by the Child Care Act or as envisaged by the Children's Act, but to look at selected issues that are relevant to the topic of this thesis. In this chapter, an attempt will be made to analyse and discuss all aspects of intercultural adoption that are to be found in

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<sup>1</sup> Act 74 of 1983.

<sup>2</sup> Skelton & Proudlock in Davel & Skelton *Commentary on the Children's Act* 1-11.

<sup>3</sup> Act 38 of 2005. In chapter 2 (n 151) I indicated that this Act would be referred to as the Children's Act of 2005. In this chapter, however, the Act will simply be referred to as the Children's Act.

<sup>4</sup> In the past, majority in South Africa was attained at the age of 21 years in terms of the Age of Majority Act 57 of 1972. However, s 17 of the Children's Act, which came into operation on 1 July 2007, lowered the age of majority to 18 years. The lowering of the age of majority does not have any effect on the meaning of "child" in respect of adoption, as only a "child" can be adopted and both s 1 of the Child Care Act and s 1 of the Children's Act define a "child" as a person under the age of 18 years.

<sup>5</sup> On 1 July 2007 certain sections came into effect. The sections that are relevant to adoption and which have already come into operation will be highlighted in this chapter. Chapter 15, which regulates adoption, has not been implemented yet.

<sup>6</sup> See "2 4 3 5 *Child Care Act 74 of 1983*" and "2 4 3 6 *Children's Act 38 of 2005*".

these two Acts and to consider the impact (both positive and negative) that I believe the Children's Act will have on intercultural adoption. Some sections of the Child Care Act and the Children's Act that are relevant have already been analysed in other chapters of this thesis. Nevertheless, for the sake of completeness, the relevant issues will again be mentioned in this chapter.<sup>7</sup>

## **6 2 GROWING UP IN A FAMILY ENVIRONMENT**

### **6 2 1 Introduction**

I have argued above that the best interests of the child, including his/her emotional health, are best served by providing the child with family life, in other words, by placing the child in a family environment.<sup>8</sup> There are two important issues to be found in this statement, namely, the best interests of the child and the family environment of the child. I shall first consider the issue of growing up in a family environment within the context of the Child Care Act and the Children's Act. Then I shall discuss the child's best interests within the context of the two Acts.

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<sup>7</sup> Several of the sections/articles referred to in this chapter are quoted in footnotes, not to minimise their importance, but to avoid interrupting the flow of the contents.

<sup>8</sup> See "3 THE CHILD AND THE FAMILY" and "4 THE BEST INTERESTS OF THE CHILD".

## 6 2 2 The Child Care Act and growing up in a family environment

The Child Care Act makes provision for alternative care for the child,<sup>9</sup> but does not refer to family care or parental care. The supreme law in South Africa,<sup>10</sup> the Constitution, introduced the right of a child to family care or parental care, or to appropriate alternative care when removed from the family environment.<sup>11</sup> Therefore, even though the Child Care Act does not mention the child's right to family care or parental care, the child has this right within the context of the Child Care Act as well. In the case of the many children in South Africa who do not have surviving biological parents or family, or whose biological parents or family are not part of the child's life, adoption in terms of the Child Care Act can and must be used to give effect to the child's right to alternative care and thus to enable the child to experience parental care and life in a family environment. Furthermore, the general principles of the Children's Act that have come into operation apply to all legislation applicable to children.<sup>12</sup> This means that the factors that are included in section 7 of the Children's Act that need to be taken into account when determining the best interests of the child, now also apply to the Child Care Act. In terms of section 7(1)(k) of the Children's Act,<sup>13</sup> read with

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<sup>9</sup> This could take the form of foster care or adoption, for example.

<sup>10</sup> S 2 of the Constitution.

<sup>11</sup> S 28(1)(b).

<sup>12</sup> S 6: "(1) The general principles set out in this section guide—  
(a) the implementation of all legislation applicable to children, including this Act".

<sup>13</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(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". Also see the discussion under "6 3 3 2 *The Children's Act, adoption and the best interests of the child*" and n 91.

section 18 of the Child Care Act,<sup>14</sup> those officials who apply the provisions of the Child Care Act thus have to give effect to the child's need to be raised in a stable family environment or, where it is impossible for the child to grow up in a stable family environment, in an environment that resembles a caring family environment as closely as possible. There is no arguing that adoption — including intercultural adoption — is a highly suitable mechanism to provide a child with a family environment.

In the context of the Child Care Act, one of the problems with attempting to provide the child with the opportunity to grow up in a family environment is that the Act does not contain a definition of the term “family”. As a result, there has not been consensus in South African society about what constitutes a family for purposes of the Child Care Act.<sup>15</sup> Families have in the past been defined in many ways, ranging from the nuclear family<sup>16</sup> to the extended family,<sup>17</sup> with much uncertainty existing about the actual meaning of the term “family” and the scope of the term.<sup>18</sup> This situation of uncertainty needed to be addressed. This has been done in the Children's Act, which is discussed immediately below.

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<sup>14</sup> S 18: “(4) A children's court to which application for an order of adoption is made ..., shall not grant the application unless it is satisfied— ...

(c) that the proposed adoption will serve the interests and conduce to the welfare of the child”.

<sup>15</sup> See the discussion under “3 2 1 2 *What is a family?*”.

<sup>16</sup> See chapter 3, n 24 and the accompanying text

<sup>17</sup> See chapter 3, n 28 and the accompanying text.

<sup>18</sup> Also see my argument under “3 2 1 2 *What is a family?*”. I suggested that the terms “family” and “parent” could be used to signify the difference between the extended family and the nuclear family.

### 6 2 3 The Children's Act and growing up in a family environment

Whereas the Child Care Act contains no Preamble, the Children's Act has a long Preamble, which is an important part of the Act.<sup>19</sup> The Preamble confirms, inter alia, that every child has the rights set out in section 28 of the Constitution.<sup>20</sup> It refers to the need to extend particular care to the child as stated in various international instruments, including the Convention and the Charter.<sup>21</sup> Furthermore, the last part of the Preamble, which states that the child, for the full and harmonious development of his/her personality, should grow up in a family environment in an atmosphere of happiness, love and understanding, is taken directly from the Preambles of both the Convention<sup>22</sup> and the Charter.<sup>23</sup> This again shows the commitment of the South African legislature to the values and

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<sup>19</sup> Preamble: "WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person;  
AND WHEREAS every child has the rights set out in section 28 of the Constitution;  
AND WHEREAS the State must respect, protect, promote and fulfill those rights;  
AND WHEREAS protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities;  
AND WHEREAS the United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance;  
AND WHEREAS the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children;  
AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding".

<sup>20</sup> S 6(2)(a) confirms that the child's rights as set out in the Bill of Rights have to be respected, protected, promoted and fulfilled.

<sup>21</sup> See "3 THE CHILD AND THE FAMILY" n 102.

<sup>22</sup> See "4 2 2 2 *The Convention on the Rights of the Child*".

<sup>23</sup> See "4 2 2 3 *The African Charter on the Rights and Welfare of the Child*".

principles of international instruments and serving the child's interests by having the child grow up in a family environment. The Preamble of the Children's Act further states that the protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities. The Preamble thus amply emphasises children's rights and the importance of a child being raised in a family environment.

The emphasis on children's rights and on the child being raised in a family environment also finds expression in the stated objects of the Children's Act.<sup>24</sup>

These objects include:

- Giving effect to the child's constitutional right to family care or parental care or appropriate alternative care when removed from the family

<sup>24</sup>

S 2, which came into effect on 1 July 2007. "The objects of this Act are—  
(a) to promote the preservation and strengthening of families;  
(b) to give effect to the following constitutional rights of children, namely—  
    (i) family care or parental care or appropriate alternative care when removed from the family environment;  
    (ii) social services;  
    (iii) protection from maltreatment, neglect, abuse or degradation; and  
    (iv) that the best interests of a child are of paramount importance in every matter concerning the child;  
(c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;  
(d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;  
(e) to strengthen and develop community structures which can assist in providing care and protection for children;  
(f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;  
(g) to provide care and protection to children who are in need of care and protection;  
(h) to recognise the special needs that children with disabilities may have; and  
(i) generally, to promote the protection, development and well-being of children." The Child Care Act does not set out its objects.

environment.<sup>25</sup> This object, read with section 7(1)(k) of the Children's Act, provides clear guidelines about the kind of family environment that the child needs. Section 7(1)(k) recognises that the child has a need to be brought up within a **stable/caring** family environment. It is no use simply providing a child who does not have a family or a suitable family with an alternative family. The importance of a **stable** family environment has been emphasised for a long time, but the Children's Act offers the first legislative recognition of this requirement in South Africa. Thus, an adoption needs to be carefully considered before a decision is made. Sometimes an intercultural adoption can provide more stability and be more appropriate for a specific child than an adoption where culture matching prevails.

The right to family care or parental care, or to appropriate alternative care when removed from the family environment was discussed in detail under "3 THE CHILD AND THE FAMILY". It is important to bear in mind that this is a right of the **child**,<sup>26</sup> and that there is a duty on parents and family to ensure that this right of the child is provided.<sup>27</sup> Accordingly, adoption

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<sup>25</sup> S 2(b)(i).

<sup>26</sup> Currie & De Waal *Bill of Rights Handbook* 605; Kruger 2007 *THRHR* 253; Heaton in *Bill of Rights Compendium* 3C-54.

<sup>27</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at 82 (also reported in 2000 11 BCLR 1169 (CC)); *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) at 375-376 (also reported in 2003 2 BCLR 111 (CC)).

should not be viewed as a way to serve the interests of adoptive parents but as a way to serve the child's interests.<sup>28</sup>

The child's right to family care or parental care is not confined to biological parents, but extends to step-parents, adoptive parents and foster parents.<sup>29</sup> As I explained above,<sup>30</sup> adoption is a form of alternative care which provides the child with the opportunity to experience parental care. Thus, where a child does not have biological parents, the biological parents cannot or will not care for the child, or the biological parents are not part of the child's life for whatever reason, the child has a right to be cared for by, inter alia, adoptive parents.

- The promotion of the preservation and strengthening of families.<sup>31</sup> As I have argued,<sup>32</sup> and as the Constitution orders by giving the child a right to family care,<sup>33</sup> a child needs to grow up in a family environment. Where at all possible and in the best interests of the child, the bond between the child and the biological family needs to be preserved. This does not necessarily mean that the child will be raised by his/her biological family, because keeping the child with his/her biological family might not be in the child's best interests, or the child might not have biological family. Family

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<sup>28</sup> Also see “3 2 2 3 *Parental care and the Constitution*”.

<sup>29</sup> “Parent” in the Children's Act is interpreted to include the adoptive parent of a child — s 1(1). Also see *Heystek v Heystek* [2002] 2 All SA 401 (T) at 404 and Clark 2000 *Stell LR* 11.

<sup>30</sup> See “3 2 3 2 *The role of the State and the Constitution*”.

<sup>31</sup> S 2(a). The distinction between the family and the extended family must be kept in mind. This is discussed below under this heading.

<sup>32</sup> See “3 THE CHILD AND THE FAMILY”.

<sup>33</sup> S 28(1)(b).

ties can be preserved, however, by making the adoption an open one, where the child will maintain contact with his/her biological family.<sup>34</sup>

- Where the child cannot be raised by his/her biological family, adoption by suitable adoptive parents would provide him/her with the opportunity to grow up as part of a family. As discussed in chapters 3 and 4,<sup>35</sup> it is important that the child forms ties with the adoptive family as early as possible in order to form attachments with the members of the adoptive family. Forming such attachments as early or as young as possible, will strengthen the child's family ties.
- To have his/her best interests enjoy paramountcy in every matter concerning him/her.<sup>36</sup> This object will be discussed in more detail below.<sup>37</sup> It is certainly possible that a situation could arise where a child's interests are protected, but the situation is not in the **best** interests of the child, in other words paramountcy is not afforded to those best interests. An example would be where a child is cared for in an institution. The child's interests are protected because he/she has a place to stay, a warm bed and food to eat. This situation would not be in the best interests of the child though. It has been established that the **best** interests of the child

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<sup>34</sup> See "4 4 2 Open adoption" and "6 6 ADOPTION CONTACT".

<sup>35</sup> See "3 3 ATTACHMENT" and "4 3 ATTACHMENT AND ADOPTION".

<sup>36</sup> S 2(b)(iv).

<sup>37</sup> See "6 3 THE BEST INTERESTS OF THE CHILD".

can best be achieved by providing a child with a family environment.<sup>38</sup> The legislative confirmation of the **paramountcy** of the child's best interests<sup>39</sup> in section 2 of the Children's Act is welcomed.

- Making provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children.<sup>40</sup> The importance of caring for the child's emotional and physical development to protect the best interests of the child is recognised by the Act.<sup>41</sup> Children have to be protected because they are a vulnerable group. This applies to all children, but when the child is adopted, chances are greater that the sound development of the child might require special attention, which special attention could be provided in terms of the Act. Examples of issues that might need to be addressed through the structures, services and means provided for by the Act are the psychological adjustment to becoming part of a family if he/she has been institutionalised for some time, whether the child is able to adjust to the social environment of the adoptive family, financial matters such as whether the child's physical needs are catered for, whether the child is able to form emotional attachments with the adoptive parents, and whether the child is struggling to overcome emotional issues arising from

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<sup>38</sup> See "3 THE CHILD AND THE FAMILY" AND "4 THE BEST INTERESTS OF THE CHILD".

<sup>39</sup> Also see s 28(2) of the Constitution.

<sup>40</sup> S 2(d).

<sup>41</sup> In terms of s 7(1)(h), a factor that has to be taken into account where relevant when the best interests of the child standard has to be applied, is the child's physical and emotional security and his or her intellectual, emotional, social and cultural development.

abuse that led to him/her being removed from a previous parent/caretaker. The Children's Act provides for the services of a social worker who is involved in the adoption process in various ways, including the counselling of the biological parents of the child and, where applicable, the child, about the decision to make the child available for adoption<sup>42</sup> and assisting with the preparation of a post-adoption agreement.<sup>43</sup> There are also structures in place that are there to benefit the child in the adoption process. The Act makes provision for a Register on Adoptable Children and Prospective Adoptive Parents<sup>44</sup> which can benefit the child and serve his/her best interests in the adoption process by speeding up the adoption process and/or finding suitable adoptive parents through the use of this register.<sup>45</sup> Furthermore, post-adoption agreements can be utilised to ensure contact between the child and his/her biological family, which could serve the child's needs.<sup>46</sup>

The best interests of the child can only be served if *all* these matters are attended to and, as I shall argue in "9 CONCLUSION", this monitoring needs to be done both before and after the adoption has taken place. The Child Care Act also makes provision for monitoring of the adoption process, and the involvement in the Children's Act is confirmation of this

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<sup>42</sup> S 233(4).

<sup>43</sup> S 234(3).

<sup>44</sup> Hereafter referred to as RACAP.

<sup>45</sup> See "6 3 3 3 Register of Adoptable Children and Prospective Adoptive Parents" below, where this register is discussed.

<sup>46</sup> Post-adoption agreements are provided for in s 234. Also see "6 6 3 Post-adoption agreements".

need for monitoring. However, the increased level of involvement by a social worker in terms of the Children's Act is welcomed.<sup>47</sup>

Section 6(1)<sup>48</sup> of the Children's Act contains the general principles that guide all decisions applicable to children in domestic legislation and guides the implementation of all legislation applicable to children and all proceedings, actions and decisions in relation to children.<sup>49</sup> Section 6(2)<sup>50</sup> is in line with our constitutional and international obligations,<sup>51</sup> as it includes obligations with regard to the best interests standard,<sup>52</sup> human dignity, equality and non-discrimination.<sup>53</sup> For the purposes of this thesis, section 6 is very important. The general principles in this section guide all legislation applicable to children. In all proceedings concerning children the factors included in section 7 must be taken into consideration, which means that adoption is now subject to clear and specific guidelines regarding the best interests of the child. One of these factors that need to be applied with regard to the child's best interests is the child's need to grow

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<sup>47</sup> Both the RACAP and post-adoption agreements are innovations provided for by the Children's Act.

<sup>48</sup> S 6 came into effect on 1 July 2007.

<sup>49</sup> See n 12 above.

<sup>50</sup> S 6(2): "All proceedings, actions or decisions in a matter concerning a child must—  
(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;  
(b) respect the child's inherent dignity;  
(c) treat the child fairly and equitably;  
(d) protect the child from unfair discrimination on any ground ...".

<sup>51</sup> Davel in Davel & Skelton *Commentary on the Children's Act* 2-3.

<sup>52</sup> S 28(2) of the Constitution; art 3(1) of the Convention; art 4(1) of the Charter.

<sup>53</sup> Ss 1, 7, 9 and 10 of the Constitution; Preamble and art 2 of the Convention; Preamble and art 3 of the Charter.

up in a stable family environment or, where this is not possible, in an environment resembling a caring family environment as closely as possible.<sup>54</sup>

Like the Child Care Act, the Children's Act does not define "family", but it provides a very comprehensive definition of "family member".<sup>55</sup> This definition is so wide that it encompasses all possible forms of family, obviously including the extended family that is part of customary law. Section 7(1)(f) refers to and distinguishes between **parent**, **family** and **extended family**.<sup>56</sup> This subsection thus recognises the need to distinguish between the family ("gesin") and the extended family ("familie").<sup>57</sup> The family refers to the "gesin", in other words the members that make up the family, such as the mother, father and all siblings. The extended family includes all other members of the family, such as uncles, grandparents and cousins. The categories that are distinguished in the section include all forms of family that could exist, thus acknowledging the importance of all forms of family that exist in South Africa, while also clearly distinguishing between the different family relationships. This distinction is welcomed, as all possible confusion that might have existed with regard to the meaning of the term

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<sup>54</sup> S 7(1)(k). Also see the discussion under "6 3 2 The Child Care Act, adoption and the best interests of the child".

<sup>55</sup> S 1: (1) "'family member', in relation to a child, means—  
(a) a parent of the child;  
(b) any other person who has parental responsibilities and rights in respect of the child;  
(c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or  
(d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship".

<sup>56</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...

(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". Also see n 91.

<sup>57</sup> The need for this distinction was discussed under "3 2 1 2 What is a family?".

“family” for purposes of adoption legislation has now been removed.<sup>58</sup> The adopted child thus has the right to be brought up in a “gesin”, whichever form that may take.<sup>59</sup> If the child is not part of such a biological family, an adoptive family could fulfil this role.

With regard to the child's opportunity to grow up in a family environment, the Children's Act is undoubtedly an improvement on the Child Care Act. As explained above, the Child Care Act, which was enacted before the Constitution, does not adequately provide for the child to grow up as part of a family and experience parental care, while this lacuna has been rectified by the Children's Act.

## **6 3 THE BEST INTERESTS OF THE CHILD**

### **6 3 1 Introduction**

The preceding chapters of this thesis have explained the importance of the best interests of the child, although determining what the best interests of the child are is not an easy task.

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<sup>58</sup> Also see “3 2 1 7 *Family care and the Children's Act*”; “3 2 1 8 *Family care and adoption*” and “3 2 2 2 *Family care versus parental care*” above.

<sup>59</sup> S 2(b)(i) of the Children's Act and s 28(1)(b) of the Constitution.

### **6 3 2 The Child Care Act, adoption and the best interests of the child**

By providing for adoption, the Child Care Act, which pre-dates the Constitution, recognises the importance of providing a family environment for the child. This recognition is in keeping with the constitutional imperative to serve the best interests of the child.<sup>60</sup>

With regard to adoption, section 18(4)(c) of the Child Care Act makes provision for the protection of the interests and welfare of the child. This section provides that an application for adoption shall not be granted by a children's court to which such application was made, unless it is satisfied that the proposed adoption will serve the interests and conduce to the welfare of the child.<sup>61</sup> This is an absolute requirement.<sup>62</sup> The inclusion of this requirement in the adoption process is in line with the protection of the best interests of the child as is found in South Africa and internationally.

The Child Care Act does not contain a general clause detailing the factors that are to be considered in determining the best interests of the child.<sup>63</sup> Over the years, because of the previous lack of statutory recognition of the rights of the child and because of the many contradictory opinions about the meaning of the best interests of the child, there has been much debate about the content and

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<sup>60</sup> See the Constitution s 28(2).

<sup>61</sup> See n 14 above. Also see "4 1 Introduction", where this aspect is discussed.

<sup>62</sup> Schäfer & Schäfer in Robinson *Law of Children* 78-79.

<sup>63</sup> The long title makes reference to the protection and welfare of "certain children". Section 18(4)(c) is one of the provisions that regulate the interests and welfare of the adopted child.

scope of the best interests of the child. This debate also affected adoption and the interpretation of the child's best interests in adoption proceedings.<sup>64</sup>

Another problem is that the Child Care Act does not contain any guidelines about how the best interests of a child are to be applied and, as a result, it was often difficult to determine whether the best interests of the child were being served in a specific matter. In other words, there were no guidelines to assist the court to know which factors to consider in order to determine the best interests of the child in general or in adoption matters in particular.<sup>65</sup> However, court decisions relating to adoption under the Child Care Act have guided us over the years in this regard.<sup>66</sup> During the past decade or so matters have improved. In 1994 the court in *McCall v McCall*<sup>67</sup> provided a comprehensive, open-ended list<sup>68</sup> of factors to be taken into account to determine the best interests of the child in custody cases.<sup>69</sup> Furthermore, section 28(2) of the Constitution now dictates that the child's best interests are paramount in all matters concerning the welfare of the child. Although there is uncertainty about the exact interpretation of section 28(2),<sup>70</sup> it is clear that the best interests standard has to be a determining factor in every matter concerning a child. Section 28(2) raises the best interests

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<sup>64</sup> In this regard, see the discussion under "4 2 1 Historical development and application in South Africa"; "4 2 5 Criticism of the best interests standard"; Davel in Davel & Skelton *Commentary on the Children's Act* 2-6.

<sup>65</sup> Palmer in Keightley *Children's Rights* 113.

<sup>66</sup> See "4 2 1 Historical development and application in South Africa".

<sup>67</sup> 1994 (3) SA 201 (C) at 204-205.

<sup>68</sup> The last factor, (*m*), was "any other factor which is relevant to the particular case with which the Court is concerned".

<sup>69</sup> For this list, see "4 2 7 Factors that determine the best interests of the child".

<sup>70</sup> See "4 2 3 The rights in section 28(1) versus section 28(2)".

standard to “a principle of paramountcy”<sup>71</sup> in every matter concerning the child, including adoption.<sup>72</sup> Section 28(2) was included in the Constitution to emphasise the importance of the best interests of a child, and should always be considered when a child is involved, whatever the circumstances. This, therefore, applies to adoption under the Child Care Act. Since 1 July 2007 there are further definite guidelines about the application of the best interests of the child standard in terms of the Children's Act. The general principles set out in section 6 guide the implementation of all legislation applicable to children<sup>73</sup> and all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.<sup>74</sup> Thus, these general principles and the guidelines about the child's best interests set out in the Children's Act will also apply to adoption in terms of the Child Care Act.

### **6 3 3 The Children's Act and the best interests of the child**

#### **6 3 3 1 General**

The recent implementation of certain sections of the Children's Act,<sup>75</sup> more than a decade after the coming into operation of our final Constitution, reflects growing sensitivity to the child's constitutional rights. This Act includes numerous

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<sup>71</sup> Davel in Davel & Skelton *Commentary on the Children's Act* 2-6.

<sup>72</sup> See “4 2 3 The rights in section 28(1) versus section 28(2)” and “4 2 4 Primacy and paramountcy”.

<sup>73</sup> S 6(1)(a).

<sup>74</sup> S 6(1)(b). The factors that have to be considered to determine the best interests of the child in terms of s 7 are discussed below under “6 3 3 The Children's Act and the best interests of the child”.

<sup>75</sup> On 1 July 2007 several sections of this Act came into operation.

references to the best interests of the child. It affords great significance and recognition to the best interests of the child in the Preamble,<sup>76</sup> section 2(a)(iv),<sup>77</sup> section 7<sup>78</sup> and section 9,<sup>79</sup> all of which came into operation on 1 July 2007.

The Preamble emphasises the importance of a child being raised in a family environment, and states that the protection of the rights of the child leads to a corresponding improvement in the lives of other sections of the community, and it confirms that every child has the rights set out in section 28 of the Constitution. These matters relate to the best interests of the child. Furthermore, the Preamble shows the commitment of the South African legislature to the values and principles of international instruments which protect the best interests of the child.

One of the objects of the Children's Act as set out in section 2 is to give effect to four constitutional rights of the child.<sup>80</sup> These are the right to family care or parental care or appropriate alternative care when removed from the family environment;<sup>81</sup> social services;<sup>82</sup> protection from maltreatment, neglect, abuse or degradation;<sup>83</sup> and that the best interests of the child are of paramount

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<sup>76</sup> It states that every child has the rights set out in s 28 of the Constitution, which of course includes the best interests of the child in s 28(2). Also see "6 3 1 Introduction" above.

<sup>77</sup> S 2 describes the objects of the Act – see n 24.

<sup>78</sup> This section contains the factors that must be considered when applying the best interests of the child standard – see n 91 below.

<sup>79</sup> S 9: "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

<sup>80</sup> S 2(b). See n 24 above.

<sup>81</sup> S 2(b)(i).

<sup>82</sup> S 2(b)(ii).

<sup>83</sup> S 2(b)(iii).

importance in every matter concerning the child.<sup>84</sup> In other words, these four rights are singled out and protected by the Children's Act. Growing up in a family environment<sup>85</sup> and the paramountcy of the best interests of the child<sup>86</sup> are thus of the utmost importance in the context of this Act and, particularly, in the context of adoption under the Act.

Section 9 of the Act, which is in line with section 28(2) of the Constitution, confirms the paramountcy of the best interests of the child, by making the best interests of the child paramount in all matters concerning the care, protection and well-being of a child. A further development that emphasises the rights of the child in the Children's Act, is the use of the term "parental responsibilities and rights"<sup>87</sup> instead of the traditional term "parental authority" in the Act,<sup>88</sup> thus shifting the emphasis with regard to the relationship between parents and children. Whereas parental authority referred to the rights, powers, duties and responsibilities parents had in respect of their minor children and those children's property,<sup>89</sup> parents now have responsibilities as well as rights with regard to children, which include, but are not restricted to, the responsibility and the right to care for the child, to maintain contact with the child, to act as guardian of the

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<sup>84</sup> S 2(b)(iv).

<sup>85</sup> S 2(b)(i) – see n 24 above.

<sup>86</sup> S 2(b)(iv) – see n 24 above.

<sup>87</sup> As referred to in s 18 of the Act, which came into operation on 1 July 2007. S 18: "(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right—  
(a) to care for the child;  
(b) to maintain contact with the child;  
(c) to act as guardian of the child; and  
(d) to contribute to the maintenance of the child."

<sup>88</sup> Also see "3 2 2 5 Parental care and the Children's Act".

<sup>89</sup> Cronjé & Heaton *Family Law* 265.

child, and to contribute to the maintenance of the child.<sup>90</sup> This again places more emphasis on the best interests of the child by placing the responsibility on the parent to care for the child.

Apart from emphasising the paramountcy of the best interests of the child, the Act provides a list of factors to be applied in determining the best interests of the child. Section 7 provides us with this list of 14 factors that have to be taken into consideration when the best interests of the child standard has to be applied.<sup>91</sup>

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<sup>90</sup> S 18(2). Also see “3 2 2 2 *Family care versus parental care*”.

<sup>91</sup> S 7: “(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—

(a) the nature of the 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 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;

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

Each factor must be taken into consideration where relevant. It is up to the court to determine which factors are relevant. This list is the first of its kind included in legislation in South Africa. Despite some shortcomings,<sup>92</sup> this list of factors is long overdue and without a doubt a welcome inclusion in the Children's Act. The list goes a long way in assisting with the application of the best interests of the child, by providing guidelines about what to consider when deciding what these best interests are.<sup>93</sup> These clear guidelines make the task of determining the best interests of the child much easier.

The importance of the best interests of the child in terms of the Children's Act is thus clear. The Children's Act not only complies with the Constitution as far as the protection of the best interests of the child is concerned, it exceeds its requirements. The Children's Act has undoubtedly taken the protection of the best interests standard in South Africa to an increased level and provided us with greater clarity regarding the factors that are relevant to determining the child's best interests.<sup>94</sup> Those factors that are relevant to the topic of this thesis will be discussed throughout this chapter. For present purposes, I shall simply state that a list of factors that can guide us as to how the best interests of the child are to be determined is welcomed. It is a pity that the list is not an open-ended one.

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- (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.”

<sup>92</sup> See the discussion in the rest of this chapter.

<sup>93</sup> However, also see the criticism of this section below under the same heading.

<sup>94</sup> Davel in Davel & Skelton *Commentary on the Children's Act* 2-12.

Davel<sup>95</sup> points out this shortcoming of section 7. Whereas the list in *McCall v McCall* makes provision for the possibility that the court could consider “any other factor which is relevant to the particular case with which the Court is concerned”,<sup>96</sup> section 7 contains no such provision. It should be obvious that there can never be a truly complete list of factors that could point to what is in the best interests of every child in every circumstance. Davel argues that judicial officers can and should use their inherent discretion to consider other factors where relevant,<sup>97</sup> and I certainly hope and trust that they will. However, this might not be enough. In my opinion, it is not in the best interests of the child to leave such an important decision to court officials. I believe that the Act should provide for circumstances where other relevant factors that could play a part in determining the best interests of the child may be considered. This omission/oversight<sup>98</sup> could be detrimental to the best interests of a child and should be corrected by the legislature.<sup>99</sup>

### 6 3 3 2      *The Children's Act, adoption and the best interests of the child*

In terms of section 230(1)(a) a child may be adopted if the adoption is in the best interests of the child.<sup>100</sup> The wording used in this section is much stronger than that in section 18(4)(c) of the Child Care Act and leaves no doubt about the

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<sup>95</sup> Davel in Davel & Skelton *Commentary on the Children's Act* 2-8.

<sup>96</sup> *McCall v McCall* 1994 (3) SA 201 (C). See “4 2 7 Factors that determine the best interests of the child”.

<sup>97</sup> Davel in Davel & Skelton *Commentary on the Children's Act* 2-8.

<sup>98</sup> It is hoped that it was only an oversight which will be rectified in the near future.

<sup>99</sup> Also see the discussion under “9 CONCLUSION”.

<sup>100</sup> S 230: “(1) Any child may be adopted if-  
(a) the adoption is in the best interests of the child”.

importance of the best interests of the child. The best interests are paramount. I submit that if a proposed adoption is not in the **best** interests of the child, the adoption application may not be granted at all. My view is based on the difference in the way that section 230(1)(a) of the Children's Act and section 18(4)(e) are phrased. Section 18(4)(c) of the Child Care Act provides that an adoption cannot be granted unless the proposed adoption will serve the interests and conduce to the welfare of the child. It is, in my opinion, quite possible that an adoption can serve the interests and conduce to the welfare of the child without necessarily being in the best interests of the child, as required by section 230(1)(a) of the Children's Act. When section 230(1)(a) of the Children's Act comes into effect, nothing will be more important in adoption proceedings than the best interests of the child. Currently, however, this is not the case. At present, under the Child Care Act, as long as the interests of the child and the welfare of the child are served (even if there are better ways of doing so), the adoption may proceed.

Section 240(2)(a) of the Children's Act provides that the best interests of the child have to be served before an adoption order may be made by a children's court,<sup>101</sup> and in terms of section 240(1) the court considering the adoption of a child must take **all** relevant factors into account.<sup>102</sup> These requirements reflect

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<sup>101</sup> S 240: "(2) A children's court considering an application may make an order for the adoption of a child only if-

(a) the adoption is in the best interests of the child".

<sup>102</sup> S 240: "(1) When considering an application for the adoption of a child, the court must take into account **all relevant factors**, including—

(a) the religious and cultural background of—

(i) the child;

the reality (which is not expressed in the Child Care Act) that there may be many relevant factors which should be taken into account when determining the best interests of the child in an application for an adoption.<sup>103</sup> In terms of section 240(2)(a) a court considering an adoption application may make an order for the adoption of the child **only** if the adoption is in the best interests of the child. This is further confirmation of the importance of the best interests of the child, and of the legislature's commitment to ensuring that the child's best interests are paramount. For the same reasons as explained in the previous paragraph, the provisions of the Children's Act provide more protection with regard to the best interests of the child than the Child Care Act does.

Sections 230(1), specifically section 230(1)(a), and 240(2)(a) must be read together with the other sections of the Act that deal with the best interests of the child, particularly section 7.<sup>104</sup> As has been pointed out, section 7 contains a list of factors that must be considered when determining the best interests of the child. These factors will now be considered individually.

- The first factor that must be taken into account in terms of section 7 of the Children's Act is the nature of the relationship between the child and the parent(s) and the relationship between the child and any other relevant

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- (ii) the child's parent; and
  - (iii) the prospective adoptive parent;

(b) all reasonable preferences expressed by a parent and stated in the consent; and  
(c) a report contemplated in section 239(1)(b) [my emphasis]".

<sup>103</sup> More will be said about this requirement under "6 7 1 The Child Care Act, adoption and culture" and "6 7 2 The Children's Act, adoption and culture" below.

<sup>104</sup> See "6 3 3 The Children's Act and the best interests of the child" above.

care-giver or person.<sup>105</sup> This factor is most important in the context of adoption. For example, a policeman, social worker or authorised officer who has reason to believe that a child is a child in need of care, inter alia, because the relationship between the parent and the child is unhealthy,<sup>106</sup> may remove the child from the biological parents,<sup>107</sup> and the child may be put up for adoption. The unhealthy relationship could play a role in the adoption application. For example, the court might decide that the unhealthy relationship requires that post-adoption contact between the child and his/her biological family should not be allowed.<sup>108</sup> On the other hand, the nature of the relationship between the child and the child's care-giver could be very healthy. If the child is in the care of foster parents who wish to adopt him/her, the relationship between the parties is clear. If this relationship is healthy, the adoption will most probably serve the best interests of the child. Where the foster care is intercultural, a healthy relationship will certainly indicate that culture *per se* is not all that important and that the child's best interests can be served even if there is a difference in culture between the child and the foster parent(s).

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<sup>105</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—  
(a) the nature of the 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".

Also see n 91 above.

<sup>106</sup> The circumstances under which a child may be considered to be in need of care are currently contained in s 14(4) of the Child Care Act. When it comes into operation, s 150 of the Children's Act will regulate protection of a child in need of care and protection. There could be numerous reasons for being in need of care, such as neglect, poverty, abuse and violence, to name but a few.

<sup>107</sup> S 12 of the Child Care Act and, when it comes into operation, s 151 of the Children's Act. As was discussed under "6 2 GROWING UP IN A FAMILY ENVIRONMENT", it is important for the best interests of a child to be raised as part of a healthy, stable family. This was also discussed in "3 THE CHILD AND THE FAMILY".

<sup>108</sup> See "4 4 2 3 South African law and open adoption".

Regardless of whether it is healthy or unhealthy, it is vital that the social worker establishes what the relationship between the foster parent and the child is and that this relationship is taken into account when a decision about a possible adoption is made.

A parent in terms of the Children's Act includes an adoptive parent.<sup>109</sup> Once an adoption has taken place, monitoring of the relationship needs to continue. The relationship between the child and the adoptive parent(s) needs to be monitored to ensure that the best interests of the child are protected. What I shall argue in the conclusion is that an adoption process needs to be monitored carefully, not only before the adoption, but also afterwards.<sup>110</sup>

- The attitude of the parents towards the child and the exercise of parental responsibilities and rights<sup>111</sup> in respect of the child, as provided for in section 7(1)(b),<sup>112</sup> are equally important. The attitude of the parents will play a major part in establishing a normal, healthy family relationship and environment. In the case of an adoption, the attitude of the parents towards the child with regard to his/her background will be extremely

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<sup>109</sup> S 1(1).

<sup>110</sup> This is provided for in s 7(1)(a)(i) of the Children's Act.

<sup>111</sup> With regard to the use of "parental responsibilities and rights", see "*6 3 3 1 General*".

<sup>112</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...

(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". Also see n 91 above.

- important. If the adoptive parents display a healthy, positive attitude about the adoption, the child will also experience the situation in a positive light. If, on the other hand, the adoptive parents come across as negative about the adoption experience, this will also affect the way the child experiences the relationship. Especially where the adoption is intercultural, the positive attitude of the adoptive parents will allow the adopted child to experience the adoption as a healthy relationship where he/she feels comfortable with the situation and at ease to pursue his/her cultural/biological background.
- In terms of section 7(1)(c) the capacity of the parent or other care-giver to provide for the needs of the child is a factor that must be taken into account to determine the best interests of the child.<sup>113</sup> The needs of the child refer to **all** needs, including physical, emotional and intellectual needs.<sup>114</sup> With regard to physical needs, there are certain constitutional rights, such as basic nutrition, shelter, basic health care services and social services that no child should have to do without. This aspect is discussed in more detail below.<sup>115</sup> The emotional needs of the child are analysed below where section 7(1)(h) is discussed.

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<sup>113</sup> S 7: “(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...

(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”. Also see n 91.

<sup>114</sup> This subsection should be read with s 7(1)(h), which deals with the child’s physical and emotional security, and is in line with the object envisaged by s 2(d) of the Children’s Act.

<sup>115</sup> See “6 4 2 1 *The Child Care Act and the financial means of the applicant(s)*” and “6 4 2 2 *The Children’s Act and the financial means of the applicant(s)*”. Also see s 28(1)(c) of the Constitution.

- In terms of section 7(1)(d) change in the child's circumstances and the effect on the child of separation from his/her parents, sibling(s) or care-giver is another factor that has to be taken into account when determining the best interests of the child.<sup>116</sup> Any change, whether good or bad, that a child experiences will affect him/her while growing up. Separation from a loved one may also emotionally affect the child. Counselling may be appropriate under such circumstances. When a child who has experienced dramatic change or has experienced being separated from parents/family is adopted, counselling both before and after the adoption should be considered.
- Section 7(1)(e) lists the practical difficulty and expense of a child having contact with parents, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents on a regular basis, as another factor that must be taken into consideration when the best interests of the child standard has to be applied.<sup>117</sup> When applying this factor to the adopted child, it must be borne in mind that there is evidence that the relationship

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<sup>116</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(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". Also see n 91.

<sup>117</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(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". Also see n 91.

of the parties to an adoptive family improves where the child maintains contact with his/her biological parents/family.<sup>118</sup> It is therefore important that every effort is made for the child to have contact with his/her biological parents/family,<sup>119</sup> unless such contact is not in the best interests of the child.<sup>120</sup> Difficulty in maintaining contact with the child's biological parents should not be a reason for contact not to take place. This contact becomes even more important in the case of intercultural adoption. By keeping contact with the biological parents/family, the child maintains contact with his/her cultural background. Although it is my view that a child's need for a family is greater than his/her need to maintain the culture of his/her biological parents/family,<sup>121</sup> it does not detract from the fact that, where possible and in the best interests of the child, an adopted child needs to maintain his/her cultural heritage.

- Section 7(1)(f)(i) of the Children's Act refers to the need for a child to **remain in the care of** his/her parent, family and extended family, unless such contact will not be in the best interests of the child,<sup>122</sup> while section 7(1)(f)(ii) recognises that a child who cannot stay in the care of a parent or

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<sup>118</sup> See "4 3 ATTACHMENT AND ADOPTION".

<sup>119</sup> Again, there are many cases where the child does not have biological parents/family or does not know who or where they are.

<sup>120</sup> This will be the case where there is, for instance, physical or emotional abuse of the child.

<sup>121</sup> See "5 6 3 1 Cultural issues as a factor".

<sup>122</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...

(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". Also see n 91.

family, needs to maintain contact with them. Although it is not always possible for the child to maintain contact with the biological parents, for example because the biological parents may be deceased, they may be unknown to the child, or contact may not be in the best interests of the child, contact with the rest of the family is also important. If the child is in the process of being adopted then obviously he/she either does not have parents, the parents are unable to or do not wish to be part of the child's life, or a decision has already been made by the children's court that the child cannot remain in the care of his/her parents or family. In order to protect the best interests of a child, it is important to **maintain contact with** his/her family or extended family where possible, as provided for in section 7(1)(f)(ii) of the Children's Act.<sup>123</sup> This contact in the context of adoption is referred to as open adoption. The benefits of open adoption have been referred to on several occasions.<sup>124</sup> Where the adoption is intercultural, adoption contact becomes even more important, as this is a way for the child to maintain his/her biological culture.

- As already discussed,<sup>125</sup> and as will also be pointed out below,<sup>126</sup> subsection 7(1)(g) of the Children's Act is extremely important for a child who is in the process of being adopted, and even more so where the

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<sup>123</sup> Also see "4 4 2 3 *South African law and open adoption*" and "6 6 2 *The Children's Act and adoption contact*".

<sup>124</sup> See "4 4 OPEN VERSUS CLOSED ADOPTION", "5 6 3 2 *Physical appearance as a factor*".

<sup>125</sup> See "4 5 AGE OF THE CHILD" and "5 RACE VERSUS CULTURE".

<sup>126</sup> See "6 5 2 2 *The Children's Act and the consent of the child*" below.

adoption is an intercultural one.<sup>127</sup> In terms of section 7(1)(g)(i) the child's age, maturity and stage of development have to be taken into account when determining the best interests of a child. As will be explained below,<sup>128</sup> a child has to consent to an adoption under certain circumstances. As this consent is subject to certain provisos, the age, maturity and stage of development of the child are of crucial importance in order to determine whether informed consent has actually been given by the child or not. This subsection will be discussed in more detail below.<sup>129</sup>

The age, maturity and stage of development of the child are also important as far as the attachment process in an adoption is concerned. It has been established that a child adjusts better socially, emotionally and psychologically if an attachment is formed while the child is young.<sup>130</sup> Thus, adoption at a young age is beneficial to the child as far as the attachment process is concerned. In this regard RACAP, the register that is envisaged by the Children's Act,<sup>131</sup> can only be beneficial to the

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<sup>127</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ... (g) the child's—

- (i) age, maturity and stage of development;
- (ii) gender;
- (iii) background; and
- (iv) any other relevant characteristics of the child". Also see n 91. Although gender is a very important factor that could play an important part in an adoption, it will not be elaborated on here.

<sup>128</sup> See "6 5 2 1 *The Child Care Act and the consent of the child*".

<sup>129</sup> See "6 5 2 1 *The Child Care Act and the consent of the child*" below.

<sup>130</sup> Rutter *Maternal Deprivation* 63; Golombok in Gaber & Aldridge *In the Best Interests of the Child* 107. See further "4 3 ATTACHMENT AND ADOPTION".

<sup>131</sup> See n 44.

adoption process. As discussed below<sup>132</sup> this register, if maintained properly, together with the provisions of section 237 which require the clerk of the children's court to gather certain information for the proposed adoption,<sup>133</sup> could assist in speeding up the adoption process and thus contribute to the promotion of the best interests of the child. On the other hand, where an older child is adopted, he/she may have formed an attachment with a biological parent or other care-giver. This attachment may influence the child's relationship with his/her adoptive parent, but is also important with regard to adoption contact.<sup>134</sup>

The benefits of adoption contact for all the parties to an adoption have been pointed out.<sup>135</sup> If the child is very young, he/she probably would not have formed any bond with a biological parent or other care-giver, but an older child probably would have formed such a bond. The child's maturity and stage of development, together with his/her age, will greatly determine how he/she will deal with something as drastic as adoption. Where such an adoption is also intercultural, these factors will play a massive role in determining how the child will deal with the situation and adapt to his/her new circumstances.

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<sup>132</sup> See "6 3 3 3 Register of Adoptable Children and Prospective Adoptive Parents".

<sup>133</sup> See s 174.

<sup>134</sup> See "6 6 ADOPTION CONTACT" below.

<sup>135</sup> See "4 3 ATTACHMENT AND ADOPTION".

The background of the child<sup>136</sup> is important for various reasons. The child's background largely determines the child's maturity and development. Furthermore, the child's background needs to be known to determine whether an adoption will be an intercultural one, and, if so, which adoptive parents will serve the best interests of the child. The child's background could also influence his/her physical<sup>137</sup> and emotional<sup>138</sup> security.<sup>139</sup>

- The inclusion in section 7(1)(h) of the consideration of a child's physical and emotional security is welcomed.<sup>140</sup> Physical security has two parts to it. Children have the constitutional right to food, housing, and basic health care,<sup>141</sup> as well as the constitutional right to be protected from neglect and abuse.<sup>142</sup> These matters need to be taken into account to determine the best interests of the child. Emotional security is equally important. Emotional bonding, also known as attachment, is the strong, affectional tie we have with special people in our lives.<sup>143</sup> The recognition by the legislature of emotional security as a factor that could influence the best interests of the child reflects the recognition of the attachment theory as

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<sup>136</sup> S 7(1)(g)(iii).

<sup>137</sup> This could be influenced by, for instance, poverty, neglect, ill-treatment or crime.

<sup>138</sup> Violence, neglect or abuse, for example, could be important.

<sup>139</sup> There is a link between this subsection and subsections (h) and (l), which are discussed below.

<sup>140</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—  
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development". Also see n 91.

<sup>141</sup> S 28(1)(c) of the Constitution.

<sup>142</sup> S 28(1)(d) of the Constitution.

<sup>143</sup> See "3 3 2 1 What is attachment?".

crucial in the development of a child.<sup>144</sup> It has already been explained that a child's emotional security develops and is largely determined in response to the environmental influences to which he/she is exposed<sup>145</sup> and that the desired environment can be provided by adoptive parents.<sup>146</sup> South African legislation dealing with children has until now not recognised the importance of emotional bonding in the family relationship. Research shows that an adopted child can develop secure attachments to adoptive parents,<sup>147</sup> as successful child rearing does not depend on whether the child is cared for by his/her biological parents.<sup>148</sup> Adoption can thus provide a child with physical and emotional security.

If a child is not physically and/or emotionally secure, or his/her intellectual, emotional, social and cultural development is not taken into account,<sup>149</sup> this could greatly influence and even jeopardise an adoption. Again, in the case of an adoption the child might find the adoption difficult to deal with if proper attention is not given to these factors before the adoption is granted. If the adoption is an intercultural one, this may add to the difficulties, not *per se* because the adoption is intercultural, but because

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<sup>144</sup> Also see "3 3 2 The theory behind attachment" and "4 3 ATTACHMENT AND ADOPTION".  
<sup>145</sup> See "3 3 1 Introduction", "3 3 ATTACHMENT" and "4 3 ATTACHMENT AND ADOPTION".  
<sup>146</sup> Clark 2000 *Stell LR* 11. Also see "3 3 ATTACHMENT" and "4 3 ATTACHMENT AND ADOPTION".  
<sup>147</sup> Golombok in Gaber & Aldridge *In the Best Interests of the Child* at 110 quotes a study by Singer, Brodzinsky, Ramsay, Steir and Waters (1985) "Mother-infant attachment in adoptive families", in *Child Development* 56: 1543-1551. See further "4 3 ATTACHMENT AND ADOPTION".  
<sup>148</sup> Wait 1989 *Welfare Focus* 52.  
<sup>149</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development". Also see n 91.

the intercultural dimension is another factor that the child has to deal with on top of other issues which may already be complicated. It is therefore important that attention is paid to these aspects and, where necessary, the child needs to be counselled with regard to his/her security and development, possibly before and after the adoption.

- In terms of section 7(1)(i) and (j), the disability of a child<sup>150</sup> and the chronic illness of a child<sup>151</sup> are factors that need to be considered when the child's best interests are determined. With regard to adoption, the presence of a disability or a chronic illness, I believe, could be an important factor in an adoption. The disability or illness has to be considered, not because the child should be treated differently to any other child, but because the presence of a disability or a chronic illness could mean that the child has special needs that could influence the selection of the adoptive parents who can serve the best interests of the child.
- An object of the Children's Act is to give effect to the constitutional right of a child to family care or parental care or *appropriate* alternative care when removed from the family environment.<sup>152</sup> This object, read with section 7(1)(k), provides clear guidelines about the kind of family environment that

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<sup>150</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(i) any disability that a child may have". Also see n 91.

<sup>151</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(j) any chronic illness from which a child may suffer". Also see n 91.

<sup>152</sup> S 2(b)(i).

the child needs.<sup>153</sup> Section 7(1)(k) recognises that the child has a need to be brought up within a **stable/caring** family environment. It is no use simply providing a child who does not have a family or a suitable family with an alternative family. In this regard, the list of names contained in RACAP<sup>154</sup> can certainly assist any official involved in the adoption process with the process of finding a suitable family for a child who is in the process of being adopted. The importance of a **stable** family environment has been stated for a long time, but the Children's Act offers the first legislative recognition of this requirement in South Africa. When a child is adopted, all relevant factors that determine the best interests of the child have to be taken into account to find a family who can provide the child with such an environment.

- In terms of section 7(1)(l) and (m), children have to be protected from violence, because they are unique and vulnerable.<sup>155</sup> Where a child has suffered physical or psychological harm, or has been exposed to physical or psychological harm for whatever reason,<sup>156</sup> or has been exposed to

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<sup>153</sup> S 7: “(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(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”. Also see n 91.

<sup>154</sup> See n 44.

<sup>155</sup> *S v Mokoena* 2008 (5) SA 578 (T) at 592. Also see “4 5 CONCLUSION”.

<sup>156</sup> S 7: “(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(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”. Also see n 91.

family violence,<sup>157</sup> the need may exist for the child to be removed from the harmful or violent situation. In such a case, the child may be taken to a place of safety and may eventually be put up for adoption.<sup>158</sup> The need to protect a child against physical or psychological harm was already provided for in legislation before the Children's Act came into force,<sup>159</sup> but the express inclusion of this factor in section 7 is welcomed as confirmation of the importance of protecting children from harm and violence when the need arises.

- Section 7(1)(n) lists the avoidance or minimising of further legal or administrative proceedings in relation to the child as another factor that must be taken into account in determining the best interests of the child. Subjecting a child to several legal or administrative proceedings is not in the best interests of that child.<sup>160</sup> Children are vulnerable, and subjecting them to unnecessary proceedings of this nature can undoubtedly affect them negatively. Where a decision has to be taken with regard to a child, it is suggested that such a decision is taken as soon as possible so as not to subject the child to unnecessary procedures. Once the chapter regulating adoption in the Children's Act comes into effect, the officials involved in

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<sup>157</sup> S 7: “(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(m) any family violence involving the child or a family member of the child”. Also see n 91.

<sup>158</sup> Section 7(1)(a), which is discussed above under this heading, relates to this subsection too.

<sup>159</sup> The Child Care Act, ss 11-15, deals with this aspect in detail.

<sup>160</sup> S 7: “(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.” Also see n 91.

the adoption process will have some help with the process of matching a child with suitable adoptive parents as soon as possible. The information gathered by the clerk of the children's court with regard to the consent required for the adoption<sup>161</sup> will eliminate some administrative tasks and RACAP<sup>162</sup> will provide information that will allow the adoption officials to find suitable adoptive parents for the child as quickly as possible.

Section 7(1)(n) confirms that it is in the best interests of the child not to prolong important decisions in relation to him/her. The need to take speedy decisions about the future of a child has already been established in the context of attachment,<sup>163</sup> and Goldstein *et al* propose that there should not be a delay in finalising an adoption decree once the child is placed with the adoptive parents.<sup>164</sup> Where a child is thus considered for an adoption, it is important that such a decision is taken speedily. A child who is in the situation where he/she is not raised by biological parents/family, may be part of a foster family. In such a case, there is no certainty or stability for the child, who may be moved from one foster family to another over the years. For such a child, it is also in his/her best interests to be adopted as soon as possible. The foster child, who is constantly moved from one foster family to another, might ultimately believe that he/she is to blame for this situation. Even if he/she is raised in

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<sup>161</sup> See s 237(1).

<sup>162</sup> S 232. Also see n 44.

<sup>163</sup> See 4.3 ATTACHMENT AND ADOPTION" above.

<sup>164</sup> Goldstein *et al Beyond the Best Interests* 36, 45.

one foster family, he/she might think that he/she is to blame for the fact that the temporary situation is not made permanent by way of adoption. If the fostering is intercultural/interracial the child might even believe that his/her cultural/racial background is to blame for the fact that he/she is not growing up as part of a permanent family.

I feel confident that the best interests of the child in adoption procedures will in future receive adequate protection, provided that the requirements of the Children's Act are met and the guidelines in section 7 are properly taken into account.

### **6 3 3 3      *Register of Adoptable Children and Prospective Adoptive Parents***

Section 232 of the Children's Act provides for a Register of Adoptable Children and Prospective Adoptive Parents (RACAP) which must be kept and maintained.<sup>165</sup> Its aim is to keep a record of adoptable children as well as fit and proper adoptive parents.<sup>166</sup>

The need for early placement of children has been emphasised.<sup>167</sup> If this register is maintained properly, it will greatly improve and even speed up the adoption

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<sup>165</sup> S 232: "(1) The Director-General must keep and maintain a register to be called the Register on Adoptable Children and Prospective Adoptive Parents for the purpose of—  
(a) keeping a record of adoptable children; and  
(b) keeping a record of fit and proper adoptive parents."

<sup>166</sup> S 232(1). The Child Care Act does not contain any similar provision.

<sup>167</sup> See "4 THE BEST INTERESTS OF THE CHILD".

process. Not only will there be an improvement in the process, but I believe that the incidence of intercountry adoptions might also be reduced due to the availability of this list.<sup>168</sup> There are many children, especially older ones, who are in need of families and are waiting to be adopted by suitable adoptive parents. Up to now there has not been any means of establishing the availability of local families beyond informal checks by agencies and adoption social workers, which are not adequate in the absence of a properly managed database.<sup>169</sup> "Searching" for suitable adoptive parents will largely be eliminated when RACAP is introduced and, I believe, more effort will go into finding homes for adoptable children, as RACAP will be a constant reminder of the fact that those children are waiting to be adopted.

Mosikatsana & Loffell believe that this register could be used to match children with prospective adoptive parents who share their cultural background.<sup>170</sup> This is true, but it will also speed up the process if there are no **suitable** prospective adoptive parents who share the cultural background of the child, and thus eliminate the situation where a child is kept waiting indefinitely for culturally matched parents. The child could therefore be placed as soon as possible with suitable parents.

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<sup>168</sup> See "5 6 3 1 Cultural issues as a factor", where I argue that, generally, any domestic adoption by a suitable family is preferable to intercountry adoption.

<sup>169</sup> Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-10.

<sup>170</sup> Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-10.

In terms of section 237 of the Children's Act, the clerk of the children's court where a child becomes available for adoption, must take steps to obtain information with regard to the consent required for the adoption.<sup>171</sup> Section 237 should be used with section 232<sup>172</sup> to the benefit of the child. The database of section 232, together with the information in section 237, could greatly help to facilitate the speedy and proper placement of children countrywide and so serve the best interests of the child.<sup>173</sup>

As mentioned above,<sup>174</sup> the Child Care Act does not contain much recognition of or any guidelines with regard to the best interests of the child. In contrast, the Children's Act strongly emphasises the best interests of the child and provides specific guidelines to be used to determine the best interests of the child.<sup>175</sup> There can be no doubt that the Children's Act is a major improvement on the Child Care Act as far as the best interests of the child are concerned.

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<sup>171</sup> S 237: "(1) When a child becomes available for adoption, the clerk of the children's court must take—  
(a) the prescribed steps to establish the name and address of each person whose consent for the adoption is required ...; and  
(b) reasonable steps to establish the name of any person whose consent would have been necessary but for section 236, and the grounds on which such person's consent is not required." S 236 sets out the circumstances when consent is not required.

<sup>172</sup> See n 165.

<sup>173</sup> Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-18.

<sup>174</sup> See "6 3 2 The Child Care Act, adoption and the best interests of the child".

<sup>175</sup> References to the best interests of the child can be found in the Preamble, ss 2, 7 9, 230(1)(a) & 240(2)(a) — see "6 3 3 The Children's Act and the best interests of the child".

## 6 4 QUALIFICATIONS OF THE APPLICANTS

### 6 4 1 Who may adopt?

#### 6 4 1 1 Who may adopt under the Child Care Act?

In terms of the Child Care Act,<sup>176</sup> read with *Du Toit v Minister of Welfare and Population Development*<sup>177</sup> and section 13 of the Civil Union Act,<sup>178</sup> a child may be adopted by spouses jointly; same-sex life partners jointly; civil union partners jointly; a widow, widower, unmarried or divorced person; a married person whose spouse is the parent of the child; a civil union partner whose partner is the parent of the child; a person who is the child's parent's same-sex life partner; or the natural father of a child born out of wedlock.<sup>179</sup> There are, however, still some South Africans who do not qualify to adopt in terms of the Child Care Act, for example, adoption by all the parties to a customary marriage is currently not possible,<sup>180</sup> and siblings living together may not adopt a child jointly.

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<sup>176</sup>

S 17.

<sup>177</sup>

2003 (2) SA 198 (CC) at 213, as read with the order handed down in *Du Toit v Minister of Welfare and Population Development* 2001 12 BCLR 1225 (T).

<sup>178</sup>

Act 17 of 2006.

<sup>179</sup>

See "3 2 3 4 *Alternative care, adoption and the persons who may adopt*".

<sup>180</sup>

See Mosikatsana 1997 *SAJHR* 616-617, where the exclusion of parties to a polygamous customary marriage from adoption is discussed and criticised.

6 4 1 2 Who may adopt under the Children's Act?

When the rest of the Children's Act comes into operation, many people who are prevented from adopting in terms of the Child Care Act will be able to adopt.<sup>181</sup> In terms of section 231(1)(a) a child may be adopted jointly by a husband and wife,<sup>182</sup> partners in a permanent domestic life-partnership,<sup>183</sup> or other persons sharing a common household and forming a permanent family unit.<sup>184</sup> Thus, read with section 13 of the Civil Union Act, married heterosexual couples, same-sex and heterosexual life partners, civil union partners and the parties to a polygamous marriage would be able to adopt jointly.<sup>185</sup> The Children's Act does not define the term "permanent domestic life-partnership". Conventionally, a life partnership refers to living together outside marriage in a relationship which is analogous to, or has most of the characteristics of, a civil marriage.<sup>186</sup> After the commencement of the Civil Union Act on 1 December 2006, a permanent

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<sup>181</sup> S 231: "(1) A child may be adopted—  
(a) jointly by—  
    (i) a husband and wife;  
    (ii) partners in a permanent domestic life-partnership; or  
    (iii) other persons sharing a common household and 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  
(e) by the foster parent of the child".

Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-7 state that s 231 has remedied all of the constitutional defects that were contained in s 17 of the Child Care Act.

<sup>182</sup> S 231(a)(i).

<sup>183</sup> S 231(a)(ii).

<sup>184</sup> S 231(a)(iii).

<sup>185</sup> However, see the next paragraph where the uncertainty with regard to the meaning of s 231(1)(a)(iii) is discussed.

<sup>186</sup> Cronjé & Heaton *Family Law* 227.

domestic life partnership presumably refers to a life partnership that falls outside the ambit of the Civil Union Act.<sup>187</sup>

Section 231(1)(a)(iii), in terms of which a child may be adopted jointly by persons sharing a common household and forming a permanent family unit, was included in the Act to allow for joint adoption by, for instance, a husband and all his wives (the kraal) in a customary-law setting.<sup>188</sup> This provision of the Act is sensitive to the different peoples living in this country. The inclusion of customary-law principles in this section of the Children's Act paves the way for more recognition of customary-law principles in adoption legislation and, in my view, provides support for my suggestion in "9 CONCLUSION" that there should be only one legal form of adoption in this country. However, how "persons sharing a common household and forming a permanent family unit" will be interpreted, remains to be seen. It is not clear whether this phrase would also include friends living together, or brothers and/or sisters who live together. In other words, how far this provision in the Children's Act will be extended is unsure. In my opinion, the courts will probably find that "persons sharing a common household and forming a permanent family unit" would need some sexual connotation, in other words the persons sharing a common household and forming a permanent family unit will need to be in an intimate relationship, failing which they will merely be regarded as applicants who wish to adopt singly.

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<sup>187</sup> Heaton *Law of Persons* 70 n 170; Heaton in Davel & Skelton *Commentary on the Children's Act* 3-11.

<sup>188</sup> SALC *Report on Project 110* 235-236.

Section 231(1)(b)-(e) contains the categories of people who may adopt on their own. They are a widower, a widow, a divorced or unmarried person, a step-parent who is married to the child's biological parent, the biological father of a child born of unmarried parents, and the foster parent of the child. By virtue of section 13 of the Civil Union Act a stepparent who is the child's biological parent's civil union partner will also be able to adopt his/her partner's child on his/her own.

The extension of those who are allowed to act as adoptive parents is welcomed, as this means that the pool of potential adoptive parents is enlarged. This does not necessarily mean that the process of finding **suitable** adoptive parents will be any easier, but having more prospective adoptive parents to choose from will certainly improve the chances of finding such parents (more quickly) with the result that the child will benefit.

As indicated above under this heading, the Children's Act addresses the issue of the exclusion of many people as potential adoptive parents. The provisions with regard to the qualifications of the applicants to an adoption in the Children's Act are therefore welcomed.

## 6 4 2 The financial means of the applicant(s)

### 6 4 2 1 *The Child Care Act and the financial means of the applicant(s)*

In terms of section 18(4)(a) of the Child Care Act an adoption cannot be granted if the applicant(s) are financially unable to maintain and educate the child.<sup>189</sup> This provision excludes many people from adopting simply because they are poor. The exclusion of an adoption applicant because of poverty is unacceptable. Being poor should not be a bar to an adoption. On the other hand though, a child has certain basic needs and rights, such as the constitutional right to basic nutrition, shelter and basic health care services and should therefore not, because of an adoption, be placed in a position where he/she lacks these things.<sup>190</sup> A possible solution to this dilemma is discussed under the next heading.

### 6 4 2 2 *The Children's Act and the financial means of the applicant(s)*

The Children's Act removes the applicants' financial ability as a requirement for the granting of an adoption order. Section 231(2)(b) requires merely that a prospective adoptive parent must be "willing and able" to undertake, exercise and

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<sup>189</sup> S 18: "(4) A children's court to which application for an order of adoption is made ..., shall not grant the application unless it is satisfied —  
(a) that the applicant is or that both applicants are ... possessed of adequate means to maintain and educate the child".

<sup>190</sup> S 28(1)(c) of the Constitution. More will be said about this problem directly below under "6 4 2 2 *The Children's Act and the financial means of the applicant(s)*".

maintain the parental responsibilities and rights in respect of the child,<sup>191</sup> and section 231(4) provides that a person may not be disqualified from adopting a child by virtue of his or her financial status.<sup>192</sup> The exclusion of people who do not have “adequate means” from adopting a child indeed needed to be addressed.<sup>193</sup> While the “willing and able” test in the Children's Act is undoubtedly a great improvement on the position in terms of the Child Care Act, there will be challenges in the implementation of this requirement. On the one hand, poverty has to be ignored when determining whether a person is fit to adopt a child. On the other hand, if the basic needs of the child, both physical and psychological, cannot be met, the best interests of the child may be jeopardised. There are certain basic physical needs, such as food, shelter, basic health care services and social services that no child should have to do without.<sup>194</sup> Having his/her basic physical needs met is a constitutional right of the child.<sup>195</sup> Provision for the child's physical needs is also a factor included in the Children's Act.<sup>196</sup> In terms of the Convention<sup>197</sup> every child has the right to a standard of living that is, inter alia, adequate for the child's physical development. It is not only the physical needs of

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<sup>191</sup> S 231: “(2) A prospective adoptive parent must be— ...  
(b) willing and able to undertake, exercise and maintain those responsibilities and rights [contained in s 231(2)(a)]”.

<sup>192</sup> S 231: “(4) A person may not be disqualified from adopting a child by virtue of his or her financial status.”

<sup>193</sup> Already in 1997 Mosikatsana argued that indigent families should be given assistance in the form of government subsidies and tax breaks to enable them to raise children – see Mosikatsana 1997 *SAJHR* 616.

<sup>194</sup> See s 28(1)(c) of the Constitution. See also *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC) 82, where it was held that the obligation to provide shelter as provided for in s 28(1)(c) is imposed primarily on the parents or family and only alternatively on the state.

<sup>195</sup> S 28(1)(c).

<sup>196</sup> S 7(1)(c). Also see “6 3 3 2 *The Children's Act, adoption and the best interests of the child*” and s 7 of the Children's Act (n 91). As indicated in s 2(d) (see n 25), the sound physical and psychological development of the child is also an object of the Children's Act.

<sup>197</sup> Art 27.

the child that need to be met though. There are also psychological needs that cannot be met without money, such as counselling where the child is in need of this.<sup>198</sup> How adoption social workers apply the provisions of section 231(4) of the Children's Act in the adoption process will be crucial for the protection of the best interests of the child. If the needs, both physical and psychological, of the child cannot be met by the adoptive parents because of a lack of money, the best interests of the child will undoubtedly suffer.

Another problematic issue is whether the Act makes provision for a form of subsidised adoption which could, for example, assist some foster parents to adopt their foster children. Foster parents of children who are in official foster care receive a government grant.<sup>199</sup> During the discussions leading up to the drafting of the Children's Act there was much debate by the South African Law Commission and the participants to the discussion, about the desirability of setting a requirement regarding the financial ability of a prospective adoptive parent<sup>200</sup> and the inclusion of social security measures in the Children's Act. Although the inclusion of an adoption grant was overwhelmingly supported by the participants in the process leading up to the Bill<sup>201</sup> and was ultimately recommended by the South African Law Commission,<sup>202</sup> such a grant was not included in the Children's Act. Often foster parents who might wish to adopt their foster child cannot consider adoption because they are unable to provide for the

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<sup>198</sup> These needs are provided for in art 27 of the Convention and s 7(1)(c) of the Children's Act.

<sup>199</sup> This is provided for in the Social Assistance Act 13 of 2004.

<sup>200</sup> See SALC *Project 110* 56, 58-59, 87-91, 146.

<sup>201</sup> SALC *Project 110* 87-91.

<sup>202</sup> SALC *Report on Project 110* 249-250.

child without the foster grant. Section 231(5) of the Children's Act makes provision for financial assistance for a person who adopts a child.<sup>203</sup> In terms of this subsection, any person who adopts a child may apply for "means-tested social assistance where applicable". The question is whether this assistance should be regarded as subsidised adoption which would assist many potential adoptive parents who currently are not able to adopt a child, such as very poor foster parents. In other words, the question is whether this assistance is in effect another way of obtaining a subsidised adoption or a child support grant, or whether it is something entirely different. The answer is unclear.

South Africa is not a rich country and the fact that subsidised adoption was omitted from the Children's Act, suggests that the assistance provided for in section 231(5) cannot be regarded as subsidised adoption and that the cases where the financial assistance will be "applicable" will be limited. If this was not the legislature's intention, I believe the legislature would have called the assistance in section 231(5) subsidised adoption as suggested by the South African Law Commission.

Mosikatsana, in discussing section 231(5), says that the very stringent means test for a child support grant will exclude many who need financial assistance in order to adopt a child.<sup>204</sup> This suggests that he believes that section 231(5)

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<sup>203</sup> S 231: "(5) Any person who adopts a child may apply for means-tested social assistance where applicable."

<sup>204</sup> Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-9.

provides for a child support grant. In terms of the Social Assistance Act,<sup>205</sup> the legislative mechanism for the administration of social grants, a child support grant<sup>206</sup> is available to a person if he/she is the primary caretaker of that child.<sup>207</sup> The primary caretaker would obviously include an adoptive parent. Mosikatsana's interpretation of means-tested social assistance thus seems to be correct. It is unfortunate though that the nature of the grant was not specified in clearer terms in the Children's Act.

Although it cannot escape criticism, the inclusion of section 231(4) and (5) in the Children's Act will be welcomed by all involved in adoption, as these subsections remove at least one obstacle in the path of many prospective applicants, thus making adoption more accessible to all and more fair. These subsections should in particular be viewed favourably by Mosikatsana, who believes that adoption procedures and agency practices currently have a class and racial bias in that they target mainly white middle class families as prospective adoptive parents. Although he states<sup>208</sup> that the national guidelines for adoption do not take into account that most black and coloured applicants are poor, he does acknowledge that the provisions of section 231(4) & (5) address some of the criticisms that were levelled at section 18(4)(c) of the Child Care Act.<sup>209</sup>

I believe there is a solution that could assist indigent prospective adoptive parents (including foster parents) in their quest to adopt a child, while taking account of the financial implications for the state. The payment of an adoption

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<sup>205</sup> Act 13 of 2004.

<sup>206</sup> A child support grant is provided for in s 4.

<sup>207</sup> S 6.

<sup>208</sup> Mosikatsana 1997 *SAJHR* 612, 614; Mosikatsana 1995 *SALJ* 618.

<sup>209</sup> Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-9.

grant would not only be very difficult for the state to afford, but might also lead to applications for the adoption of a child for the wrong reason, namely to obtain the grant, which might be used for other purposes. In other words, I do not believe that a grant in the form of money is the best solution. My proposal is that, instead of the adoptive parents receiving money, the adopted child should receive alternative assistance. Using a means-based test, the adopted child should have access to free education, medical services, transport to and from school, food packages at school, etcetera.<sup>210</sup> An adopted child might also need counselling, either to deal with the major impact that adoption has on the life of the child, or because of circumstances in the past and the psychological effect of the background of the child on him/her. Where the adoption is an intercultural one, this need may be even stronger. If counselling of the child is necessary, a system could be implemented to provide for free counselling for the child, both before and after the adoption.

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<sup>210</sup> A suggestion will also be made in “9 CONCLUSION” that Government assistance might be crucial to ensure equality and fairness in adoption applications. This assistance should extend to facilitating contact between the adopted child and the biological parents, where such contact is in the best interests of the child – see “9 CONCLUSION”.

## 6 5 CONSENT AND CHILD PARTICIPATION

### 6 5 1 The consent of the parent

#### 6 5 1 1 *The Child Care Act and the consent of the parent*

An adoption application can only be considered if the required consent has been obtained. In terms of the Child Care Act, the parent of a child in respect of whom an adoption application has been made, has to consent to the adoption, irrespective of whether the parent is a minor or not.<sup>211</sup> If the parent is a minor, he/she need not be assisted by his/her parent or guardian.

Section 19 of the Child Care Act provides for circumstances where the consent of the parent/guardian may be dispensed with.<sup>212</sup> These circumstances are irrelevant for the purposes of this thesis, but the principle of dispensing with the parent's consent needs to be mentioned in order to place the discussion under the next heading in perspective.<sup>213</sup>

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<sup>211</sup> S 18: "(4) A children's court to which application for an order of adoption is made ..., shall not grant the application unless it is satisfied— ...

(d) that consent to the adoption has been given by both parents of the child ... whether or not such mother or natural father is a minor or a married person and whether or not he or she is assisted by his or her parent, guardian ...".

<sup>212</sup> Also see "6 5 2 1 *The Child Care Act and the consent of the child*" below.

<sup>213</sup> See "6 5 1 2 *The Children's Act and the consent of the parent*" below.

6 5 1 2      *The Children's Act and the consent of the parent*

Like the Child Care Act, the Children's Act requires the consent of the parent of the child who is to be adopted. However, unlike the Child Care Act, the Children's Act prescribes that where the parent is a minor he/she must be assisted by his/her guardian.<sup>214</sup> Section 236 of the Children's Act provides for circumstances where the consent of the parent may be dispensed with, but this section does not apply to the assistance of the parent's guardian.<sup>215</sup> No section of the Act sets out the circumstances in which the assistance of the guardian of a parent who is a minor may be dispensed with. In terms of section 45 of the Children's Act the children's court may adjudicate any matter involving the protection and well-being of a child, including the adoption of the child.<sup>216</sup> Unfortunately, it does not seem that this section is broad enough to empower the court to dispense with the assistance of the guardian of the child's parent. It therefore seems that the Act does not provide for dispensing with the assistance of the parent's guardian at all. This is a serious lacuna in the Act.

The assistance of a minor by his/her guardian is generally supported, as a minor often does not have the intellectual capacity or the experience to participate independently in legal and commercial dealings.<sup>217</sup> However, the mandatory

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<sup>214</sup> S 233: "(1) A child may be adopted only if consent for the adoption has been given by—  
(a) each parent of the child, regardless of whether the parents are married or not: Provided that, if the parent is a child, that parent is assisted by his or her guardian".

<sup>215</sup> Also see "6 5 2 1 *The Child Care Act and the consent of the child*" below.

<sup>216</sup> S 45(1)(a), (i) & (k). This section has not yet come into effect.

<sup>217</sup> Heaton *Law of Persons* 85.

requirement of assistance by the parent's guardian in the case of an adoption contained in the Children's Act might cause problems and delays which are not in the best interests of the child who is to be adopted. The reason for the inclusion of the requirement of the assistance of the guardian of the minor parent is clear, namely to protect the minor. There may, however, be instances where the minor parent does not want his/her guardian to know about the pregnancy or the birth of the child — perhaps because the minor is afraid of his/her guardian or ashamed of the pregnancy or the child's birth. In such a case the minor, who is compelled to obtain his/her guardian's assistance in consenting to the adoption, might believe that termination of the pregnancy is the better option.<sup>218</sup> Furthermore, there is always the possibility that the guardian may unreasonably withhold assistance, or be missing or unable to give assistance because of incompetence, etcetera.<sup>219</sup> The Act does not even provide for dispensing with the guardian's assistance in these circumstances.

As the Children's Act does not provide for circumstances where the assistance of the guardian of the parent is not appropriate, cannot be obtained or is being withheld unreasonably, other options have to be considered. Any person who has an interest in the care, well-being and development of a child may apply to the High Court for an order granting him/her guardianship of the child in terms of

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<sup>218</sup> In terms of s 5(1) of the Choice on Termination of Pregnancy Act 92 of 1996, the termination of a pregnancy may only take place with the informed consent of the pregnant woman, and in terms of s 5(2) no consent other than that of the pregnant woman is required, except if she is incapable of giving consent. In *Christian Lawyers' Association v National Minister of Health* 2004 10 BCLR 1086 (T) at 1092 Justice Mojaelo said that the cornerstone of the regulation of the termination of a pregnancy is the requirement of her "informed consent". A minor may therefore independently consent to a termination of her pregnancy provided that she is able to give informed consent.

<sup>219</sup> See Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-12.

section 24 of the Children's Act.<sup>220</sup> This section could possibly provide a solution to the problem of a parent's guardian who is unable/unavailable to give assistance or is unreasonably withholding assistance, as a person with an interest in the care, well-being and development of the child could approach the High Court. Once guardianship is obtained an application for adoption could proceed. However, it is unclear who such a person, with an interest in the care, well-being and development of the child, could be. The prospective adoptive parent(s) and the adoption social worker come to mind, but applying for guardianship seems to be quite a drastic step with serious consequences, one that probably will not be taken by a social worker,<sup>221</sup> and one that is probably not appropriate for the prospective adoptive parent to take. It also has to be borne in mind that High Court proceedings are expensive and time consuming and the High Court is not very accessible.<sup>222</sup> Furthermore, in the event of a person applying for guardianship of a child who already has a guardian, the applicant must submit reasons why the child's existing guardian is not suitable to have guardianship in respect of the child.<sup>223</sup> It would thus seem that where there is a guardian who is suitable to give assistance (such as in the situation where the minor is ashamed of the pregnancy and is for this reason afraid to approach his/her guardian) this section would not apply. All in all, the use of section 24 of the Children's Act does not seem to be a viable option.

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<sup>220</sup> S 24(1). This section is not yet in operation.

<sup>221</sup> Guardianship refers to administering and safeguarding the child's property and property interests, assisting or representing the child in administrative, contractual and other legal matters, and giving or refusing any consent that is legally required in respect of the child – s 18(3) of the Children's Act.

<sup>222</sup> Gallinetti in Davel & Skelton *Commentary on the Children's Act* 4-11.

<sup>223</sup> S 24(3).

The High Court as the upper guardian of all minors has the power to appoint a guardian for the minor, or even to dispense with the requirement of assistance by the minor's guardian.<sup>224</sup> Thus the lacuna in the Children's Act could be overcome by approaching the High Court for an order dispensing with the assistance of the parent's guardian. This seems to be a more viable option than the previous one, as the power of the High Court is not limited by the fact that there is a guardian, as is the case in terms of section 24 of the Children's Act. However, the same criticism that was raised above with regard to section 24 applies in this case, namely that proceedings in this court are expensive and time-consuming, and that the High Court is not very accessible. Furthermore, having to approach the High Court causes a delay in the adoption proceedings, which is not in the best interests of the child.

The problems experienced by a minor parent who needs the assistance of his/her guardian for the adoption of his/her child could cause a delay in the placement of the child for adoption, which is not in the best interests of the child. In my opinion the addition of the requirement of the assistance of the guardian of the parent before an adoption may proceed is a retrogressive step. Unfortunately I therefore believe the provisions of the Child Care Act with regard to this aspect

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<sup>224</sup> As upper guardian of all children, the High Court may inter alia suspend a parent's guardianship – see Cronjé & Heaton *Family Law* 280-281. The court took this step in *P v P* 2002 (6) SA 105 (N) and *Ex parte Kedar* 1993 (1) SA 242 (W). In *AD v DW* 2008 4 BCLR 359 (CC) at 193 the Constitutional Court held that the High Court, in its capacity as upper guardian of all minor children, has the jurisdiction to make an order for sole custody and sole guardianship. It is unthinkable that the High Court would hold that its powers do not extend to dispensing with the assistance of the guardian of a minor who has given his/her child up for adoption and wants to give his/her consent to the adoption.

were more in line with the best interests of the child than those of the Children's Act.

An additional aspect regarding parental consent which has been included in the Children's Act, and is not found in the Child Care Act, is the preference expressed by the biological parent with regard to the possible adoptive parent. According to section 240(1)(b) of the Children's Act the court must take into account all reasonable preferences expressed by a parent and stated in the consent.<sup>225</sup> It is important to note that this requirement does not allow the parent to decide who may adopt the child concerned. The preference of the parent is a factor that the court must take into account, nothing more. If this provision is applied incorrectly, it could lead to serious abuses of the system. It could mean that the parent of the child may be responsible for preventing an adoption from taking place, even though all other circumstances/factors indicate that the adoption will be successful and in the best interests of the child. To illustrate this, a woman may become pregnant after having sex with a man of a specific race or culture, who is not willing to marry her. She may resent him so much that she states in her consent that she does not want her child to be adopted by any person of that race or culture, with the result that the child might have to be placed with parents who are not quite as suitable to raise the child or, even worse, the child might not be adopted at all and miss out on the opportunity to be raised in a family environment.

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<sup>225</sup> See n 102.

## 6 5 2 The consent of the child

### 6 5 2 1 *The Child Care Act and the consent of the child*

In the English case of *Gillick v West Norfolk and Wisbech Area Health Authority*,<sup>226</sup> the most significant decision of the twentieth century on the legal relationship between parents and children,<sup>227</sup> the court developed the “*Gillick* competency test”, in terms of which a court will evaluate the relevant circumstances to decide on the best interests of a child. The court dealt with children’s growing autonomy in general. It confirmed that parental rights do not exist for the benefit of the parent and that a child becomes increasingly independent as he/she grows older. Parental responsibility dwindles correspondingly. Parental rights are recognised by the law only as long as they are needed for the protection of the child.<sup>228</sup> This child-centered approach is supported. Each case has to be judged on its merits. Children are individuals and the extent to which their views and wishes have to be taken into account cannot be determined by applying a fixed age, but will differ from one case to the next.

Section 18(4)(e) of the Child Care Act<sup>229</sup> provides for child participation in the adoption process under certain circumstances by requiring that a child, who is

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<sup>226</sup> [1985] 3 All ER 402 (HL).

<sup>227</sup> Kruger 2005 *Codicillus* 5.

<sup>228</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL) at 410-413.

<sup>229</sup> S 18: “(4) A children’s court to which application for an order of adoption is made ..., shall not grant the application unless it is satisfied— ...  
(e) that the child, if over the age of ten years, consents to the adoption and understands the nature and import of such consent”.

over the age of ten years, consents to his/her adoption and understands the nature and import of such consent. Child participation in the adoption process is in line with the child-centered approach,<sup>230</sup> but I believe that this section is flawed because the requirement is too rigid.

Firstly, linking the requirement of the child's consent to a specific age does not take into account the individual circumstances of the child and of the particular case. Age alone should not be assumed to be the determinate for the mental development and maturity of the child, for mental development and maturity are determined by many factors.<sup>231</sup> On the one hand, a child aged ten years may have a much younger mental age.<sup>232</sup> Where, for example, the child is older than ten years but suffers from some mental illness, consent might be inappropriate. A child under the age of ten years, on the other hand, might have the mental development of a much older child and may be mature enough to consent. The way section 18(4)(e) is phrased does not take this into account. Similarly, maturity develops at different times for different children. Age and maturity do not always cohere.<sup>233</sup> It is quite possible that a child of ten years might not be mature enough to be involved in an adoption process and *vice versa*.

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<sup>230</sup> Child participation, as discussed under "4 2 6 Parent-centered versus child-centered approach", should be determined by the circumstances of each case and should not be rigid. Also see Heaton 1990 *THRHR* 97-98.

<sup>231</sup> Strous 2007 *SA Journal of Psychology* 235.

<sup>232</sup> Mental development is not the same for all children, and can be influenced by many factors.

<sup>233</sup> Strous 2007 *SA Journal of Psychology* 235.

Furthermore, even where the child is capable of and mature enough to give consent other factors, such as abuse, fear, or the desire to get out of a children's home at any cost, may influence such consent and make it unsuitable, inappropriate or undesirable. It is submitted that the validity of consent should be determined on a case-by-case basis. Secondly, section 18(4)(e) is phrased in such a way that consent cannot be dispensed with even if it is found that the child does not understand the nature and import of such consent. Section 18(4)(e) divides the consent requirement into two parts, both of which must be satisfied before the consent requirement can be said to have been met. A child who is over the age of ten has to consent to the adoption **and** has to understand the nature and import of the consent. This means that if a child over ten years does not understand the nature and import of the consent, an adoption cannot be granted in respect of the child. The result seems to be that such a child cannot be adopted at all, for the Act does not provide for dispensing with the child's consent. Depending on the circumstances of the individual case the best interests of the child can therefore be compromised by the way the section is phrased.

My argument is thus that consent should not be dependent on a specific age, but rather on the development and maturity of the particular child as well as the circumstances of the case. In line with Eekelaar's dynamic self-determinism

method,<sup>234</sup> it is important that children should be involved in the adoption process, but only as far as they are able to participate.<sup>235</sup>

To complicate matters even further, the section gives no exact indication of the nature and import of what it is that the child needs to understand before he/she consents. Is it the nature and importance of an adoption in general that needs to be understood, or is it the nature and importance of the specific adoption and all that it entails that needs to be understood? The child may understand the nature and import of an adoption, but may not understand that there are issues in his/her specific adoption that could have an even greater impact on him/her than adoption ordinarily has, such as the effect that an intercultural adoption could have on his/her biological culture. Whether the child's adoption could go ahead under these circumstances is unclear. In my opinion, the child should be required to understand the nature and import of his/her specific adoption. If the child understands the nature and import of adoption in general, but does not understand the impact thereof on him/her for whatever reason, his/her consent to the adoption should not count for anything. The social worker facilitating the adoption should be required to determine whether the child is capable of giving consent, and should also be required to counsel the child about his/her decision and should receive proper training to be able to fulfil this task. Unfortunately the

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<sup>234</sup> See "4 2 6 Parent-centered versus child-centered approach" above.

<sup>235</sup> See s 18(4)(e) of the Child Care Act, s 233(1)(c)(i) of the Children's Act, art 12(1) of the Convention and art 4(2) of the Charter.

Child Care Act does not make provision for such a role for the adoption social worker.<sup>236</sup>

It would have been better had section 18(4)(e) of the Child Care Act been worded in such a way that a children's court to which application for an order of adoption is made, could not grant the application unless it was satisfied that the child, who is of an age and maturity to understand the nature and import of consent under the circumstances of the specific adoption, consents to the adoption. This would have been more in line with the best interests of the child. The consent requirement should not be linked to a specific age and should require the child to understand exactly what it is to which he/she is consenting. It should also not bar the adoption of children who are incapable of understanding the nature and impact of consent.

Both the Convention and the Charter take a very balanced approach when it comes to children's age and their involvement in decisions that affect them. In my view, this approach is far better than the rigid approach dictated by the Child Care Act, as discussed above. The Convention does not make the consent of a child subject to a specific age, but rather relies on the age **and maturity** of the child. Article 12(1) of the Convention states that a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the view being given due weight in accordance with the age

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<sup>236</sup> This unfortunate situation has been addressed in the Children's Act in s 233(4). Section 233(4) of the Children's Act is discussed below under "6 5 2 2 *The Children's Act and the consent of the child*".

and maturity of the child. Similarly, article 4(2) of the Charter provides that in all judicial or administrative proceedings affecting a child, the child who is capable of communicating his/her own views has to be heard, and those views shall be taken into consideration by the relevant authority. Each case will therefore be judged on its own merit, and the views of the child will be taken into account if the child's age and maturity allow this. Although it does not explicitly require the consent of a child to an adoption, article 21(a) of the Convention provides that States Parties that recognise and/or permit adoption have to ensure that the best interests of the child are the paramount consideration and that, if required, **the persons concerned** have given their informed consent to the adoption. In terms of article 24(a) of the Charter, States Parties which recognise the system of adoption have to ensure that the best interest of the child is the paramount consideration and that, if necessary, **the appropriate persons concerned** have given their informed consent to the adoption. There is no specific indication of who these persons are in either the Convention or the Charter and, in my opinion, the consent of the child who is of an age and maturity to be able to give consent is included in this requirement.

6 5 2 2      *The Children's Act and the consent of the child*

Section 233(1)(c) of the Children's Act,<sup>237</sup> read with section 10,<sup>238</sup> provides for child participation in the adoption process in terms of this Act. There are two parts to section 233(1)(c). In the first place, section 233(1)(c)(i) requires that a child aged ten years or older has to consent to his/her adoption.<sup>239</sup> I have argued that age in itself should not be the determining factor for consent.<sup>240</sup> The criticism that is levelled against section 18(4)(e) of the Child Care Act<sup>241</sup> in this regard applies equally to section 233(1)(c)(i) of the Children's Act. It is my view that if other factors such as maturity are not taken into consideration, the child's consent is inappropriate.

Whereas the Child Care Act requires the child's understanding of the consent, section 233(1)(c) does away with this part of the consent requirement. The section requires that a child aged ten years or older consent to the adoption, apparently regardless of whether he/she understands such consent or not. I

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<sup>237</sup> S 233: "(1) A child may be adopted only if consent for the adoption has been given by— ...  
(c) The child, if the child is—  
    (i) 10 years of age or older; or  
    (ii) under the age of 10 years, but is of an age, maturity and stage of development to understand the implications of such consent."

<sup>238</sup> S 10: "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

<sup>239</sup> S 233(1)(c)(i). See n 237 above.

<sup>240</sup> The Children's Act extends the requirement of consent to children under ten years under certain circumstances. These circumstances will be discussed below.

<sup>241</sup> See "6 5 2 1 *The Child Care Act and the consent of the child*" above. The provisions of cl 117(2)(h) of the Children's Bill 2007 of Botswana, in terms of which a court to which application for an adoption is made has to take the views of the child into consideration subject to the child's age, maturity and level of understanding before it grants the application, are, in my opinion, more in line with the best interests of the child – see "8 3 2 Adoption of Children Act" and "8 6 2 Reform proposals".

believe that this provision is more detrimental to the best interests of the child than section 18(4)(e) of the Child Care Act. Even though it is unclear what the intention was when the legislature included the requirement of understanding in the Child Care Act, the inclusion of the requirement is not criticised. It is simply the way in which it was worded that is problematic.<sup>242</sup> The removal of the requirement that the child needs to understand the consent is not supported. Section 233(1)(c)(i) should rather have been rephrased to grant more protection to the child who has to consent to an adoption. It is crucial that the child concerned understands to what he/she is consenting before such consent can be taken into account. Consent should not be dependent on a specific age, but rather on the development and maturity of the particular child as well as the circumstances of the case. In terms of section 233(4) the social worker facilitating the adoption of a child must counsel the child before consent to an adoption is granted.<sup>243</sup> Unfortunately though, section 233(4) only requires counselling, nothing more. The child then has to decide whether to consent or not. The decision to consent or not is not affected by the counselling. Surely, counselling by a properly trained adoption social worker will be in the best interests of the child, but I believe this section should be extended to require the social worker to determine whether the child is then capable of giving the requisite consent.

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<sup>242</sup> See “6 5 2 1 *The Child Care Act and the consent of the child*” above.

<sup>243</sup> S 233: “(4) Before consent for the adoption of the child is granted in terms of subsection (1), the adoption social worker facilitating the adoption of the child must counsel ... the child on the decision to make the child available for adoption.”

There is a second part to this subsection, namely section 233(1)(c)(ii). It requires that a child under the age of ten years who is of an age, maturity and stage of development to understand the implications of such consent has to consent to an adoption before the adoption application can be considered.<sup>244</sup> In my opinion, this subsection, although it cannot escape criticism, serves the interests of the child better than subsection (i). The requirement in subsection 233(1)(c)(ii) at least takes into consideration the maturity and stage of development of the child, and whether he/she understands the implications of the consent. Like section 18(4)(e) of the Child Care Act, this subsection of the Children's Act does not indicate what it is that the child needs to understand, in other words, it is unclear whether the child needs to understand the implications of consenting to adoption in general, or whether the child needs to understand the implications of consenting to adoption in his/her specific case.<sup>245</sup> Again, it is submitted that the social worker facilitating the adoption should determine whether the child is capable of giving consent and, if necessary, counsel the child about this issue. At least the Children's Act provides for counselling by the adoption social worker where applicable,<sup>246</sup> but I believe the adoption social worker should be trained to determine whether the child is mature enough to understand the consent and to have an input with regard to the child's ability to consent to his/her adoption. As mentioned above,<sup>247</sup> proper training of adoption social workers will be very important.

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<sup>244</sup> S 233(1)(c)(ii) - see n 237 above.

<sup>245</sup> Also see my argument under "6 5 2 1 *The Child Care Act and the consent of the child*" above.

<sup>246</sup> S 233.

<sup>247</sup> See "6 5 2 1 *The Child Care Act and the consent of the child*" above.

In line with article 12 of the Convention and article 4(2) of the Charter a better approach, in my view, would have been to base the decision about the involvement of a child in both the giving of consent and the child's best interests in general in adoption proceedings for children of **all** ages on section 10,<sup>248</sup> read with section 7(1)(g)(i), of the Children's Act.<sup>249</sup> Section 10 incorporates the provisions of article 12(1) of the Convention into our domestic law, thereby complying with South Africa's obligations in that regard.<sup>250</sup> In terms of section 10, every child who is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way, and views expressed by the child **must be given** due consideration. Section 7(1)(g)(i) provides that the age, maturity and stage of development of a child need to be taken into account to determine the best interests of the child.<sup>251</sup> In my opinion section 233(1)(c) does not comply with the provisions of section 7(1)(g)(i). Section 233(1)(c) should rather have read as follows:

A child may be adopted only if consent for the adoption has been given by— ...

(c) the child, if the child is of such an age, maturity and stage of development as to be able to consent to the adoption and understand the implications of such consent. The adoption social worker facilitating the adoption is tasked with determining whether the

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<sup>248</sup> See n 238 above.

<sup>249</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(g) the child's—  
(i) age, maturity and stage of development".

<sup>250</sup> Davel in Davel & Skelton *Commentary on the Children's Act* 2-14.

<sup>251</sup> See n 91 above.

*Chapter 6: The Child Care Act and the Children's Act*

child is able to consent to the adoption, taking into account the personal circumstances of the child.

Alternatively, a provision that lists circumstances where the consent of the child to an adoption can be dispensed with should be inserted into the Children's Act. Both the Child Care Act<sup>252</sup> and the Children's Act<sup>253</sup> make provision for dispensing with the consent of the parent of the child who is to be adopted. Such consent could be dispensed with because the parent is dead, missing, mentally ill, has abandoned the child or has abused the child, to name but a few. There is no reason why this section cannot be amended to make provision for circumstances where the consent of the child could be dispensed with where such consent is inappropriate. Where the child is incapable of consenting, or consent was acquired in an unacceptable manner (for example where undue pressure was placed on the child to consent), the consent of the child should be dispensed with. It is recommended that section 233(1)(c) should be amended to set out those circumstances in which the child's consent may be waived.

Until this amendment is made, there is a way to overcome the problem of a child having to consent to his/her adoption where such consent is not appropriate. Section 236(5) of the Children's Act<sup>254</sup> provides that a parent or person can be excluded from giving consent to an adoption if grounds for such exclusion exist.

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<sup>252</sup> S 19.

<sup>253</sup> S 236.

<sup>254</sup> S 236: "(5) A children's court may on a balance of probabilities make a finding as to the existence of a ground on which a parent or person is excluded in terms of this subsection from giving consent to the adoption of a child."

Unfortunately there is no indication in the Act of what would amount to “a ground on which a parent or person is excluded” from giving consent to the adoption of a child. This of course complicates matters, as the presiding officer in an adoption application will have to use his/her own discretion, which could give rise to many different interpretations of what these grounds are. Be that as it may, when it comes into effect, the courts should interpret this section in such a way that the requirement with regard to the consent of the child can be dispensed with where appropriate. A child is a **person**, which means that the children's court may make a finding that he/she is excluded from giving consent for the adoption. In other words, I submit that by using section 236(5) the court should be able to dispense with the consent of a child over the age of ten years and to allow an adoption to proceed without the child's consent where appropriate. Careful scrutiny of the adoption process is always advocated, but if the child's consent is to be dispensed with, the best interests of the child demands that this process be overseen even more carefully by all parties involved. I say this because in these circumstances the child is not in a position to have any input in the adoption and thus needs the security of knowing that the other parties will take care of his/her best interests.

The important issue for participation of a child in any matter concerning the child, which obviously includes adoption, is not the age of the child *per se*, but the age of the child together with **all** other relevant factors. Again, I would recommend that it would be more in line with the best interests of the child if section 233(1)(c)

provided that a child may be adopted only if consent for the adoption has been given by the child who is of an age, maturity and stage of development to understand the nature and import of consent under the specific circumstances. If the child is not of an age, maturity and stage of development to understand the nature and import of consent to the adoption under the specific circumstances of his/her adoption, his/her consent should be dispensed with. As I have already argued, an adoption social worker who has been properly trained to make such a recommendation, should make a recommendation to the presiding officer of the children's court<sup>255</sup> about the ability of the child to consent to the adoption or not. Although I do not believe that the court ought to be bound by the decision of the social worker, the social worker should guide the court in this regard.<sup>256</sup> Anyone

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<sup>255</sup> An adoption application is heard in the children's court – s 239(1)(a) of the Children's Act.

<sup>256</sup> The role of the adoption social worker can be equated to that of the family advocate as provided for in the Mediation in Certain Divorce Matters Act 24 of 1987, where the family advocate may make recommendations and report to the court on any matter concerning the welfare of a minor or dependent child of a marriage – s 4(1). Although the court is not bound by these recommendations and report, the recommendations do usually play an important role: see eg *Terblanche v Terblanche* 1992 (1) SA 501 (W); *Van Vuuren v Van Vuuren* 1993 (1) SA 163 (T); *Whitehead v Whitehead* 1993 (3) SA 72 (SE); *Van den Berg v Le Roux* [2003] 3 All SA 599 (NC); *P v P* 2007 (5) SA 94 (SCA). Although the family advocate usually reports to the High Court, he/she also has a role to play in respect of the children's court. With regard to parental responsibilities and rights of unmarried fathers (s 21(3)(a) of the Children's Act), parenting plans (s 33(5) of the Children's Act) and lay forum hearings (s 49(1)(a) of the Children's Act) parties may not approach the court as a first resort for the resolution of their disputes, but must first attend mediation through (inter alia) a family advocate. These matters are discussed in De Jong 2008 *THRHR* 632-635. Also, in terms of s 62 of the Children's Act, the children's court may order an investigation by inter alia a family advocate for purposes of deciding a matter before it. Furthermore, the Jurisdiction of Regional Courts Amendment Act 31 of 2008 (which is not yet in operation) extends the jurisdiction of the regional divisions of the magistrates' courts. The Act empowers regional divisions to decide divorce and nullity cases, cases relating to customary marriages, and matters arising from such cases, and confers the same jurisdiction as the High Court on the regional divisions for purposes of deciding these cases (s 29(1B) of the Magistrates' Courts Act as inserted by s 7 of the Jurisdiction of Regional Courts Amendment Act). Family advocates and family councillors who have been appointed in terms of the Mediation in Certain Divorce Matters Act will be deemed also to have been appointed in respect of the regional divisions and will therefore have the same powers to investigate and to make recommendations regarding the interests of children that they enjoy in the High Court. Thus recommendations and reports of family advocates, like recommendations of social workers, operate in the context of children's court.

who feels aggrieved by the decision of the children's court may approach the High Court.

Both section 18(4)(e) of the Child Care Act and section 233(1)(c) of the Children's Act are, in my opinion, too rigid with regard to the circumstances under which a child has to consent to his/her adoption. As explained above, I believe that there should be no reference to a specific age, but that it would be more appropriate to determine the need for the child's consent in every case, based on his/her ability to understand the nature and import of consent under the specific circumstances. As a result, it cannot be said that the Children's Act is an improvement on the Child Care Act in this regard.

## **6 6 ADOPTION CONTACT**

### **6 6 1 The Child Care Act and adoption contact**

In the past, the accepted adoptive practice in most countries, including South Africa, was closed adoption, where neither biological parents nor adoptive parents were permitted access to any information about each other, and the biological origins of the adopted child were kept from him/her, even after adulthood.<sup>257</sup> If an intercultural adoption had taken place, this would have meant that the child's biological culture/cultural background was kept from him/her after

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<sup>257</sup> Louw 2003 *De Jure* 253-254.

the adoption, and the child would have been denied the opportunity to learn about his/her biological culture. If the adoption was interracial, there would usually have been a definite and obvious difference in appearance between the child and the adoptive parents. This, in my view, would have created tremendous confusion for the child. Even though he/she would have been aware of the obvious difference in appearance between him/her and the adoptive parents and the fact that they could not be biologically related, the child's biological origins were not known by the child and even if the adoptive parents wanted to, they probably would not have been able to provide him/her with information about his/her biological background.<sup>258</sup> The child would have been denied the opportunity to learn about his/her cultural and racial background. The child's knowledge that he/she is for instance black while the adoptive parents are white would not have assisted with establishing the biological culture of the child because, as I have argued,<sup>259</sup> there is no such thing as a "black culture" or a "white culture". In South Africa, the provisions of section 20 of the Child Care Act, which create the legal fiction that an adopted child is the child of the adoptive parents,<sup>260</sup> are probably at least partly to blame for this situation.

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<sup>258</sup> In the next paragraph I explain that access to adoption records is extremely difficult in terms of the Child Care Act.

<sup>259</sup> See "5 3 2 Making a distinction".

<sup>260</sup> S 20: "(1) An order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent ... immediately prior to such adoption, and that parent's relatives.

(2) An adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage."

The Child Care Act further severely limits access to adoption records.<sup>261</sup> Access to adoption records in South Africa can only be obtained by the adoptive parent from the date on which the adopted child reaches the age of 18 years,<sup>262</sup> or by the adopted child from the date on which he/she reaches the age of 21 years.<sup>263</sup> It is therefore not easy for an adoptive parent or an adopted child to obtain information about the biological parents/family of the child. This situation seriously hampers the chances of maintaining contact between the child and the biological parents/family. Where an adopted child is not able to obtain any information about his/her biological background and parents/family, it also prevents him/her from obtaining any information about his/her cultural background.

## **6 6 2 The Children's Act and adoption contact**

When the relevant part of the Children's Act comes into effect, it will do away with the artificial situation that was created by section 20(2) the Child Care Act. In terms of section 242(3) of the Children's Act, the child will no longer be regarded

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<sup>261</sup> The circumstances under which access to these records can be obtained are discussed under “4 4 2 3 *South African law and open adoption*”.

<sup>262</sup> GG 10546 of 12 December 1986, Government Notice R 2612 reg 28(1)(a).

<sup>263</sup> GG 10546 of 12 December 1986, Government Notice R 2612 reg 28(1)(b). Although the age of majority has been lowered from 21 years to 18 years in terms of the Children's Act, Government Notice R 2612 is not linked to the age of majority, but specifically stipulates the age at which an adopted child may access adoption records as 21 years. Until such time as regulations changing this age are published, an adopted person will not be able to access adoption records until he/she reaches the age of 21 years. This situation can be detrimental to the adopted person who wishes to obtain knowledge about his/her biological background.

as if he/she was born to the adoptive parent.<sup>264</sup> Instead, an adopted child will for all purposes be regarded as the child of the adoptive parent and the adoptive parent will for all purposes be regarded as the parent of the adopted child. This more realistic situation is welcomed. By not legally terminating the relationship between the child and his/her biological parents the Children's Act, in my opinion, recognises the child's need to maintain contact with his/her biological parents and family. The legislature has taken note of the reality that biological ties cannot be severed.<sup>265</sup>

The Children's Act also recognises that a child who cannot stay in the care of a parent or family needs to maintain contact with them.<sup>266</sup> Even if it is not possible for the child to maintain contact with his/her biological parents, contact with the rest of his/her biological family is just as important. In terms of section 7(1)(f)(ii) a factor that must be taken into consideration when determining the best interests of the child is the maintenance of **a connection with** his/her family or extended family, culture or tradition where possible.<sup>267</sup> The realisation that an adopted child needs to have knowledge about and contact with his/her biological family and cultural background, will be extremely beneficial to the interculturally adopted

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<sup>264</sup> S 242: "(3) An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child."

<sup>265</sup> Also see "4 4 2 2 *Benefits of adoption contact*" and "4 4 2 3 *South African law and open adoption*".

<sup>266</sup> S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...  
(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". Also see n 91 above and the discussion under "6 3 3 2 *The Children's Act, adoption and the best interests of the child*".

<sup>267</sup> Also see "4 4 2 3 *South African law and open adoption*".

child, who now has the opportunity to learn about his/her cultural background. Furthermore, there is evidence that the relationship of the parties to an adoptive family improves where the child maintains contact with his/her biological parents/family.<sup>268</sup> It is therefore important that every effort is made for the child to have contact with his/her biological parents and/or family,<sup>269</sup> unless such contact is not in the best interests of the child.<sup>270</sup>

Difficulty in maintaining contact with the child's biological parents and/or family is no reason for contact not to take place.<sup>271</sup> In fact, section 18 of the Children's Act shifts the emphasis of the relationship between the parent and child by giving parents responsibilities towards their children.<sup>272</sup> These responsibilities include the duty to maintain contact with the child,<sup>273</sup> thus placing the responsibility of keeping contact with the child on the parent as well. An adopted child thus has the right to be cared for by the adoptive parent and to maintain contact with a biological parent and the parents, both biological and adoptive, are responsible to maintain this contact.<sup>274</sup>

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<sup>268</sup> See "4 3 ATTACHMENT AND ADOPTION".

<sup>269</sup> Again, there are many cases where the child does not have biological parents/family members or does not know who or where they are.

<sup>270</sup> This will be the case where there is, for instance, physical or emotional abuse of the child.

<sup>271</sup> S 7(1)(e) of the Children's Act. S 7: "(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely— ...

(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". Also see n 91.

<sup>272</sup> Also see n 87.

<sup>273</sup> S 18(2)(b). Also see n 87.

<sup>274</sup> In terms of s 1(1) of the Act a parent includes both a biological parent and an adoptive parent.

### **6 6 3 Post-adoption agreements**

The Children's Act introduced post-adoption agreements into our legal system. In their discussions leading up to the formulation of the Children's Act, the SA Law Commission did not recommend a legislative scheme for open adoption, but supported a system of voluntary agreements regarding openness in adoption, in other words, post-adoption agreements.<sup>275</sup> Reference was made to Western Australia, where a similar scheme exists in terms of which adoption plans are negotiated. In that state, the Adoption Act<sup>276</sup> provides that an adoption plan has to be negotiated, if possible, between the birth parents who have consented to the adoption, the prospective adoptive parents and, if the Director-General believes it to be appropriate, the child's representative.<sup>277</sup> There, the unwillingness of a party to negotiate an adoption plan may even lead to a child becoming unadoptable.<sup>278</sup> Although the Commission refers to post-adoption contact in Western Australia, the Commission's Discussion Paper does not indicate whether post-adoption contact is successful in Western Australia.

In terms of section 234 of the Children's Act, which has not yet come into operation, the biological parent or guardian and the prospective adoptive parent of the child may enter into a post-adoption agreement to provide for communication, including visitation/contact, between the child and the biological

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<sup>275</sup> SALC *Project 110* 147-152.

<sup>276</sup> Act 9 of 1994.

<sup>277</sup> S 46(1).

<sup>278</sup> S 49.

parent or guardian, and the provision of information, including medical information, about the child before an application for the adoption of the child is made.<sup>279</sup> The social worker facilitating the adoption of the child must assist the parties in preparing a post-adoption agreement and counsel them on the implications of such an agreement.<sup>280</sup> If it is in the best interests of the child, the court may confirm the post-adoption agreement,<sup>281</sup> which only takes effect if it is made an order of court.<sup>282</sup>

A post-adoption agreement could certainly serve the best interests of the child, and it could actually be indispensable to the health of the child where there is a family history of some illness or a genetic condition, for example, that could affect the child or be life threatening. Although post-adoption agreements are, in terms of the Children's Act, not compulsory, I have a concern about these agreements.

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<sup>279</sup> S 234: “(1) The parent or guardian of a child may, before an application for the adoption of a child is made in terms of section 239, enter into a post-adoption agreement with a prospective adoptive parent of that child to provide for—  
(a) communication, including visitation between the child and the parent or guardian concerned and such other person as may be stipulated in the agreement; and  
(b) the provision of information, including medical information, about the child, after the application for adoption is granted.  
(2) An agreement contemplated in subsection (1) may not be entered into without the consent of the child if the child is of an age, maturity and stage of development to understand the implications of such agreement.  
(3) The adoption social worker facilitating the adoption of the child must assist the parties in preparing a post-adoption agreement and counsel them on the implications of such an agreement.  
(4) A court may, when granting an application in terms of section 239 for the adoption of the child, confirm a post-adoption agreement if it is in the best interests of the child.  
(5) A post-adoption agreement must be in the prescribed format.  
(6) A post-adoption agreement—  
(a) takes effect only if made an order of court;  
(b) may be amended or terminated only by an order of court on application—  
(i) by a party to the agreement; or  
(ii) by the adopted child.”

<sup>280</sup> S 234(3). Again, the social worker will need to be trained properly to do this.

<sup>281</sup> S 234(4). Also see “4 4 2 3 *South African law and open adoption*”.

<sup>282</sup> S 234(6)(a).

Will the willingness of a party (specifically the prospective adoptive parent) to enter into a post-adoption agreement be taken into account when an adoption application is considered? Could the refusal or unwillingness by someone to enter into such an agreement be construed as evidence that the person does not have the best interests of the child at heart? What might happen is that someone who does not want to participate in such an agreement, might feel pressurised into a post-adoption agreement, which, of course, may not necessarily be in the best interests of the child.

Post-adoption agreements, if properly monitored, can contribute greatly to the best interests of the child, and could be of tremendous importance for the interculturally adopted child who could be enabled to keep contact with and have knowledge of his/her cultural background. I have already pointed out the importance of contact between the adopted child and his/her biological parents/family.<sup>283</sup> However, if these agreements are not properly monitored, they could actually work against the best interests of the child. As I have explained, a party to an adoption who agrees to a post-adoption agreement because of pressure or guilt or for whatever reason other than the belief that such an agreement is in the best interests of the child, may come to resent the other parties to this agreement. Perhaps this aspect of openness in adoption needs more time and attention.<sup>284</sup>

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<sup>283</sup> See "4 4 2 Open adoption".

<sup>284</sup> This is also the view of Louw 2003 *De Jure* 277.

Whereas adoption in terms of the Child Care Act created the artificial situation where the child was considered as if born to the adoptive parents<sup>285</sup> and access to the adoption records of the child was restricted,<sup>286</sup> the Children's Act emphasises the importance of contact between the adopted child and his/her biological family.<sup>287</sup> The Children's Act supports openness in adoption, something which has been found to be in the best interests of the child.<sup>288</sup> Although I voiced my concern about the implementation of post-adoption agreements and the willingness of parties to enter into such an agreement, the provisions in the Children's Act are welcomed.

#### **6 6 4 Customary law and adoption contact**

Although the system is certainly not without its faults, customary adoption can serve as an example of how adoption contact can be in the best interests of the child. As I have already indicated,<sup>289</sup> the aim of adoption in customary law is adult-centered. However, with customary adoption there is ongoing contact between the child and the biological family, even after the adoption. The solution to the problems in customary adoption is, I believe, to apply the principles of adoption contact in customary law, but to do it in a more formalised way, by including the customary adoption principles in statutory adoption and by involving a social worker who will monitor the adoption and who will protect the interests of

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<sup>285</sup> S 20(2).

<sup>286</sup> See "6 6 1 The Child Care Act and adoption contact".

<sup>287</sup> See "6 6 2 The Children's Act and adoption contact" and "6 6 3 Post-adoption agreements".

<sup>288</sup> See "4 4 OPEN VERSUS CLOSED ADOPTION".

<sup>289</sup> See "4 4 1 Introduction".

the child. In this way, there will be one procedure that will regulate adoption in South Africa, which will be in the best interests of the child.<sup>290</sup>

## **6 7 CULTURAL ASPECTS**

### **6 7 1 The Child Care Act, adoption and culture**

The need for a child to maintain a connection with the culture of his/her biological parents and family has been discussed at length in this thesis.<sup>291</sup> The importance of culture must not be overlooked, but at the same time culture, in isolation, should never be considered more important than the best interests of the child, viewed holistically. The Child Care Act places tremendous emphasis on the role of culture in an adoption.<sup>292</sup> Section 18(3) compels a children's court to which an application for an adoption order is made to have regard to the matters mentioned in section 40 of the Act.<sup>293</sup> Section 40 provides that regard must be had to the religious and cultural background of the child and his or her parents as against that of the person in or to whose custody the child is to be placed or transferred. Section 40 thus isolates and emphasises two particular factors that need to be considered before an adoption takes place. The emphasis that is

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<sup>290</sup> Also see "9 CONCLUSION". My suggestion is that the principles of customary adoption should be incorporated into legislative adoption.

<sup>291</sup> See "5 RACE VERSUS CULTURE".

<sup>292</sup> See also "5 1 INTRODUCTION".

<sup>293</sup> S 40: "... 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."  
S 18: "(3) In considering any such application the children's court shall have regard to the matters mentioned in section 40."

placed on these two factors creates the impression that they are somehow more important than other relevant factors when an adoption is considered. The emphasis on cultural background and the impression that cultural differences are particularly important have resulted in strong opposition to intercultural adoption — sometimes without proper consideration being given to the best interests of the child.<sup>294</sup>

### **6 7 2 The Children's Act, adoption and culture**

As appears, inter alia, from comparing section 18 of the Child Care Act to section 240(1)(a) of the Children's Act, the role of culture is far more balanced in the Children's Act than in the Child Care Act.<sup>295</sup> Section 240(1)(a) of the Children's Act, which is not yet in operation, provides that the court considering the adoption of a child must take into account **all** relevant factors, including the religious and cultural background of the child, the child's parents and the prospective adoptive parents.<sup>296</sup> The difference in emphasis and formulation reflect the reality (which is not evident in the Child Care Act) that there are other factors besides religion and culture which are relevant in the case of an adoption and which should be taken

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<sup>294</sup> See further “5 6 3 1 *Cultural issues as a factor*” where I explained that this requirement actually works against the best interests of the child.

<sup>295</sup> S 240: “(1) When considering an application for the adoption of a child, the court must take into account all relevant factors, including—  
(a) the religious and cultural background of—  
    (i) the child;  
    (ii) the child's parent; and  
    (iii) the prospective adoptive parent;  
(b) all reasonable preferences expressed by a parent and stated in the consent; and  
(c) a report contemplated in section 239(1)(b).”

<sup>296</sup> Also see “4 1 INTRODUCTION”.

into account. The inclusion in the Act of a reference to “all relevant factors” is welcomed, and will hopefully mean that less emphasis will in future be placed on religion and culture and more emphasis on the best interests of the child as a whole, which could of course include taking religion and culture into account.

However, the specific references to religion and culture in section 240(1)(a) still create the impression that those two factors are particularly important. That religion and culture have to be included as relevant factors when considering an application for adoption goes without saying. The wording of the section which stipulates that the court must take into account **all** relevant factors **including** religious and cultural background indicates that there are other relevant factors too. Specifically mentioning these two factors however creates the impression that the two factors that are mentioned by name (ie religion and culture) are, or may be considered, “more relevant” than other relevant factors such as age, language, etcetera. In other words, the section creates the impression that there is a hierarchy of relevant factors, with religion and culture being in the top position. It would have been preferable for the legislature to merely state that all relevant factors have to be taken into account, and left it to the court to consider all the factors that are listed in section 7 of the Act and to decide which of them are relevant in the particular case and how much weight should be attached to each of the relevant factors. If, for instance, a baby is adopted, culture should not be considered very important in the decision about the adoption of the child,

because the child has not yet formed an attachment with any culture.<sup>297</sup> However, if an older child has formed ties with a specific culture, culture might be considered important in deciding whether or not to allow an intercultural adoption.<sup>298</sup>

In terms of section 231(3), an adoption worker **may** take the cultural diversity of the child and the prospective adoptive parent into account in the assessment of the prospective adoptive parent.<sup>299</sup> This subsection does not pertain to the applicant's eligibility to adopt.<sup>300</sup> It is confirmation that culture does not **have** to be taken into account. It **may** be taken into account.<sup>301</sup> In other words, cultural difference does not automatically exclude an applicant as a possible adoptive parent. Where the prospective adoptive parent and the child have different cultural backgrounds, this is a factor that the social worker may consider. As mentioned above,<sup>302</sup> if there is a prospective adoptive parent with a similar background to the child who is suitable, the "mild preference" rule may be applied, and he/she may be deemed more appropriate to adopt the child than another prospective adoptive parent who, although suitable, has a different cultural background to the child. Thus, difference in culture is not a bar to

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<sup>297</sup> This does not mean that the cultural background of the child is not important or should not be maintained. It simply should not be particularly important when the decision about the adoption is taken.

<sup>298</sup> See "5 4 2 Culture and the child".

<sup>299</sup> S 231: "(3) In the assessment of a prospective adoptive parent, an adoption social worker may take the cultural and community diversity of the adoptable child and prospective adoptive parent into consideration."

<sup>300</sup> Mosikatsana & Loffell in Davel & Skelton *Commentary on the Children's Act* 15-8.

<sup>301</sup> Whether culture will be taken into account, will obviously depend on the circumstances of the case.

<sup>302</sup> See "5 3 2 Making a distinction".

adoption, but it may be taken into account. It is important that the adoption social worker has to be trained to understand this difference. Knowledge of this difference is essential for the proper application of this section by social workers dealing with intercultural adoptions.

Section 229 of the Children's Act sets out the purposes of adoption, namely, to protect and nurture children by providing a safe, healthy environment with positive support<sup>303</sup> and to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.<sup>304</sup> When the intention to introduce the Children's Bill in Parliament was published in 2003 by the Minister of Social Development<sup>305</sup> section 229 (which was then clause 229) contained three subsections. Subsections (a) and (b) were exactly the same as they are in the Children's Act. Subsection (c), which was removed before the reintroduction of the Bill as a section 75 Bill, read as follows:

The purposes of adoption are to— ...

(c) respect the individual and family by demonstrating respect for cultural, ethnic and community diversity.

The purposes in section 229 are listed as equal. There is no indication that one has to receive preference over the others. The removal of subsection (c) before

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<sup>303</sup> S 229(a).

<sup>304</sup> S 229(b).

<sup>305</sup> GG 25346 of 13 August 2003, General Notice 2200.

the resubmission of the Bill and the eventual enactment of the Act, in my view, leads to a very important conclusion, namely, that the legislature was wary of placing too much emphasis on culture. This is further confirmation that culture, although important, should not carry more weight than other factors that could influence the best interests of the child. It is my belief that the legislature removed respect for cultural, ethnic and community diversity from this section precisely because the goals of protecting and nurturing the child<sup>306</sup> and of promoting the goals of permanency planning<sup>307</sup> are more important than protecting culture.

Even though I have some objections to and reservations about the listing in section 240(1)(a) of religion and culture, I am of the opinion that, overall, the Children's Act is a huge improvement on the Child Care Act as far as the role of culture in the adoption process is concerned.

## **6 8 CUSTOMARY LAW, ADOPTION AND THE BEST INTERESTS OF THE CHILD**

Although the discussion in this chapter focuses on statutory adoption law, some reference to customary law is needed. Adoption in customary law is usually about the needs of the family head, who usually adopts a boy to be his heir. The focus is on the adult, and there is no express protection for or acknowledgement of the

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<sup>306</sup> S 229(a).

<sup>307</sup> S 229(b).

best interests of the child.<sup>308</sup> Having established that the legislature in the Children's Act has given more recognition, not less, to the rights and interests of the child, it seems that customary adoptions do not comply with current trends, both local and international, about the rights of children in the context of adoption.

However, in the Children's Act the legislature recognised the need to accommodate some customary-law principles and the values of all population groups. Thus, in section 1(1) "family member" is defined in broad terms to include "a grandparent, brother, sister, uncle, aunt or cousin" of the child, and in section 7(1)(f) recognition is given to the extended family.<sup>309</sup> In terms of section 231(1)(a) "persons sharing a common household and forming a permanent family unit" are allowed to adopt a child. This subsection was included to allow for joint adoption by, for instance, a husband and all his wives (the kraal) in a customary-law setting.<sup>310</sup> I believe that the inclusion of these provisions is an attempt by the legislature to make provision within the Act for statutory adoptions that would be in line with customary principles and values. The inclusion of customary-law principles and values into the Act enables more people to comply with the requirements for a statutory adoption, while simultaneously protecting the best interests of the child. As I shall argue in the conclusion of this thesis, there should always be allowance for the customary practices that are part of our indigenous law, but if these practices do not take proper account of the best interests of the

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<sup>308</sup> Bennett *Customary Law in SA* 319. See "2 4 2 2 *Development of adoption in customary law*", where customary adoption is discussed.

<sup>309</sup> See "6 2 3 *The Children's Act and growing up in a family environment*" above.

<sup>310</sup> SALC *Report on Project 110* 235-236.

child they should be reformed in order to give effect to the constitutional provision that the child's best interests are paramount.<sup>311</sup>

## **6 9 CONCLUSION**

Although both the Child Care Act and the Children's Act serve the best interests of the child to some extent, neither of these Acts, in the context of intercultural adoption, provides complete protection of the best interests of the child. There are issues in both Acts that deserve attention. However, as the Child Care Act will soon be replaced *in toto* by the Children's Act, it is unlikely that the Child Care Act will be amended again.

The Children's Act, when implemented, will greatly improve the position of the child in general and specifically of the child who is involved in an intercultural adoption. As appears above in this chapter,<sup>312</sup> there is much more emphasis on the best interests of the child in the Children's Act, which is of course welcomed. Furthermore, the approach to culture in the adoption process is far more balanced than it is under the Child Care Act.<sup>313</sup> Therefore, the full implementation of the Children's Act is eagerly awaited. I trust that those aspects that could prove to be problematic or deserve further attention will be adequately addressed

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<sup>311</sup> Constitution s 28(2). Also see "9 CONCLUSION".

<sup>312</sup> See "6 3 THE BEST INTERESTS OF THE CHILD".

<sup>313</sup> See "6 7 CULTURAL ASPECTS".

by the courts when they arise, should the legislature not address them in the near future.

This chapter concludes the discussion of the South African position with regard to the intercultural adoption of children and the protection of their best interests. The following two chapters will focus on intercultural adoption in Botswana and New Zealand.

## 7 ADOPTION IN NEW ZEALAND

<b>7 1 INTRODUCTION</b> .....	322
<b>7 2 LEGISLATION</b> .....	323
<b>7 2 1 <i>Adoption of Children Act 9 of 1881</i></b> .....	323
<b>7 2 2 <i>Adoption of Children Act 8 of 1895</i></b> .....	326
<b>7 2 3 <i>Infants Act 86 of 1908</i></b> .....	326
<b>7 2 4 <i>Maori Land Act 15 of 1909 and the Maori Affairs Act</i></b> <b>94 of 1953</b> .....	327
<b>7 2 5 <i>Adoption Act 93 of 1955</i></b> .....	328
<b>7 2 6 <i>Children, Young Persons, and their Families Act</i></b> <b>24 of 1989</b> .....	333
<b>7 2 7 United Nations Convention on the Rights of the Child</b> .....	338
<b>7 3 RACE AND CULTURE IN NEW ZEALAND ADOPTION LAW</b> .....	339
<b>7 4 THE ROLE OF THE CHILD'S BEST INTERESTS IN NEW</b> <b>ZEALAND ADOPTION LAW</b> .....	345
<b>7 4 1 Introduction</b> .....	345
<b>7 4 2 The welfare and interests of the child</b> .....	347
<b>7 4 2 1 <i>Determining welfare and interests</i></b> .....	347
<b>7 4 2 2 <i>Factors to be taken into account</i></b> .....	350
<b>7 4 2 3 <i>Is adoption still valid?</i></b> .....	355
<b>7 4 3 Open versus closed adoption</b> .....	357
<b>7 5 FUTURE REFORM OF NEW ZEALAND ADOPTION LAW</b> .....	362
<b>7 5 1 Introduction</b> .....	362
<b>7 5 2 Reform proposals</b> .....	365

## 7 1 INTRODUCTION

Because the situation in South Africa is so different from that of most countries,<sup>1</sup> it is important when analysing the adoption procedures in other countries to try to find a country with similar circumstances. Like South Africa, New Zealand is a multicultural society.<sup>2</sup> The people of New Zealand are mainly European and Maori. Maori people<sup>3</sup> are an integral part of the wider New Zealand society,<sup>4</sup> which creates a challenge when formulating and administering family law in such a way that it guarantees all citizens equal consideration and respect for their cultural views and practices.<sup>5</sup> There are racial differences as well as cultural ones, and the issues that arise in New Zealand when it comes to interracial and intercultural adoption are probably similar to those that we face in South Africa. As is the case in South Africa in respect of the black perspective,<sup>6</sup> there has been criticism in New Zealand from the Maori perspective of the way in which the current adoption legislation is formulated,<sup>7</sup> and much of the reform suggestions

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<sup>1</sup> See “1 1 INTRODUCTION”.

<sup>2</sup> NZLC *Preliminary Paper* 38 5. Robinson also suggests this in his discussion of New Zealand culture and family law in Robinson 1996 *Stell LR* 210.

<sup>3</sup> S 2 of the *Maori Affairs Act* 94 of 1953 defined a Maori as “a person belonging to the aboriginal race of New Zealand; and includes a half-caste and a person intermediate in blood between half-castes and persons of pure descent from that race”. This definition was replaced by the definition in s 4 of the *Te Ture Whenua Maori Act* 4 of 1993, which defines a Maori as “a person of the Maori race of New Zealand, and includes a descendant of any such person”. The *Maori Affairs Act* was replaced by the *Te Ture Whenua Maori Act*, which came into force on 1 July 1993.

<sup>4</sup> Cultural beliefs are very strong among the Maori people. In New Zealand, Maoris are in the minority. In South Africa the situation is different, because people of European descent are in the minority. Also see “1 1 RESEARCH PROBLEM”.

<sup>5</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 42.

<sup>6</sup> See “5 RACE VERSUS CULTURE”.

<sup>7</sup> See “7 2 5 Adoption Act 93 of 1955”, where it is suggested that the *Adoption Act of 1955* rejects Maori customs and beliefs. Once again, it has to be remembered that the circumstances in South Africa are different to those in New Zealand, as Maoris are in the minority in New Zealand, whereas in South Africa, blacks are in the majority.

for adoption in New Zealand involve more awareness of Maori culture.<sup>8</sup> Another reason for selecting New Zealand for comparative purposes is that the Bill which preceded the Adoption of Children Act<sup>9</sup> in South Africa was modelled on the *Infants Act*<sup>10</sup> of New Zealand. Furthermore, socio-economic circumstances in New Zealand and South Africa are similar.<sup>11</sup>

## 7 2 LEGISLATION

### 7 2 1 Adoption of Children Act 9 of 1881

Before the promulgation of the *Adoption of Children Act*<sup>12</sup> adoption was as common in New Zealand as it was in other countries, but it was not formally governed by means of legislation. This was the case for both Europeans<sup>13</sup> and Maoris.<sup>14</sup> These adoptions had no secure legal foundation.<sup>15</sup> Children were cared for by foster parents who agreed to receive and raise them as members of their family,<sup>16</sup> and Maori adoptions arranged by *whanau*<sup>17</sup> were open, based on long-

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<sup>8</sup> See “7 5 FUTURE REFORM OF NEW ZEALAND ADOPTION LAW”.

<sup>9</sup> Act 25 of 1923.

<sup>10</sup> Act 86 of 1908. See also “2 4 3 1 Introduction” above.

<sup>11</sup> Kruger 2005 *CILSA* 246.

<sup>12</sup> Hereafter referred to as the *Adoption Act of 1881*. This Act came about as a result of the initiative of GM Waterhouse, at the time a private member of Parliament.

<sup>13</sup> Campbell *Law of Adoption in NZ* 1.

<sup>14</sup> Campbell *Law of Adoption in NZ* 68.

<sup>15</sup> Griffith *NZ adoption resource vol 1* 227.

<sup>16</sup> Campbell *Law of Adoption in NZ* 1.

<sup>17</sup> This term is defined under “7 2 5 *Adoption Act* 93 of 1955”.

standing Maori custom.<sup>18</sup> Any adoption agreement dispute had to be dealt with under common law.<sup>19</sup>

Even after the introduction of legislation, Maoris wishing to adopt continued to have a choice to use customary adoption.<sup>20</sup> In 1901, while the practice of customary adoption was still permitted, it became essential to register the adoption in order for a claim to the estate of any Maori who died after 31 March 1902 to be recognised.<sup>21</sup>

In 1881, New Zealand became the first British community to introduce adoption legislation.<sup>22</sup> This followed the recognition that informal adoption, described by Campbell<sup>23</sup> as a “system of voluntary guardianship”, was already taking place. The *Adoption Act of 1881* was a very short and basic Act.<sup>24</sup> There was no reference to race or culture, and no restrictions with regard to adoption of this nature.<sup>25</sup> The Act thus applied to everyone, and Maoris could adopt a child, both Pakeha (European) and Maori, under the provisions of this Act in the same way

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<sup>18</sup> Griffith *NZ adoption resource vol 1* 227.

<sup>19</sup> Griffith *NZ adoption resource vol 1* 227.

<sup>20</sup> Campbell *Law of Adoption in NZ* 68.

<sup>21</sup> S 50 of the *Native Land Claims Adjustment and Laws Amendment Act* 65 of 1901.

<sup>22</sup> Else *A Question of Adoption* x. The *Adoption Act of 1881* came into effect on 19 September 1881.

<sup>23</sup> *Law of adoption in NZ* 1.

<sup>24</sup> The Act consisted of only 11 sections.

<sup>25</sup> See “2 4 3 2 *Adoption of Children Act 25 of 1923*”. As I argued there, this was possibly not because the legislature was in favour of such adoptions, but rather because the legislature did not consider the possibility of such adoptions taking place. The only reference in this Act that possibly has a cultural link is in s 8 where provision is made for the adoption of deserted children by benevolent institutions if the child is of the same religious denomination as that of the institution. This is a strange section, as the religious denomination of a very young deserted child will surely not be known.

that a European could.<sup>26</sup> Maoris wishing to adopt thus had a choice between customary Maori placement or European adoption via the courts.<sup>27</sup> The important difference between European adoption and Maori adoption is that Maori culture sees the child as belonging to the larger family (the *whanau*, *hapu* and *iwi*), rather than to the parents.<sup>28</sup>

Even though there was certainly not much focus on the rights of children as long ago as 1881, this Act did recognise the interests of the child.<sup>29</sup> To illustrate this: a district judge could make an order authorising an adoption when certain circumstances had been met, one of these being that “the interests of such a child will be promoted by the adoption”. The adopted child retained his/her biological name in addition to the name of the adoptive parent(s)<sup>30</sup> and there was no restriction on contact or the passing of information between the child,<sup>31</sup> the biological family, and the adoptive family. This creates the impression that open adoption existed in the first adoption legislation. Unfortunately this changed, and open adoption is currently a very sensitive and contentious issue.<sup>32</sup>

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<sup>26</sup> Campbell *Law of Adoption in NZ* 68.

<sup>27</sup> *Native Rights Act* 11 of 1865.

<sup>28</sup> Else 1987 *International Journal of the Sociology of Law* 241.

<sup>29</sup> S 3.

<sup>30</sup> S 10.

<sup>31</sup> A child was defined in s 2 as a boy or a girl under the age of 12 years.

<sup>32</sup> See the discussion below under “7 4 3 Open versus closed adoption”.

### 7 2 2 *Adoption of Children Act 8 of 1895*

The *Adoption Act of 1881* was later replaced by the *Adoption of Children Act*.<sup>33</sup> Insofar as the topic of this thesis is concerned, the Act did not differ significantly from the *Adoption Act of 1881*. Just like the previous Act, there were no legislative restrictions regarding race and culture in adoption procedures.<sup>34</sup> In terms of the *Adoption Act of 1895* a Maori could still adopt any child, whether Maori or European, and *vice versa*. The requirement about the interests of the child was extended though, so that it was required that “the welfare and interests of the child will be promoted by the adoption”.<sup>35</sup> That the welfare and interests of a child were important was further illustrated by the fact that the legislature for the first time included a requirement that the child, if over the age of 12 years, had to consent to the adoption.

### 7 2 3 *Infants Act 86 of 1908*

The *Adoption Act of 1895* was consolidated as Part III of the *Infants Act*,<sup>36</sup> which was very similar to the *Adoption Act of 1895*. With regard to Maori adoptions, the same principles applied as in the two preceding Acts. The new Act did, however, include a section<sup>37</sup> which indicated the circumstances in which the consent of

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<sup>33</sup> Hereafter the *Adoption Act of 1895*. It came into effect on 20 August 1895.

<sup>34</sup> The adoption of a deserted child with the same religious denomination as a benevolent institution was still possible in term of s 10 – see n 25.

<sup>35</sup> S 5(3). See my discussion below under “7 4 2 The welfare and interests of the child” about the meaning of “welfare” and “interests”.

<sup>36</sup> Act 86 of 1908. Ss 15-26 dealt with adoption.

<sup>37</sup> S 23.

parents could be dispensed with, which had not formed part of the previous legislation. On the other hand, the sections in the *Adoption Act of 1895*<sup>38</sup> and the *Adoption Act of 1881*<sup>39</sup> which conferred the name of the adoptive parent on the adopted child were not included in the *Infants Act*. Furthermore, it was required that a judge had to be satisfied that a child, if over the age of 12 years, had consented to an adoption before an adoption order could be made.<sup>40</sup>

#### **7 2 4 Maori Land Act 15 of 1909 and the Maori Affairs Act 94 of 1953**

After the commencement of the *Maori Land Act*<sup>41</sup> customary adoptions by Maoris were no longer recognised, unless they were registered before the commencement of the Act.<sup>42</sup> It was no longer lawful to make an order under the *Infants Act* for adoption of a child by a Maori,<sup>43</sup> and these adoptions had no legal force or effect.<sup>44</sup> An important change that was implemented by the *Maori Land Act* was that Maoris could no longer adopt non-Maori children. Maoris could only adopt a Maori or a descendant of a Maori.<sup>45</sup> In contrast, adoptions by Europeans were still regulated by Part III of the *Infants Act*, which meant that a Maori child could still be adopted by a European adoptive parent. This provision stayed in

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<sup>38</sup> S 12.

<sup>39</sup> S 10.

<sup>40</sup> S 18(1)(d).

<sup>41</sup> Also referred to as the *Native Land Act*. This Act came into effect on 31 March 1910.

<sup>42</sup> S 161.

<sup>43</sup> S 81(1). This prohibition of customary adoptions is continued by s 19 of the *Adoption Act of 1955*. This Act is discussed below under “7 2 5 *Adoption Act 93 of 1955*”.

<sup>44</sup> S 80(1).

<sup>45</sup> S 164.

force until 1955, when the *Adoption Act of 1955*<sup>46</sup> was enacted. The *Adoption Act of 1955* is discussed under the next heading below.

In terms of the *Maori Affairs Act*<sup>47</sup> jurisdiction to make orders of adoption in favour of Maoris was conferred on the Maori Land Court.<sup>48</sup> Furthermore, an order of adoption could not be made under the *Maori Affairs Act* in respect of any child other than a Maori child or a descendant of a Maori child.<sup>49</sup> The reason for the inclusion of this section was unclear, but the ban on interracial adoption by Maoris remained in force until 1955.<sup>50</sup>

### **7 2 5 Adoption Act 93 of 1955**

The *Adoption Act*,<sup>51</sup> which repealed the *Infants Act* as well as part IX of the *Maori Affairs Act*,<sup>52</sup> thus making the same rules applicable to both European and Maori adoptions, currently regulates adoption in New Zealand. Section 18 of the *Adoption Act of 1955* provides that the Act applies to all New Zealanders, as “[a]n adoption order may be made under this Act on the application of any person,

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<sup>46</sup> See n 51.

<sup>47</sup> Act 94 of 1953. Part IX “Adoption of children by Maoris” (ss 80 – 90) of this Act covered adoption. The Act was a continuation of the system introduced by the *Maori Land Act*.

<sup>48</sup> S 81(1).

<sup>49</sup> S 81(2) of Part IX, Adoption of Children by Natives.

<sup>50</sup> Else *A Question of Adoption* 179. This was until the *Adoption Act of 1955* was legislated.

<sup>51</sup> Hereafter the *Adoption Act of 1955*. It came into effect on 27 October 1955.

<sup>52</sup> Although s 19(2) of the *Adoption Act of 1955* provides that an adoption in accordance with Maori custom that was made and registered in the Maori Land Court before 31 March 1910 has the same force and effect as if it were lawfully made by an adoption order under Part IX of the *Native Land Act* this is, today, of purely academic value.

whether a Maori or not, in respect of any child, whether a Maori or not”.<sup>53</sup> As discussed under “5 2 4 *Maori Land Act* 15 of 1909 and the *Maori Affairs Act* 94 of 1953”, both the *Maori Land Act* and the *Maori Affairs Act* only outlawed adoption of European children by Maoris, and not the other way around. Although it is undoubtedly a positive feature that the ban on Maori adopting Pakeha children has been repealed,<sup>54</sup> the repeal raises some serious and complicated issues. On the one hand, it could be argued that the passing of the *Adoption Act of 1955*<sup>55</sup> is a positive step which consolidates and amends the legislation relating to adoption by applying the same body of rules to both European and Maori adoptions. On the other hand, it could also be argued that this Act brings to an end a period of cultural awareness as far as adoption is concerned. It has been said that the Act rejects Maori beliefs and customs,<sup>56</sup> and brings Maori adoptions under virtually the same provisions as Pakeha ones. In other words, the Act creates much greater changes for Maori than for Pakeha. The customs and beliefs of the Maori people are ignored, and this may be seen as pressure on Maori people to abandon their customs and beliefs.<sup>57</sup> The Maoris, for example, give preference to relatives as adoptive parents,<sup>58</sup> whereas the *Adoption Act of 1955* barely acknowledges the possibility of preference being afforded to relatives.<sup>59</sup> Else

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<sup>53</sup> See also Campbell *Law of Adoption in NZ* 15.

<sup>54</sup> Interestingly, the *Native Land Act* only outlawed adoption of European children by Maoris, and not the other way around as well.

<sup>55</sup> It repealed Part IX of the *Maori Affairs Act*, which regulated Maori adoptions.

<sup>56</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 47.

<sup>57</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 48.

<sup>58</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 61. This is discussed in more detail below under this heading.

<sup>59</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 61.

says ignoring the customs and beliefs of Maori people makes no sense in the Maori context.<sup>60</sup>

In a 1962 amendment of the *Adoption Act of 1955*<sup>61</sup> the last remaining aspect of customary adoption was terminated. The government decided to end the jurisdiction of the Maori Land Court in respect of adoption, so that Magistrates' Courts henceforth dealt with all adoptions.<sup>62</sup> The stated aim of the amendment was to "do away with one or more of the provisions that differentiate between Maoris and other New Zealanders ... [T]he Maori people are ... better equipped to deal with the normal Courts and their attitude toward adoption has come more closely into line with that of the rest of the community".<sup>63</sup> This statement is debatable, to say the least. The problem is that there is a fundamental difference in the way in which Maori tradition and the law define the concept of adoption. In legislation, adoption is distinguished from fostering, where a child is placed temporarily in the custody and care of an adult or adults other than his/her biological parent(s).<sup>64</sup> The principle in the *Adoption Act of 1955* is that adoption replaces one set of parents with another. According to the Act it is as if the child was born to the adoptive parent(s) in lawful wedlock,<sup>65</sup> extinguishing the child's legal connection with his/her biological parents. The adopted child ceases to be

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<sup>60</sup> Else *A Question of Adoption* 180.

<sup>61</sup> S 2(c) of the *Adoption Amendment Act* 134 of 1962 repealed the definition of the term "court" and substituted it with the definition "a Magistrate's Court of civil jurisdiction". This Act came into effect on 1 April 1963.

<sup>62</sup> In 1980 Magistrate's Courts were replaced by District Courts (s 3(1) of the *District Courts Amendment Act* 125 of 1979), which came into effect on 1 April 1980.

<sup>63</sup> *New Zealand Parliamentary Debates*, 1962, 330 at 609, as quoted in Else *A Question of Adoption* 181.

<sup>64</sup> S 11 of the *Guardianship Act* 63 of 1968.

<sup>65</sup> S 16(2)(a).

the child of his biological parents.<sup>66</sup> In contrast, Maori do not approve of the complete severance of relations between the child and his/her biological parents.<sup>67</sup> According to Maori tradition, children belong not only to their parents but also to the extended family.<sup>68</sup> This extended family forms the basic family structure in Maori custom<sup>69</sup> and is called the *whanau* (a group of relatives defined by reference to a recent ancestor, comprising several generations, several nuclear families and several households, and having a degree of ongoing corporate life focused in group symbols such as a name).<sup>70</sup> When it is fully functional, its members are bound to each other by ties of loyalty as well as affection.<sup>71</sup> Then there is the *hapu* (the middle tier in a hierarchy of groups organised on the basis of descent, each of which is made up of several associated *whanau*) and *iwi* (the top tier of the hierarchy of groups, each made up of several related *hapu*),<sup>72</sup> and the members of both of these tiers are to be treated with respect, love, and care by all members of the group.<sup>73</sup> The *whanau*, *hapu* and *iwi* have a major say in the welfare of the child, and their views may take preference over the views of the child's biological or adoptive parents.<sup>74</sup> Maori give members of their *whanau* a child to raise as their own.<sup>75</sup> Where adults other than biological parents and grandparents are the primary caregivers of a

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<sup>66</sup> S 16(2)(b).

<sup>67</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 62.

<sup>68</sup> Else 1987 *International Journal of the Sociology of Law* 241; Robinson 1996 *Stell LR* 213.

<sup>69</sup> Atkin 1988-1989 *Journal of Family Law* 232.

<sup>70</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 50.

<sup>71</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 50.

<sup>72</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 54; Kruger 2005 *CILSA* 247.

<sup>73</sup> This has not been incorporated into the *Adoption Act of 1955*, but the Department of Social Welfare made a recommendation to that effect in *Puao-Te-Ata-Tu* (Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare, 1986).

<sup>74</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 53.

<sup>75</sup> Robinson 1996 *Stell LR* 214.

child for any significant period, this system of caring for children has been equated with guardianship. The term that is used in a situation like this is *whangai*, and is often referred to as “Maori customary adoption”.<sup>76</sup>

I believe that it is important to have one single adoption Act which regulates adoption in a country, but this Act must be sensitive to all people living in that country.<sup>77</sup> As discussed above, it is clear that current adoption legislation<sup>78</sup> focuses on the traditional nuclear family, and does not take account of other cultures in New Zealand. It does not end with this, though. Taking other cultures into account again creates other problems. It has been said<sup>79</sup> that adoption by near relatives ends the child’s legal relations with either the maternal or the paternal side of the family, and to an extent distorts the relationship on the side within which the adoption takes place.<sup>80</sup> This statement puts the complexity of the problem into perspective. Although there is a lot of merit in the way Maori tradition deals with adoption, it does incur its own problems. When relatives become the adoptive parents, as is preferred in Maori culture, this could create problems in the relationships that the child forms with family members. To illustrate: The extended family of a child plays an important role in any child’s life. Where a child is, for instance, adopted by a sister or mother of the biological

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<sup>76</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 61; NZLC *Preliminary Paper 38* 12. The Maori term *matua whangai* means adoptive parent, and the term *tamaiti whangai* means adopted child.

<sup>77</sup> Also see my recommendations for South Africa under “6 4 1 2 *Who may adopt under the Children’s Act?*” and “9 CONCLUSION”.

<sup>78</sup> *Adoption Act of 1955*.

<sup>79</sup> In *MR v Department of Social Welfare* (1986) 4 NZFLR 326 the court quotes from “A review of the Law of Adoption” by PM Webb, a paper produced for the Justice Department in Wellington, 1979.

<sup>80</sup> At 328.

mother, this creates the situation where the relationships with the biological family, which should continue after an adoption,<sup>81</sup> change<sup>82</sup> and the child becomes an integral part of the biological mother's family. On the other hand, the child's relationship with the biological father's family remains as it was before the adoption, which naturally creates an imbalance in these relationships.

The reality is that there are children who need parents, and adoption can solve this dilemma. In my view, the *Adoption Act of 1955* needs drastic amendment, and the sooner this is seriously considered, the better. Some proposals for change have been made by the Department of Social Welfare and the Ministry of Justice, but these have not been implemented.<sup>83</sup> These proposals will be discussed under "7 5 FUTURE REFORM OF NEW ZEALAND ADOPTION LAW" below. Until such time as the current adoption legislation is revised or replaced though, the provisions of the *Adoption Act of 1955* have to be complied with. The challenge is to balance the interests of the various parties in such a way that the best interests of the child will triumph.

### **7 2 6 Children, Young Persons, and their Families Act 24 of 1989**

As a result of the *Adoption Act of 1955* a situation was created where the biological parents became legal strangers and the adoptive parents became the

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<sup>81</sup> Also see my arguments under "7 4 3 Open versus closed adoption" and "4 4 OPEN VERSUS CLOSED ADOPTION".

<sup>82</sup> In terms of s 16(2)(a) of the *Adoption Act of 1955* it is as if the child were born to the adoptive parent.

<sup>83</sup> See "7 5 2 Reform proposals" below.

adopted child's parents in all respects (as if the child had been born to them). This was based on the idea of legitimising the child by adoption, and enabling the full burden of financial and other responsibilities to pass to the adoptive parents. Statistics show, however, that the New Zealand family has been changing over the last 25 years.<sup>84</sup> The *Children, Young Persons, and their Families Act*,<sup>85</sup> which is a milestone among family statutes in New Zealand as it took the first steps towards acknowledging that a child has rights<sup>86</sup> and also recognised the diversity of family forms to be found in New Zealand,<sup>87</sup> came into effect on 1 November 1989. It is described in the heading as an Act to advance the well-being of families and the well-being of children and young persons as members of families, *whanau*, *hapu*, *iwi* and family groups. The central focus of this Act is the family, not parents.<sup>88</sup>

The *CYPF Act* provides a culturally sensitive approach<sup>89</sup> and emphasises that it is crucial for a child<sup>90</sup> to maintain contact with the family and wider family group; in other words, it focuses on the importance of the child's family or origin.<sup>91</sup> In contrast to the *Adoption Act of 1955*,<sup>92</sup> this Act not only recognises the existence of *whanau*, *hapu* and *iwi*, but also authorises their participation in decisions

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<sup>84</sup> Henaghan "Defining the family" in Henaghan & Atkin *Family Law Policy in NZ* 6.

<sup>85</sup> Act 24 of 1989, hereafter the *CYPF Act*.

<sup>86</sup> Tapp & Taylor in Henaghan & Atkin *Family Law Policy in NZ* 147.

<sup>87</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 65; Robinson 1996 *Stell LR* 215.

<sup>88</sup> Atkin 2006 *Victoria University of Wellington Law Review* 477.

<sup>89</sup> Robinson 1996 *Stell LR* 314.

<sup>90</sup> In this Act a child is a boy or girl under the age of 14 – s 2(1).

<sup>91</sup> Ss 5 and 13. See also Henaghan & Atkin in Henaghan & Atkin *Family Law Policy in NZ* v.

<sup>92</sup> See "7 2 5 *Adoption Act* 93 of 1955" above.

affecting a child or young person.<sup>93</sup> It further includes the promotion of children, young persons and their families among its objectives.<sup>94</sup>

The *CYPF Act* is the first New Zealand Act<sup>95</sup> to define the extended family under the term “family group”.<sup>96</sup> Cultural identity is an important aspect of a child’s welfare, and, according to the *CYPF Act*, it is best nurtured by the child’s placement with persons of the same race and culture as the child.<sup>97</sup> In all matters relating to this Act, the welfare and interests of the child or young person “shall be the first and paramount consideration”.<sup>98</sup> This is a recognition of children’s rights that is more in line with current trends. Section 5(a) provides that, wherever possible, “a child’s or young person’s family, *whanau*, *hapu*, *iwi*, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, *whanau*, *hapu*, *iwi*, and family group”. However, the view of the family, *whanau*, *hapu*, *iwi*, and family group is not determinative.<sup>99</sup>

When they are known, the family of a child who will be adopted can play an important role in making a decision about the prospective adoptive family. A danger is that “in listening to a family group’s input attention can become focused

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<sup>93</sup> S 5(a).

<sup>94</sup> S 4.

<sup>95</sup> Henaghan “Defining the family” in Henaghan & Atkin *Family Law Policy in NZ* 11.

<sup>96</sup> S 2(1).

<sup>97</sup> Ss 5(a) & (b) and 13. This is a very rigid approach, and not necessarily one that protects the interests of the child.

<sup>98</sup> S 6.

<sup>99</sup> Robinson 1996 *Stell LR* 319 explains that the terminology used, namely that “regard must be had”, indicates this.

on the needs and wishes of the adults and be diverted from the needs and rights of the child”.<sup>100</sup> Although not specifically enacted to deal with adoptions,<sup>101</sup> this Act has been referred to in adoption applications, as can be seen in the following examples:

- In the important case of *BP v D-GSW*<sup>102</sup> the mother of the child had chosen to have the child adopted. An appeal was launched by the maternal grandmother against the Family Court’s refusal to grant custody of her grandchild to herself. A point of appeal was that the Family Court judge was wrong to find that, if the principles of certain sections of the *CYPF Act* had been applicable, there would have been no different result.<sup>103</sup> It was argued on behalf of the appellant that if the principles of the *CYPF Act* had been applied, the child would have been placed with a member of the *whanau* rather than with strangers selected through the department.<sup>104</sup> The Full Court of the High Court found that placement of a child with the *whanau* is a desirable end, not an imposed one, and that there will be circumstances where placement within the *whanau* is inappropriate or impossible.<sup>105</sup> The court reiterated that the statutorily imposed standard in respect of adoption is the welfare of the child,<sup>106</sup> and held that the application of the *CYPF Act* would not have resulted in a

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<sup>100</sup> *In the Adoption of J* [1992] NZFLR 369 at 373.

<sup>101</sup> This was confirmed by the court in *Re Custody of C* (1993) 10 FRNZ 344 at 351-352.

<sup>102</sup> [1997] NZFLR 642.

<sup>103</sup> At 650-651.

<sup>104</sup> At 651.

<sup>105</sup> At 651.

<sup>106</sup> Although the court did not specifically indicate when the welfare of the child will be the benchmark, it is assumed that it is with respect to adoptions, as this is the relevant issue.

different outcome.<sup>107</sup>

- In *B v M*<sup>108</sup> the court held that the relevant sections in the *CYPF Act* specifically apply to care and protection and youth justice issues and have no direct application in the case of adoption. It was decided that the mother, as the child's sole guardian, had the right to make the decision to have the child adopted according to her own system of beliefs and conscience. Judge Inglis QC said<sup>109</sup> that the practical effect of an adoption outside of the *whanau* need not necessarily be to distance the adopted child from the *whanau* or to sever the child's links on a permanent basis. Noting the Maori view that an adoption simply adds people to a child's family rather than substituting one family for another, he emphasised that the bloodlines do remain after the adoption.

Care has to be taken not to attempt to apply the principles of the *CYPF Act* directly to adoption applications. The *CYPF Act* was not enacted to deal specifically with adoptions,<sup>110</sup> but to reform the law relating to children and young persons who are in need of care or protection or who offend against the law.<sup>111</sup> As this Act caters for children and young persons who are in need of care or protection, and the Preamble requires that such children should be cared for by

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<sup>107</sup> At 651.

<sup>108</sup> [1997] NZFLR 126 at 138.

<sup>109</sup> At 135.

<sup>110</sup> This was confirmed by the court in *Re Custody of C* (1993) 10 FRNZ 344 at 351-352.

<sup>111</sup> Preamble of the Act.

their own family, *whanau*, *hapu*, *iwi* or family group wherever possible,<sup>112</sup> it may therefore sometimes come into play in adoption situations, but will not necessarily be applicable. As discussed above though, current adoption legislation is not adequate to protect the interests of children. Therefore, the courts have to use what legislative provisions they have available to them. Although the object of the *CYPF Act* is to promote the well-being of children, young persons, and their families and family groups, this Act can play an important part when adoption applications are heard, as it is in line with the principles of open adoption, which I strongly support.<sup>113</sup>

### **7 2 7 United Nations Convention on the Rights of the Child**

New Zealand ratified the Convention on 6 May 1993, and therefore has to comply with the obligations the Convention imposes. The importance of the Convention has been discussed throughout this thesis,<sup>114</sup> and repeating everything under this heading serves no purpose. It is important though to bear in mind that the Convention places great emphasis on the best interests of the child.

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<sup>112</sup> Preamble, under (c).

<sup>113</sup> Open adoption is discussed under “7 4 3 Open versus closed adoption” and “4 4 OPEN VERSUS CLOSED ADOPTION”.

<sup>114</sup> See specifically “3 THE CHILD AND THE FAMILY” and “4 THE BEST INTERESTS OF THE CHILD”.

### 7 3 RACE AND CULTURE IN NEW ZEALAND ADOPTION LAW

We cannot alter or change our genetic makeup, but cultural identification depends on many variable factors and choices. As discussed in “5 2 DEFINITIONS” above, our race is determined by our ancestry, but we can choose or change our culture. It also should not be assumed that people will necessarily identify with the culture of their family.

The *Adoption Act of 1955* confirms that adoption does not affect the race of the child,<sup>115</sup> but it can of course affect the cultural awareness and values of the child. The *Adoption Act of 1955* does not refer to the relevance of culture at all. The baby’s biological parent does not legally have a say when it comes to cultural issues under the *Adoption Act of 1955*. However, when a parent or guardian consents to an adoption<sup>116</sup> or appoints the chief executive as the guardian of the child until such time as the child is legally adopted,<sup>117</sup> such consent may be subject to conditions with respect to the religious denomination and practice of the applicant(s).<sup>118</sup>

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<sup>115</sup> In terms of s 16(2)(e) of the *Adoption Act of 1955* “the adoption order shall not affect the race ... of the adopted child”.

<sup>116</sup> In terms of s 7(6) such consent can even be given where the parent or guardian does not know the identity of the applicant.

<sup>117</sup> In terms of s 7(4) a parent who wishes to have his or her child adopted may (with the prior consent of the chief executive) appoint the chief executive of the Department responsible for the administration of the *CYPF Act*, in writing, as the guardian of the child until such time as the child is legally adopted, and may impose conditions with respect to the religious denomination and practice of the applicant(s) to adopt the child.

<sup>118</sup> In terms of s 11(c) an adoption order cannot be made by the Court unless it is satisfied that any condition imposed by a parent or guardian of the child with respect to religious denomination is complied with.

Much of what follows has already been discussed in “5 RACE VERSUS CULTURE”, but for the sake of completeness it will be touched on here as well. The relevance or importance of culture is certainly not denied. This discussion is simply an attempt to put the role which it plays in adoption into perspective. There have been claims that interracial adoption does not work,<sup>119</sup> that it is not in the interests of the child and should therefore not be allowed. Of course, the interracial factor is an additional complication or stress in adoption, but the same can be said for something like interracial marriages, and few would suggest they cannot work or are not in the interests of the parties involved. Although it is true that marriage is between consenting adults and adoption deals with vulnerable children, the courts need to make a decision about the best interests of a child and in this regard need to be very careful. An interracial/intercultural adoption might well be in the best interests of a particular child. I am of the opinion that it will usually be better, when circumstances are ideal, for adopted children to be placed with adoptive parents with the same cultural background.<sup>120</sup> All things being equal, I do not think the validity of placing a child in a home where the circumstances are as similar as possible to that of the biological family can be denied. In this way, all aspects of a child’s heritage can be preserved. This is not always possible or advisable though.<sup>121</sup> Often the culture of the biological parent is not even known, as is the case where a baby is abandoned, and a further

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<sup>119</sup> See the discussion under “5 RACE VERSUS CULTURE”.

<sup>120</sup> See “5 3 2 Making a distinction”.

<sup>121</sup> Various issues come to mind. Firstly, there might not necessarily be adoptive parents that fit this mould. Secondly, the child’s background might be unknown and, lastly, the background of the child might of such a nature that a drastic change is required for the positive development of the child. This aspect is discussed in more detail under “5 RACE VERSUS CULTURE”. As the child gets older, culture becomes increasingly important when making a decision about adoption.

problem that is faced when culture becomes a factor in adoptions, is that all people of the same race do not necessarily have the same culture. Maoris, for instance, belong to different tribes (*iwis*), that all have different cultures, and Europeans similarly have different cultures.<sup>122</sup>

To complicate matters even more, inter-marriage of Maori and Pakeha takes place on a large scale.<sup>123</sup> The racial division between Maori and Pakeha is therefore not clear cut and very few Maori claim to be of pure blood. In fact, most Maoris have mixed Maori and European ancestry.<sup>124</sup> People of mixed origins may choose to identify more fully with the culture of one race or the other. Some identify with both and have their own mix of cultural values. We may even adopt a culture as a way of life, without any real genetic identity.<sup>125</sup>

In *Hamlin v Rutherford*,<sup>126</sup> the court said that the undoubted, but uncertain, future advantages to a girl with Maori blood of having access to her cultural heritage through her Maori blood relatives, could not be allowed to predominate over her immediate security which was best served by her being adopted into the care of a loving European couple, who were friends selected by the child's European mother.<sup>127</sup> In another case, *Powell v Duncan*,<sup>128</sup> the court accepted that, while cultural factors are significant in considering the welfare of a child, the child's

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<sup>122</sup> Also see the discussion under "5 RACE VERSUS CULTURE" above.

<sup>123</sup> Griffith *NZ adoption resource vol 6* 55.

<sup>124</sup> Griffith *NZ adoption resource vol 6* 55.

<sup>125</sup> This aspect was discussed in more detail under "5 RACE VERSUS CULTURE" above.

<sup>126</sup> (1989) 5 NZFLR 426.

<sup>127</sup> At 433.

<sup>128</sup> [1996] NZFLR 721 at 729.

psychological health and safety must take precedence over more abstract cultural concerns. In the High Court, Wellington, in *H v R and H*,<sup>129</sup> Judge Heron indicated that the court's concern in that case was with the upbringing of a small child. Even though "[c]ultural diversity has splendid benefits", it is "capable of being enjoyed only in the future".<sup>130</sup> The court said that it has to attend to the child's material and emotional needs, and that the balancing of the relationships between the adoptive parents, the biological parents and the child is a delicate one which must be based on agreement, co-operation and a mutual desire to serve the best interests of the child.<sup>131</sup> With this the court confirmed that the welfare of the child at the time of the adoption application is not necessarily served by taking too much account of the child's cultural background.

*Re Adoption 17/88*<sup>132</sup> provides us with an excellent example of the clash between the Maori and the European concepts of adoption. In this case a Maori child was adopted. The paternal grandmother raised Maori tradition as a basis to have an interim adoption order set aside. Although both biological parents consented to the adoption, the paternal grandmother argued that the court had no jurisdiction to make the adoption order. Her belief that the adoption of a Maori child was a matter to be determined by the whole *whanau* and not just the biological parents was founded in tradition. Judge Inglis QC, however, said that New Zealand does

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<sup>129</sup> (1989) 5 FRNZ 104 at 110.

<sup>130</sup> At 110.

<sup>131</sup> At 110-111.

<sup>132</sup> (1989) 5 FRNZ 360.

not give rights of guardianship or custody to a grandmother.<sup>133</sup> Judge Inglis did, however, recognise the importance for the child of maintaining her place in the biological father's lineage.<sup>134</sup> Judge Inglis urged all involved to protect and harness her lineage as well as the special place of each party to the adoption,<sup>135</sup> but also emphasised that the child had bonded with the adoptive parents, and held that it was questionable whether the child's bonds with the only parents she had ever known should be broken for the sake of providing her with the **intangible advantages of absorption into her *whanau* on her father's side.**<sup>136</sup> The application was dismissed. Again, this case confirms that cultural considerations are not decisive in an adoption application.

Generally speaking, cultural issues do now play a major part in proceedings under the *Adoption Act of 1955*. In *Re Application by Nana*<sup>137</sup> the court noted that there has been a growing awareness of the importance of cultural identity between the child and adoptive parents.<sup>138</sup> In *T v F*<sup>139</sup> the judge emphasised that both sides of a child's ancestry must be acknowledged. He said that "...in this day and age, it has to be recognized that this child's feet stand astride two cultures. It is not for this Court to say that one is better for this child than the other. Rather it is for a Family Court to say that the child should be offered the best of both. The welfare of the child comes first. It is the paramount consideration for the Family

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<sup>133</sup> At 370-371.

<sup>134</sup> At 376-377.

<sup>135</sup> At 377.

<sup>136</sup> At 371.

<sup>137</sup> [1992] NZFLR 37.

<sup>138</sup> At 41.

<sup>139</sup> (1996) 14 FRNZ 415.

Court. And when matters are seen in that light it becomes clear that for this child of dual ancestry both sides of that ancestry are important to her and that in her upbringing neither is to be diminished at the expense of the other without good reason. For when the child reaches maturity and is able to make her own choices, her upbringing in both cultures will give her the opportunity to decide which course she wants her life to take.”<sup>140</sup> The court made an interim order that the Maori paternal grandparents, who were both eminent and distinguished within their community, were suitable for appointment as additional guardians following the hearing of the adoption application if the adoptive parents did not object, which would foster the child’s cultural heritage.<sup>141</sup>

In a High Court judgment confirming a Family Court decision, *T v T*,<sup>142</sup> Judge Robertson declined an adoption order in favour of paternal grandparents who were seeking to adopt their Maori grandchild. The court said that it has to be satisfied that the best interests of the child would be promoted by an adoption,<sup>143</sup> and that the alternative mechanisms of custody and guardianship would assure the grandparents of security and stability “without going through a process which in law extinguishes rights even if within the Maori cultural reality they might continue and thrive”.<sup>144</sup> In my view, the cases above show a positive approach which could provide balance and stability in the child’s life, but once again respecting that the adoptive parents are responsible for raising the child in the

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<sup>140</sup> At 421.

<sup>141</sup> At 429.

<sup>142</sup> (1998) 16 FRNZ 599.

<sup>143</sup> At 602.

<sup>144</sup> At 603.

way they see fit.<sup>145</sup>

It has to be mentioned that the problems and stresses discussed above are not unique to interracial/intercultural adoption, but often also emerge where the adoption is inracial or by adoptive parents of the same culture as the child. Unfortunately there has been little debate or research in New Zealand about the positive and negative aspects of intercultural adoption, and there appears to be no research at all in that country on the success of interracial adoptions.<sup>146</sup> There is a need for more in-depth research in this regard.

## **7 4 THE ROLE OF THE CHILD'S BEST INTERESTS IN NEW ZEALAND ADOPTION LAW**

### **7 4 1 Introduction**

According to Campbell<sup>147</sup> the principal purpose and chief motive of adoption is usually to benefit a child<sup>148</sup> who has no parents or whose parents are unable or unwilling to care for him/her. Thus it is recognised that adoption under favourable conditions is preferable to reception in an institution. It is submitted, in line with international trends, that the proper purpose of adoption has to be seen from the

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<sup>145</sup> Also see "9 CONCLUSION", where I emphasise that biological parents and adoptive parents have a different role in the adopted child's life.

<sup>146</sup> Griffith *NZ adoption resource vol 6* 192.

<sup>147</sup> Campbell *Law of Adoption in NZ* 14.

<sup>148</sup> In terms of the *Adoption Act of 1955* a child is someone under the age of 21.

child's point of view, namely to provide the child with a permanent substitute family because the biological parents/family do not want the child, because they are unable to provide the family environment essential to normal growth, or because the child, for whatever reason, has no biological parents/family.

The "welfare of the child" has been familiar terminology in New Zealand law for decades.<sup>149</sup> Sadly though, when the *Adoption Act of 1955* was enacted 60 years after the *Adoption Act of 1895*, the wording of section 11(b), which deals with the welfare and interests of a child in adoption, was exactly the same as that of section 5(3) of the *Adoption Act of 1895*. Today, more than a century after the *Adoption Act of 1895* was legislated, the law remains unchanged. This shows a lack of understanding as far as children's rights go, and certainly no move towards protecting children's rights. Of course, this Act was introduced at a time when children's rights did not carry as much weight as they do today, but it is surprising that increased rights for children have not been introduced by means of an amendment to the Act.

The *Adoption Act of 1955* does require that in all adoption matters the court has to be satisfied that the "welfare and interests of the child will be promoted by the adoption",<sup>150</sup> but it does not expressly describe the interests of the child as "paramount" or the primary purpose of adoption. It may be that any differences in phrasing or emphasis are merely semantic, but the question is what "the welfare

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<sup>149</sup> Austin 1995 *Victoria University of Wellington Law Review* 273.

<sup>150</sup> In terms of s 11(b) the welfare and interests of the child have to be promoted by the adoption.

and interests of the child” means and how this is applied in practice. Taking the requirements of the Act at face value, it seems that the Act focuses mainly on the needs and rights of adults rather than those of children.<sup>151</sup> Fortunately, the courts have used their power of interpretation in such a manner that the interests of the child have not been neglected. Thus, for example, in *Director-General of Social Welfare v L*<sup>152</sup> the welfare and interests of the child were regarded as the ultimate test in an adoption application, where the court confirmed that the primary purpose of adoption is to benefit the child.<sup>153</sup>

## 7 4 2 The welfare and interests of the child

### 7 4 2 1 Determining welfare and interests

Welfare and interests can (wrongly) be promoted without necessarily protecting the best interests of the child. When determining what the terms “welfare” and “interests” mean and how they should be applied, the courts have done so in a manner that cannot be seen as consistent. In *Director-General of Social Welfare v L*<sup>154</sup> Judge Bisson drew a distinction between “welfare”, which he described as the day-to-day care and upbringing of the child, and “interests”, which he said was more about the effects on the child of the termination of the parent-child

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<sup>151</sup> Robert Ludbrook, a leading authority on adoption law in New Zealand, identified this as a disadvantage associated with adoption in a submission subsequent to NZLC *Preliminary Paper 38* in NZLC *Report 65* 38.

<sup>152</sup> [1989] 2 NZLR 314 (CA).

<sup>153</sup> At 326.

<sup>154</sup> [1989] 2 NZLR 314 (CA) at 324-325.

relationship. However, Judge Richardson, with whom Judge Somers concurred, stated that the words “and interests” in s 11(b) were simply added for the purpose of emphasis. He said that “welfare” was concerned with “all aspects of the wellbeing of the child which must include considerations of blood ties”.<sup>155</sup> Judge Callaghan in *Re B*,<sup>156</sup> however, suggested that the “interests” of the child extend beyond nurturing to include “the child’s interests for the rest of its life, both as an infant and an adult, and genealogical ties”.

Each case obviously has to be considered by bearing in mind its particular facts. It has been said that in determining the child’s welfare and interests, the Court is “not concerned with any generalised philosophy about adoption on which opinions can legitimately differ, and may not be materially assisted by predictions for the future based on generalised research but which may or may not apply to **this** child, **this** mother, or **these** adopting parents”.<sup>157</sup> In the case of *In the matter of B*<sup>158</sup> the Court held that it is interested in the long-term welfare and interests of the child.<sup>159</sup> I believe that it is not possible to attempt to focus on the child’s welfare without also involving the child’s interests, and *vice versa*. These two concepts make up one phrase; they are intertwined. A meaningful distinction cannot be drawn in this context between a child’s “welfare” and “interests”.

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<sup>155</sup> At 319.

<sup>156</sup> Family Court Christchurch FP 009/32/99, 30 March 2001 at 11 (as quoted by Caldwell in Jenkison *Family Law Service* par 6.711).

<sup>157</sup> *In the matter of A (adoption)* [1998] NZFLR 964 at 974.

<sup>158</sup> [1999] NZFLR 161.

<sup>159</sup> *Adoption Application by T* [1996] NZFLR 28.

The High Court in *Re Appeal by T*<sup>160</sup> held that precedent is of little value in determining the child's welfare and interests, and that when considering the child's welfare and interests, "full regard should be had to the cultural attitudes of the family concerned". Judge Tompkins declared that "[a]n adoption that may be considered inappropriate in a European setting may well promote the welfare and interests of the child in a Polynesian setting". Judge Inglis QC, who presided over *In the matter of A*,<sup>161</sup> stated that whether the welfare and interests would be promoted involves a comparison between "what can reasonably be predicted if it does not proceed". This dictum was cited with approval in *Re B*.<sup>162</sup>

In a step that has to be applauded, the Court of Appeal in *Director-General of Social Welfare v L*<sup>163</sup> used clever interpretation to incorporate modern views and values in a situation where the existing adoption legislation falls short.<sup>164</sup> Although the *Adoption Act of 1955* requires the welfare and interests of a child to be promoted by an adoption, this requirement is not enough today.<sup>165</sup> The child's welfare and interests have to be the paramount consideration in any decision affecting the child. The court recognised this and interpreted the welfare and interests of a child to be the first and paramount considerations when a decision

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<sup>160</sup> [1995] NZFLR 773 at 777 per Judge Tompkins.

<sup>161</sup> Family Court Christchurch A 009 009 98, 28 September 1998 at 9 (as quoted by Caldwell in Jenkison *Family Law Service* par 6.711).

<sup>162</sup> [2007] NZFLR 399 at par [44] (as quoted by Caldwell in Jenkison *Family Law Service* par 6.711 n 7f).

<sup>163</sup> [1989] 2 NZLR 314 (CA).

<sup>164</sup> As discussed under "7 5 FUTURE REFORM OF NEW ZEALAND ADOPTION LAW", there is an urgent need for change in the adoption legislation.

<sup>165</sup> See the discussion under "7 4 1 Introduction".

about adoption is made. It took the view<sup>166</sup> that adoption involves a change of guardianship, which links it with the *Guardianship Act*. In the *Guardianship Act* the paramountcy principle is statutorily prescribed in section 23(1) which stipulates that the welfare of the child is the first and paramount consideration in any proceedings where any matter relating to the custody or guardianship of a child is in question. In 2005 the *Guardianship Act* was replaced by the *Care of Children Act*.<sup>167</sup> It is, fortunately, possible to interpret the principles of this Act in the same way as was done by the court in *Director-General of Social Welfare v L*.<sup>168</sup> Although I believe that it can be dangerous for courts to interpret legislation in a way that it was probably not intended, I also believe that the court in this instance acted quite correctly. If legislation falls short and the legislature is not prepared to accept that the existing legislation that governs adoption is in need of attention and amendment, the responsibility lies with the courts, where possible, to protect the interests of litigants, especially children.

#### 7 4 2 2 Factors to be taken into account

In *Re Custody of C*<sup>169</sup> a fifteen-year-old mother wanted to have her child adopted. The parents of the sixteen-year-old father argued that the biological family should come first when a decision is made about placing the child for adoption, but the

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<sup>166</sup> At 319.

<sup>167</sup> Act 90 of 2004, which came into effect on 1 July 2005. The term “custody” was replaced with “day-to-day care” and the term “access” was replaced by “contact”.

<sup>168</sup> [1989] 2 NZLR 314 (CA). In terms of s 4(1) the welfare and interests of the child are first and paramount in the administration and application of the Act and in any proceedings involving the guardianship, day-to-day care or contact with a child.

<sup>169</sup> (1993) 10 FRNZ 344.

Court held that no principle of the *Adoption Act of 1955* requires that biology should come first.<sup>170</sup> The Court said that while biological family and *whanau* are emphasised in the *CYPF Act*, the same principles do not apply to adoption.<sup>171</sup> Placing the child for adoption at the mother's wish was held to provide the best environment for the child. It was also held in *Director-General of Social Welfare v L*<sup>172</sup> by the Court of Appeal that "except in a singular case" the biological family relationship will be of little, if any, consequence in the assessment of the child's welfare and interest once consent has been either given or dispensed with. The point stated by the Court of Appeal in *J v J & J*,<sup>173</sup> that New Zealand law (contrary to Maori tradition) contains no presumption that a child's welfare is best met through care by the biological parents or family, was reiterated in *M & B v H & S*<sup>174</sup> and in *B v M*.<sup>175</sup> Ultimately, in an adoption application, the court will always consider a child's welfare and interests, which may not necessarily be met by placing too much emphasis on biological background.

Culture is an issue that has featured in many adoption applications, and has been dealt with by the courts in different ways.<sup>176</sup> In an application for an interracial adoption in 1990, *Application by C*,<sup>177</sup> the Maori mother consented to the adoption. The identity of the father was unknown, but he was European. The Family Court, Porirua, took note of the Maori tradition whereby the tribal group's

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<sup>170</sup> At 350.

<sup>171</sup> At 351-352.

<sup>172</sup> [1989] 2 NZLR 314 (CA) at 326.

<sup>173</sup> (1983) 1 FRNZ 1 at 5.

<sup>174</sup> (1989) 5 FRNZ 636 at 642.

<sup>175</sup> [1997] NZFLR 126 at 131.

<sup>176</sup> In this regard, also see "5 RACE VERSUS CULTURE".

<sup>177</sup> [1990] NZFLR 280.

responsibility for a child takes precedence over the views of the biological parents.<sup>178</sup> Some members of the child's *whanau* were opposed to the adoption.<sup>179</sup> Judge Borrin said that Maori culture is a minority culture in New Zealand and, unless it is fostered with care, a child will be lost to it, whereas European culture, being dominant, can be more readily acquired.<sup>180</sup> As the court was not satisfied that the child's welfare and interests would, in cultural respects, be promoted by the adoption, the application was dismissed.<sup>181</sup> I do not support this decision. The *Adoption Act of 1955* promotes the welfare and interests of the child. The Court of Appeal held in *B v G*<sup>182</sup> that section 11(b) of the *Adoption Act of 1955* is expressed broadly, and that the Court is not limited in its consideration of matters that can be taken into account to determine the welfare and interests of the child.<sup>183</sup> This judgment is supported. The court has to consider any factor(s) that may influence the welfare and interests of a child. It is, of course, important that the cultural background of a child has to be protected, but never at the expense of the welfare and best interests of a child viewed holistically. As I have argued,<sup>184</sup> culture is one of many factors that have to be considered. It should not be singled out and be rendered dominant. In, for example, *In the*

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<sup>178</sup> At 285.

<sup>179</sup> At 285.

<sup>180</sup> At 286. In this regard, see my remarks under "5 RACE VERSUS CULTURE", where I argue that there is no such thing as a "black" culture or a "white" culture. The same argument can be used in this case.

<sup>181</sup> At 287.

<sup>182</sup> [2002] NZFLR 961.

<sup>183</sup> At 971-972. This is in line with the provisions of the Children's Act of 2005 in South Africa, and reflects the reality that there are many factors that could affect and influence the best interests of a child.

<sup>184</sup> See "5 RACE VERSUS CULTURE" and "7 3 RACE AND CULTURE IN NEW ZEALAND ADOPTION LAW".

*matter of B*,<sup>185</sup> it was held that psychological issues should be accorded no less weight than cultural issues.<sup>186</sup> This adds support to my viewpoint about not singling out culture at the expense of other factors. This does not mean that the relevance of culture is denied, but merely places its importance into perspective.

My argument finds support in the matter of *B v M*.<sup>187</sup> The Family Court, Hastings, made it clear that it is always a matter of assessing what is “in the best welfare of *this* child in *these* circumstances, and generalised perceptions and assumptions must give way to particular facts and circumstances as they affect the child”.<sup>188</sup> The court then went further and added that cultural heritage and Maori ancestry are essential elements, but not the only elements, in assessing the child’s welfare. The court stated that the real issue is how the child’s Maori ancestry and cultural heritage are to be balanced with other factors relevant to her welfare.<sup>189</sup> In conclusion, the court found<sup>190</sup> that the advantages of being placed in a “stable, loving, child-centered two-parent home where the child’s natural heritage is recognised and respected greatly outweigh any perceived disadvantages”. This statement by the Court confirms that it is not necessary for an adopted child to retain his/her own culture, as long as that culture is recognised and respected. The above decision is in line with my view on the question of the best interests of a child.

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<sup>185</sup> [1999] NZFLR 161.

<sup>186</sup> At 164.

<sup>187</sup> [1997] NZFLR 126 at 132.

<sup>188</sup> In this regard, also see n 157 and the accompanying text, above.

<sup>189</sup> At 132, 134.

<sup>190</sup> At 138.

An interesting decision is that of *Re Adoption of J*,<sup>191</sup> where the judge said that an adoption is unlikely to be successful unless the adoption serves the interests of the intending adoptive parents, and to this extent the interests of the adoptive parents and the child are intimately linked.<sup>192</sup> This may be true, and I understand the logic of this decision in that the best interests of the child can only be promoted if the adoptive parents are comfortable with any decisions that are taken in the interests of the child. Ultimately, however, the interests of the adoptive parents are not the important issue. Fortunately, Judge Keane qualifies this statement by adding that the interests of the adoptive parents are strictly secondary to the interests and welfare of the child.<sup>193</sup>

The child's role in an adoption order is another aspect that needs consideration. With more, not less, emphasis on children's rights over the years, it seems strange that the *Adoption Act of 1955* does not contain a requirement that consent by a child is needed before an adoption order may be made.<sup>194</sup> It is true that the wishes of the child are not necessarily synonymous with the child's welfare,<sup>195</sup> and the court must inquire beyond the child's preferences, however strongly and sincerely they are articulated.<sup>196</sup> On the other hand though, the wishes of the child have to carry some weight, taking into account the child's age

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<sup>191</sup> (1995) 13 FRNZ 248.

<sup>192</sup> At 251.

<sup>193</sup> At 251.

<sup>194</sup> In terms of the *Adoption Act of 1895* a child over the age of 12 had to consent to an adoption – see “7 2 2 *Adoption of Children Act* 8 of 1895”. This was also a requirement in terms of the *Infants Act* – see “7 2 3 *Infants Act* 86 of 1908”.

<sup>195</sup> The child's preferences could be influenced by factors such as discipline or financial issues.

<sup>196</sup> See *Adoption Application by T* [1999] NZFLR 300 at 307.

and understanding.<sup>197</sup> Section 11(b) of the *Adoption Act of 1955* inter alia requires that the court making an interim order or an adoption order has to give due **consideration** to the wishes of the child, this being subject to the age and understanding of the child. This is in line with article 12(1) of the Convention, which New Zealand has ratified, in terms of which the views of a child, who is capable of forming such views, have to be considered in accordance with the age and maturity of the child. In my opinion the requirement should have been that the consent of a child is a **requirement** for an adoption order to be made, subject to the age and understanding of the child.<sup>198</sup> If this were the case, there would be a change in emphasis. The court would make a judgement about the ability of a child to consent, not about the value it attaches to such consent.

#### 7 4 2 3      *Is adoption still valid?*

With all the emphasis that is placed on heredity and the continued role of the biological parents/family in the life of an adopted child nowadays,<sup>199</sup> the question is whether adoption is still a viable option for children in New Zealand. It has been suggested that total control of, or total responsibility for, a child will enable the adoptive parent(s) to function better and without anxiety, and that the child will feel better as a permanent member of a particular family rather than being

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<sup>197</sup> *Adoption Application by T* [1999] NZFLR 300 at 306.

<sup>198</sup> This is especially important for the adoption of older children. Also see my recommendation under “6 5 2 2 *The Children’s Act and the consent of the child*”.

<sup>199</sup> See “7 4 3 Open versus closed adoption” and “4 4 OPEN VERSUS CLOSED ADOPTION”.

shared between families.<sup>200</sup> This, in my opinion, is an archaic view of adoption. I do not believe that the relationship should be viewed as one where the parent has control over the child as if the child were an object, but I do believe that permanency is very important. Adoption can in some cases provide the child with certainty, security, and a particular sense of belonging to a family who loves and cares for him/her. The factor of permanency for the child has received much attention in the New Zealand case law and has been given significant weight in decisions such as *In the Adoption of AJM*.<sup>201</sup> Orders for guardianship and custody under the *Guardianship Act*, or the *CYPF Act*, are not “set in concrete, and if that route were chosen there would be the prospect and the fear of continued access and review applications at the least. The prospect and that fear alone would have a destabilising effect.”<sup>202</sup> Adoption orders can provide a child with a sense of security and belonging that orders of guardianship and custody cannot.

The concept of the best interests of a child is something that will always warrant discussion, as it is constantly evolving. It is important that legislation should place more emphasis on the best interests of the child. In the light of current trends, and especially international instruments, such as the Convention which requires the best interests of the child to be a primary consideration,<sup>203</sup> this is an area of

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<sup>200</sup> Henaghan “Rearranging families” in Henaghan & Atkin *Family Law Policy in NZ* 309.

<sup>201</sup> [2005] NZFLR 529 at 534. See also *Re W* (1988) 4 NZFLR 648 at 651.

<sup>202</sup> *In the Adoption of J* [1992] NZFLR 369 at 374.

<sup>203</sup> Art 3.

the *Adoption Act of 1955* that needs attention. It is clearly time for the New Zealand legislature to address this issue.<sup>204</sup>

### 7 4 3 Open versus closed adoption

The *Adoption Act of 1955* places great emphasis on secrecy when it comes to adoption. This is inter alia illustrated by the automatic change of the surname of the child to that of the adopter(s) in terms of s 16(1) of the *Adoption Act of 1955* and the inaccessibility of the original birth entry and court records of the adoption as legislated in section 23 of the *Adoption Act of 1955*. It is also true, though, that although there is currently no statutory provision for adoption contact,<sup>205</sup> New Zealand adoption statutes have never expressly prohibited contact after an adoption. In fact, New Zealand has been described as “leading Western adoption practice with respect to openness”.<sup>206</sup> Adoption contact has always been and remains a matter of choice between the parties concerned. The *Adoption Act of 1955* does not prevent biological parents and adoptive parents from arranging an open adoption with free access to information and freedom of contact within the adoption triangle. The frequency and regularity of contact between the biological parents and adoptive family is an individual arrangement, determined by all parties, in terms of what is commonly known as a “contact agreement”. These arrangements are, by their very nature, flexible and can be reviewed by either party as the need arises.

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<sup>204</sup> See the discussion under “7 5 FUTURE REFORM OF NEW ZEALAND ADOPTION LAW”.

<sup>205</sup> See “4 4 2 1 *Forms of open adoption*”, where I explain the use of the term “adoption contact”.

<sup>206</sup> Ryburn *Open Adoption* 16.

The best interests of the child are central to adoption contact.<sup>207</sup> The main reason for supporting contact after an adoption is to ensure that the child has continued access to both biological and adoptive parents/families. As the child grows older, he/she usually participates in making decisions about the type, and the frequency, of contact. Adoption social workers can be involved in helping the two families to reach a mutually acceptable contact agreement.<sup>208</sup> Allowing for adoption contact is one of the keys to ensuring that a child does not lose his/her biological past. The child maintains a link with the biological parents/family, which obviously includes the culture of the biological parents/family. Often with an interracial or intercultural adoption, there is concern about the adoptive parents' ability and/or willingness to ensure that the child does not lose this important aspect of his/her past. With an open adoption, the child will undoubtedly be in the best position to be exposed to and influenced by all aspects of both the biological and adoptive parents/families. This could unfortunately also include negative influences, such as an abusive relationship and criminal behaviour, and the relationships therefore have to be monitored carefully.

In an article by Bridge, Perry and Bridge<sup>209</sup> the view was expressed that the balancing of relationships between the adoptive parents, the biological parents and the child is a delicate one that must be based on agreement, co-operation and a mutual desire to serve the best interests of the child. It is my opinion that a

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<sup>207</sup> NZLC *Report* 65 39.

<sup>208</sup> Griffith *NZ adoption resource vol 4* 127.

<sup>209</sup> Bridge *et al* 1987 *Family Law Bulletin* 135.

contact agreement can never work if this advice is not followed by all relevant parties to the adoption. This is illustrated in *H v R and H*.<sup>210</sup> A contact agreement was negotiated between the parties, but the biological father abused the terms of this contract to such an extent that his conduct became invasive.<sup>211</sup>

The problem is that contact agreements are not legally enforceable in New Zealand. Although the *Adoption Act of 1955* does not specifically demand that information about an adoption and the parties thereto has to be concealed, there is also no provision in this Act, or any other Act, for adoption contact. Section 23 of the *Adoption Act of 1955* states that the adoption records of a child can be inspected,<sup>212</sup> but only where inspection is required for some purpose in connection with the administration of an estate or trust of which that person is an executor, administrator, or trustee; where forbidden degrees of relationship are investigated under the Marriage Act; where forbidden degrees of relationship for purposes of a civil union are investigated under the Civil Union Act; and where a report has to be prepared by a social worker. Therefore, unless the parties to an adoption agree to have contact, the information about an adoption and the parties thereto is generally not available to any of the parties to the adoption. Griffith explains that legislation that regulates contact between the adopted child, the biological parents and the adoptive parents would protect all the parties involved in an adoption, and the child's access to both families would thereby be protected. Relationships are more likely to work when the parties feel they are

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<sup>210</sup> (1989) 5 FRNZ 104.

<sup>211</sup> At 107.

<sup>212</sup> S 23(1).

regarded as equals. Lack of legislative provision puts biological parents in an unequal and powerless situation. Large numbers of people choose adoption contact, and the law needs to address this reality.<sup>213</sup>

Where a contact agreement has been agreed to, secrecy is obviously not a problem, but there are many adoptions where the parties do not have any information about the other parties to the adoption, or where there is no contact between the relevant parties. A positive step in this regard is the *Adult Adoption Information Act*.<sup>214</sup> In terms of this Act, it is now possible for an adult adoptee or the biological parents of an adult adoptee to obtain information about the adoption. The emphasis on secrecy where no contact agreement has been made, has shifted in the following ways:

- An adult adopted person<sup>215</sup> is able to apply for their original birth certificate,<sup>216</sup> but biological parents of persons adopted before 1 March 1986 have the power to veto the revelation of identifying information.<sup>217</sup> This is because they were promised secrecy when they entered into the adoption process and this gives them the opportunity to maintain secrecy if they wish. Persons giving up children for adoption after 1 March 1986 do not have the power of veto.

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<sup>213</sup> Griffith *NZ adoption resource vol 5* 359.

<sup>214</sup> Act 127 of 1985, which came into effect on 1 March 1986.

<sup>215</sup> This is an adopted person who has turned 21.

<sup>216</sup> S 4.

<sup>217</sup> S 3.

- The Act also provides that a biological parent can obtain identifying information about a child placed for adoption when the adopted child turns 21,<sup>218</sup> but the child has a right to register the desire not to have contact with his/her biological parents.<sup>219</sup>
- S 11 provides for circumstances where a doctor may obtain information on medical grounds.

The inclusion of the above provisions in the *Adult Adoption Information Act* is welcomed. Children have the need to know where they come from, which includes their biological background.<sup>220</sup> In *B v M*<sup>221</sup> Judge Inglis QC said it is not necessarily in the adopted child's best interests to shield the child from knowledge of his/her origins.<sup>222</sup> Unfortunately this Act is only applicable once the adopted person is no longer a child. This restriction has to be criticised. The parties to an adoption should not have to wait until the child is an adult before being able to obtain information with regard to the adoption. The need for information and/or contact exists from the moment of the adoption. The restriction is also contrary to Maori culture. Maori use descent to identify themselves and, provided he/she has access to this biological information, an adopted child can do the same.<sup>223</sup> An adopted person who has no knowledge of his/her biological

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<sup>218</sup> S 8.

<sup>219</sup> S 7.

<sup>220</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 63.

<sup>221</sup> [1997] NZFLR 126 at 135.

<sup>222</sup> It has to be remembered that a child's biological background is not always known.

<sup>223</sup> Hall & Metge in Henaghan & Atkin *Family Law Policy in NZ* 63.

background is disadvantaged in the Maori community. Although this aspect of Maori culture is dissimilar to European culture in general, it does not minimise the need of a European child to have knowledge of his/her biological background. I believe the legislature in New Zealand needs to give attention to this issue, and make adoption less secretive. The secrecy that was part of adoption previously created the unnatural situation where the child was seen as the biological child of the adoptive parent(s). We have moved on from this,<sup>224</sup> and it is time for legal change too. Ultimately, the best interests of the child still come first and these interests require openness in an adoption.

## **7 5 FUTURE REFORM OF NEW ZEALAND ADOPTION LAW**

### **7 5 1 Introduction**

The Adoption Act 1955 ... was passed at a time when some Family Court Judges were not even twinkles in their parents' eyes and others were running around in nappies.<sup>225</sup>

Current adoption legislation in New Zealand was enacted more than 50 years ago.<sup>226</sup> There have been minor amendments over the years, but the basic structure of the Act has remained unchanged. Adoption in New Zealand has

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<sup>224</sup> Also see “ 4 4 2 3 *South African law and open adoption*”.

<sup>225</sup> Henaghan 2006 *NZFLJ* 131.

<sup>226</sup> The *Adoption Act of 1955*.

often been referred to as the “Cinderella” of family law.<sup>227</sup> The *Adoption Act of 1955* still reflects the values and morals of the New Zealand society of the 1950s. Social needs and perspectives change throughout history. What is acceptable practice for one generation can be considered completely unacceptable for another, and *vice versa*.

It is time for the existing adoption legislation to be amended to fit in with current views and acceptable practices. In 2002 the Court of Appeal stated that “[g]iven the age of the Act and the different social circumstances in which it was passed law reform does seem appropriate”.<sup>228</sup> However, the Court of Appeal further observed that, until such reform occurs, any case had to be dealt with in accordance with the existing legislation.<sup>229</sup> This does not mean, though, that allowances should not be made for changing times. In the case of *In the matter of B (adoption)*<sup>230</sup> the court said that if counsel suggests that the welfare and interests of the child must be determined with reference to “what was known about the needs of children in 1955 and in the context of the social outlook at the time”, it rejects such submission. The court said that the welfare and interests of children must always be determined by the best information available.<sup>231</sup> This, I believe, would of course include *current* social values and understandings, and allow for an interpretation of the *Adoption Act of 1955* that makes provision for

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<sup>227</sup> NZLC *Report 65 xx*.

<sup>228</sup> *B v G* [2002] NZFLR 961 at 964.

<sup>229</sup> *B v G* [2002] NZFLR 961 at 964. In *Re Adoption 17/88* (1989) 5 FRNZ 360 at 371 the court said that it “must take the law as it finds it”.

<sup>230</sup> [1999] NZFLR 161.

<sup>231</sup> At 166.

changing circumstances. In *Application for Adoption by RRM and RBM*<sup>232</sup> it was held that, although some observers believe that the *Adoption Act of 1955* is obsolete, the legislation remains on the statute book and that “modern trends” can be adequately reflected under the present statute by way of a case by case application of the over-arching concept of the child’s welfare and interests.<sup>233</sup> As discussed under “7 4 2 The welfare and interests of the child”, this has already happened in at least one case,<sup>234</sup> where the court used clever and innovative interpretation to develop the law.

Until such time as the legislation changes, judges will have to use their discretion in each case to determine the interests of the parties involved, especially those of children. The practice of adoption is moving towards more involvement of all people in the child’s life and more openness about the process so that the child is not cut off from the past.<sup>235</sup> The child may have no knowledge about his/her past, but that does not detract from the importance of raising the child with an awareness of his/her past. Again, it is possible that an adopted child may not have any knowledge of his/her past. A baby who is abandoned shortly after birth, for instance, can have no knowledge of his/her biological parents/family and their culture. Where it is known, however, the biological background of an adopted child is an important part of that child’s life.

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<sup>232</sup> [1994] NZFLR 231.

<sup>233</sup> At 234.

<sup>234</sup> *Director-General of Social Welfare v L* [1989] 2 NZLR 314 (CA).

<sup>235</sup> Henaghan “Rearranging families” in Henaghan & Atkin *Family Law Policy in NZ* 309.

## 7 5 2 Reform proposals

As discussed above,<sup>236</sup> there is a need for stronger formulation of the rights of children within the context of adoption in New Zealand. The Department of Social Welfare<sup>237</sup> and the Ministry of Justice drafted proposals for new legislation and have proposed a number of changes.<sup>238</sup> Further, the Law Commission produced a discussion paper, *Preliminary Paper 38*<sup>239</sup> in October 1999. The brief from the Minister of Justice was to “review the legal framework for adoption in New Zealand as set out in the Adoption Act 1955 ... and to recommend whether and how the framework should be modified to address contemporary social needs”.<sup>240</sup> The Commission was asked to consider inter alia:<sup>241</sup>

- The principles that should apply in relation to adoption.
- Whether special recognition should be given to Maori customary adoptions or any other culturally different adoption practices, and whether provision should be made for future contact between biological parents and other persons, including grandparents, adoptive parents and the adopted child.
- At what stage an adopted child should be entitled to information about

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<sup>236</sup> See “7 4 2 The welfare and interests of the child” above.

<sup>237</sup> Pursuant to the *Department of Child, Youth and Family Services Act* 82 of 1999, the Department of Social Welfare is now known as the Department of Child, Youth and Family Services.

<sup>238</sup> Caldwell in Jenkison *Family Law Service* par 6.701.

<sup>239</sup> See n 2.

<sup>240</sup> NZLC *Preliminary Paper 38* xi and Appendix A 117.

<sup>241</sup> NZLC *Preliminary Paper 38* 117.

his/her identity.

The Law Commission requested interested parties to submit comments and answers to the questions raised in *Preliminary Paper 38*. The submissions and recommendations that were received as a result of this discussion paper led to the drafting in September 2000 of the Law Commission's final report, *Report 65*, which was published after extensive consultation with various concerned groups. This report proposed that the *Adoption Act*, the *Guardianship Act* and the *CYPF Act* all be incorporated into a single *Care of Children Act*.<sup>242</sup> For the purposes of this thesis, the following important recommendations were made:

- The fundamental purpose of adoption should be to provide a child who cannot or will not be cared for by his/her biological parents with a permanent family life.<sup>243</sup>
- The welfare and interests of the child should be the paramount consideration.<sup>244</sup>
- The legal effect of adoption should be the transfer of permanent parental responsibility from biological parents to the adoptive parents,<sup>245</sup> and

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<sup>242</sup> NZLC *Report 65* 43. In South Africa, too, various Acts regulated different aspects with regard to children. Many of these Acts have been repealed and replaced by the Children's Act of 2005.

<sup>243</sup> NZLC *Report 65* 69.

<sup>244</sup> NZLC *Report 65* 71.

<sup>245</sup> NZLC *Report 65* 45.

parental responsibilities and rights should specifically be defined in the *Care of Children Act*.<sup>246</sup>

- Adopted persons, biological parents and adoptive parents should have unrestricted access to their adoption information, but existing vetoes on access to information should remain in force.<sup>247</sup>
- Where practicable, a child should be placed within a family of the same culture as the child. If that is not possible, the court should be satisfied that the prospective adopter(s) will help foster the child's cultural, social, economic and linguistic heritage, and facilitate contact with the child's family.<sup>248</sup> The cultural heritage of the child should be taken into account in such a way as to ensure that the child has full access to his/her cultural, social and economic heritage.<sup>249</sup> This recommendation reflects the logical and realistic approach the Law Commission adopted by saying that a child should not remain in care because there are no suitable adopters available from the child's cultural group. This provision, like all other provisions in the proposed legislation, has to be applied in accordance with the overriding principle that the welfare and interests of the child are

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<sup>246</sup> NZLC *Report 65* 48.

<sup>247</sup> NZLC *Report 65* 60. As was discussed under "7 4 3 Open versus closed adoption", it is important for an adopted child to know about his or her past and, where possible, have contact with the biological parents.

<sup>248</sup> NZLC *Report 65* 89. Again, open adoption will be very important here.

<sup>249</sup> NZLC *Report 65* 92.

paramount. A similar argument is made with regard to adoption in South Africa.<sup>250</sup>

- In applications to adopt a Maori child, a Maori social worker, preferably one that has *iwi* affiliations with the child, should provide the social worker's report.<sup>251</sup> In my view, this is an important issue, but not only when the adoption relates to a Maori child. I believe that in any adoption every attempt should be made to assign a social worker to the case who has knowledge of the background, values and circumstances of the child, and who understands the cultural background of the child. This recommendation is also made for adoptions in South Africa.<sup>252</sup>
- When an intercultural adoption application is considered, the court should call for a report on cultural matters to ascertain the suitability of the placement and how the prospective adopters intend to foster the child's cultural heritage.<sup>253</sup> As I have argued above, the suitability of the placement is not only determined by cultural issues. Although cultural heritage is important, a report should be prepared to determine the suitability of the adoptive parents in **all** ways.

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<sup>250</sup> See "5 3 2 Making a distinction", where "mild preference" is explained, and "9 CONCLUSION".

<sup>251</sup> NZLC *Report 65 90*.

<sup>252</sup> See "9 CONCLUSION".

<sup>253</sup> NZLC *Report 65 91*.

- A key element of successful adoption is adequate preparation and counselling, and there should be mandatory pre-adoption counselling for the child, the biological and prospective adoptive parents.<sup>254</sup> In my opinion, this is probably one of the most important proposals. Both pre- and post-adoption counselling are essential elements of any adoption. This issue will be discussed in more detail in “9 CONCLUSION”.
- Post-adoption counselling should be available to adoptive parents, biological parents and adopted persons,<sup>255</sup> and these services should be provided separately from adoption assessment services, which are provided before the adoption.<sup>256</sup> Post-adoption counselling is at least as important as pre-adoption counselling and probably even more so. It is also important to understand that the counselling may have to be ongoing. It will have to continue for as long as the situation of a particular child requires it. A further suggestion was that such services should be state funded,<sup>257</sup> which in South Africa will be crucial. More about this under “9 CONCLUSION”.
- The Adoption Information Services Unit of the Department of Child, Youth and Family Services,<sup>258</sup> which has overall responsibility for the welfare and

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<sup>254</sup> NZLC *Report 65* 95, 98.

<sup>255</sup> NZLC *Report 65* 100.

<sup>256</sup> NZLC *Report 65* 101.

<sup>257</sup> NZLC *Report 65* 110.

<sup>258</sup> See n 237 — the Department of Child, Youth and Family Services was previously known as the Department of Social Welfare.

protection of children in New Zealand, should remain the sole assessor of the suitability of prospective adoptive parents.<sup>259</sup> I believe the important issue here is not so much **who** determines the suitability of adoptive parents or an adoption in general. The emphasis has to be on proper training for the decision-makers.

- Upon registration of an adoption order, an adopted person should automatically be provided with two birth certificates, a post-adoption birth certificate that only shows the adoptive parents, and a full birth certificate that lists all details of the person's birth and subsequent adoption.<sup>260</sup> Adoption records should be open to inspection as of right by adoptees, adoptive parents and biological parents.<sup>261</sup>

Although the Law Commission recommended that adoption reform should be included in a Care of Children Bill,<sup>262</sup> the *Care of Children Act* that was subsequently enacted<sup>263</sup> only deals with guardianship and care. To date the Government has not made any decisions on proposals for the reform of adoption law.<sup>264</sup> There are no immediate plans for any changes to the *Adoption Act of 1955*.<sup>265</sup>

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<sup>259</sup> NZLC Report 65 104.

<sup>260</sup> NZLC Report 65 224.

<sup>261</sup> NZLC Report 65 225.

<sup>262</sup> See above.

<sup>263</sup> This Act came into operation on 1 July 2005.

<sup>264</sup> E-mail dated 12 March 2008 from L Johns of the Department of Justice in New Zealand.

<sup>265</sup> This was confirmed via an e-mail dated 19 February 2008, by P Adamson of the Law Commission of New Zealand.

The decision of the New Zealand authorities not to implement any of the changes that were recommended to the *Adoption Act of 1955* is, to say the least, unfortunate. There is broad consensus in New Zealand on the need for reform in this area.<sup>266</sup> The content of this Act is in many ways archaic and outdated. It has taken approximately 50 years to review this Act and it will probably be a while before any changes are again considered and maybe approved. In the meantime, the best interests of many children may be neglected.

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<sup>266</sup> Henaghan 2006 *NZFLJ* 133 calls this Act an embarrassment. In this article, he even asks readers to write to the Minister of Justice to request that the Act be updated.

## 8 ADOPTION IN BOTSWANA

8 1 INTRODUCTION .....	374
8 2 CUSTOMARY LAW .....	378
8 2 1 Introduction .....	378
8 2 2 Adoption in terms of customary law .....	380
8 3 LEGISLATION .....	384
8 3 1 Introduction .....	384
8 3 2 <i>Adoption of Children Act</i> .....	384
8 3 3 Constitution of Botswana .....	389
8 3 4 United Nations Convention on the Rights of the Child .....	391
8 3 5 The African Charter on the Rights and Welfare of the Child .....	393
8 4 RACE AND CULTURE IN BOTSWANA ADOPTION LAW .....	393
8 4 1 Culture and customary adoption .....	393
8 4 2 Culture and statutory adoption .....	395
8 4 3 Culture and case law .....	395
8 4 4 Race and customary adoption .....	396
8 4 5 Race and statutory adoption .....	397
8 5 THE ROLE OF THE CHILD'S BEST INTERESTS IN BOTSWANA ADOPTION LAW .....	400
8 5 1 Introduction .....	400
8 5 2 Adoption and the child's best interests .....	403
8 5 2 1 <i>Customary law</i> .....	403
8 5 2 2 <i>Legislation</i> .....	405
8 5 3 Open versus closed adoption .....	411

<b>8 6 FUTURE REFORM OF BOTSWANA ADOPTION LAW</b> .....	412
<b>8 6 1 Introduction</b> .....	412
<b>8 6 2 Reform proposals</b> .....	413
<b>8 7 CONCLUSION</b> .....	417

## 8 1 INTRODUCTION

Botswana<sup>1</sup> was invaded by British troops and declared a British Protectorate in 1885. Until then the peoples who make up Botswana today lived alongside each other as independent entities.<sup>2</sup> In 1891 the High Commissioner of South Africa was given the right to administer the Protectorate. The law of the (then) Cape Colony<sup>3</sup> was introduced and so Roman-Dutch law was introduced into Bechuanaland.<sup>4</sup> Botswana became an independent Republic on 29 September 1966.<sup>5</sup>

Roman-Dutch law as influenced by English law still survives today.<sup>6</sup> It is recognised as an independent source of law and together with statute law is labelled the common law.<sup>7</sup> Botswana's dual legal system, which recognises the

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<sup>1</sup> Known from colonisation until independence in 1966 as Bechuanaland.

<sup>2</sup> Nsereko *Constitutional Law in Botswana* xv.

<sup>3</sup> The common law of the Cape of Good Hope was the Roman–Dutch law.

<sup>4</sup> Booï *Globalex* at <http://www.nyulawglobal.org/Globalex/Botswana.htm>; Nsereko *Constitutional Law in Botswana* xv-xvi; Himsworth 1972 *Journal of African Law* 4.

<sup>5</sup> Nsereko *Constitutional Law in Botswana* xix.

<sup>6</sup> Booï *Globalex* at <http://www.nyulawglobal.org/Globalex/Botswana.htm>.

<sup>7</sup> Molokomme *Children of the Fence* 29.

co-existence of this common law<sup>8</sup> and customary law,<sup>9</sup> applies to different sections of the population and provides different laws for persons based upon their ethnic or social origin, religious beliefs and other factors.<sup>10</sup> Statutory law applies to all individuals while customary law varies from community to community.<sup>11</sup>

Often the relationship between statute law and customary law is vague.<sup>12</sup> In respect of adoption it is, however, clear that it can take place either in terms of customary law<sup>13</sup> or in terms of statute.<sup>14</sup> A similar dual system exists in South Africa with regard to adoption, where both customary adoption<sup>15</sup> and statutory adoption<sup>16</sup> take place. In New Zealand adoption could also take place either in terms of customary law or statute,<sup>17</sup> but this dual system for adoption was terminated when the *Maori Land Act* came into force.<sup>18</sup>

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<sup>8</sup> This is referred to as common law/state law/statute law. For consistency I shall use the term “statute law” in the remainder of this chapter.

<sup>9</sup> Booii *Globalex* at <http://www.nyulawglobal.org/Globalex/Botswana.htm>.

<sup>10</sup> Molokomme & Mokobi in Ncube *Children’s Rights in Eastern and Southern Africa* 183; Himsworth 1972 *Journal of African Law* 4.

<sup>11</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 84.

<sup>12</sup> Molokomme & Mokobi in Ncube *Children’s Rights in Eastern and Southern Africa* 186.

<sup>13</sup> S 16 of the *Adoption of Children Act* 1952 states that nothing in the Act shall be construed to prevent the adoption in accordance with customary law of a child who is subject to customary law by a person who is also subject to customary law. In other words, this will only be possible where both the child and the prospective adoptive parent are subject to customary law. More will be said about this under “8 4 RACE AND CULTURE IN BOTSWANA ADOPTION LAW”.

<sup>14</sup> Quansah *Family Law in Botswana* 138.

<sup>15</sup> See the discussion about South Africa’s customary adoption under “2 4 2 Customary law and adoption”.

<sup>16</sup> The current legislation which regulates statutory adoption is discussed in the chapter “6 THE CHILD CARE ACT AND THE CHILDREN’S ACT”.

<sup>17</sup> See “7 2 1 *Adoption of Children Act* 9 of 1881”.

<sup>18</sup> See “7 2 4 *Maori Land Act* 15 of 1909 and the *Maori Affairs Act* 94 of 1953”.

Ethnically Botswana is heterogeneous, with more than 30 ethnic groups, and most of the population being indigenous Africans.<sup>19</sup> The Central Statistics Office of the Government of Botswana has not included race in their census questionnaires since 1964,<sup>20</sup> which obviously makes it hard to obtain the actual racial distribution of the population.<sup>21</sup> However, according to Commeyras & Chilisa the Tswana speaking ethnic groups comprise about 80% of the country's population.<sup>22</sup> According to the 2001 population and housing census<sup>23</sup> Botswana had a population of 1.7 million people at that stage,<sup>24</sup> "almost all of them Africans".<sup>25</sup> About 44% of this figure was children below the age of 18 years with the majority of these children living in rural areas.<sup>26</sup> According to Molokomme the vast majority of Botswana citizens live their lives and settle their disputes largely according to customary law.<sup>27</sup> There is thus ample indication that the indigenous population comprises the majority of people in Botswana, which makes the population distribution in Botswana similar to that of South Africa, where the black population makes up the bulk of the citizens in the country.<sup>28</sup>

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<sup>19</sup> Nsereko *Constitutional Law in Botswana* xxi.

<sup>20</sup> Statistics at [http://www.cso.gov.bw/index.php?option=com\\_content&task=view&id=139](http://www.cso.gov.bw/index.php?option=com_content&task=view&id=139).

<sup>21</sup> In terms of s 15(3) of the Constitution of Botswana (hereafter "the 1966 Constitution"), different treatment of different persons on various grounds, including race, is discriminatory.

<sup>22</sup> Commeyras & Chilisa *International Journal of Educational Development* 434.

<sup>23</sup> This is quoted in Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 83.

<sup>24</sup> Nsereko *Constitutional Law in Botswana* xxi; Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 83.

<sup>25</sup> Nsereko *Constitutional Law in Botswana* xxi.

<sup>26</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 83.

<sup>27</sup> Molokomme *Children of the Fence* 40.

<sup>28</sup> In 2008 the population in South Africa was nearly 50 million people, of which roughly 38 731 000 were black – StatsOnline at <http://www.statssa.gov.za/timeseriesdata>.

South African law was incorporated into Botswana with little modification.<sup>29</sup> When the *Adoption of Children Act*<sup>30</sup> was proclaimed in 1952, the Children's Act of 1937 was the statute that regulated South African adoption legislation.<sup>31</sup> The *Adoption of Children Act* is very similar to the Children's Act of 1937, which is understandable as it is obviously based on the South African Act.<sup>32</sup> However, whereas the South African Children's Act of 1937 was replaced by the Children's Act of 1960 when it became outdated, Botswana has retained the *Adoption of Children Act* for the past 56 years.

The inclusion of the adoption laws of Botswana into this thesis is done for various reasons. Both South Africa and Botswana have dual systems regulating adoption.<sup>33</sup> As discussed above, the division of the population with regard to race is similar in South Africa and Botswana and the *Adoption of Children Act* of Botswana is based on the South African Children's Act of 1937. Unfortunately, adoption is not something with which the population of Botswana is very familiar,<sup>34</sup> with the result that very little information on the subject is available for research purposes.

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<sup>29</sup> Booi Globalex at <http://www.nyulawglobal.org/Globalex/Botswana.htm>.

<sup>30</sup> *Adoption of Children Act*. See "8 3 2 *Adoption of Children Act*". This Act still regulates statutory adoption in Botswana.

<sup>31</sup> For more about this Act, see "2 4 3 3 *Children's Act 31 of 1937*".

<sup>32</sup> See the discussion above in this paragraph.

<sup>33</sup> Also see "2 4 SOUTH AFRICAN LAW".

<sup>34</sup> E-mail dated 23 October 2008 from Prof EK Quansah of the University of Botswana.

## 8 2 CUSTOMARY LAW

### 8 2 1 Introduction

Before Botswana became independent in 1966, customary law was the only regulatory mechanism within any community in the country. However, after independence the inclusion of common law into the legal system introduced a new kind of universal law that applied to all individuals living within Botswana.<sup>35</sup> Customary law is not codified,<sup>36</sup> but the term “customary law” is defined by statute. The statutory definition of customary law is that it consists of rules of law which by custom are applicable to any particular tribe or tribal community in Botswana, not being rules which are inconsistent with the provisions of any enactment or contrary to morality, humanity or natural justice.<sup>37</sup> In other words, customary law is applicable to members of a tribe<sup>38</sup> or tribal community within Botswana.<sup>39</sup> Thus, as in South Africa,<sup>40</sup> adoption in terms of customary law is not available to everyone. However, the *Common Law and Customary Law Act*<sup>41</sup> provides that in all cases in which customary law is the proper law to apply, the courts have to apply customary law. Thus, the courts do not have a discretion whether to apply customary or statutory law.

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<sup>35</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 84.

<sup>36</sup> Seepapitso IV in Brothers *et al Botswana in the 21<sup>st</sup> Century* 343.

<sup>37</sup> S 4(1) of the *Common Law and Customary Law Act* 1969.

<sup>38</sup> A tribesman is defined as “a member of a tribe or tribal community of Botswana ...” — s 3 of the *Common Law and Customary Law Act*. Also see Stewart & Armstrong *Women in Southern Africa* 10.

<sup>39</sup> Quansah *Family Law in Botswana* 126.

<sup>40</sup> See “2 4 2 Customary law and adoption”.

<sup>41</sup> S 5 of the *Common Law and Customary Law Act*.

Unlike statutory law<sup>42</sup> there are no rules defining what a child is under customary law and the status of a child depends largely on the laws and customs of the individual tribe.<sup>43</sup> According to Molokomme & Mokobi<sup>44</sup> traditional customary law does not treat the rights of the child separately from those of the rest of the family as a unit. Further, parents are defined in a different manner from the Western concept, as biological parents are not necessarily recognised as a child's only parents.<sup>45</sup> This reminds us of the view of Mosikatsana,<sup>46</sup> who focuses his beliefs and viewpoints on the community, rather than the individual,<sup>47</sup> and is also similar to the cultural beliefs of the Maori of New Zealand, who view the child as belonging to the larger family, rather than to the parents.<sup>48</sup> Molokomme & Mokobi believe that this broad definition of parenthood can be both beneficial and detrimental to the interests of the child.<sup>49</sup> As I have already argued,<sup>50</sup> I believe that this viewpoint is not conducive to the best interests of the child. To determine the best interests of a child he/she, and nobody else, should be considered.

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<sup>42</sup> See "8 3 LEGISLATION" below.

<sup>43</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 84.

<sup>44</sup> Molokomme & Mokobi in Ncube *Children's Rights in Eastern and Southern Africa* 186.

<sup>45</sup> Molokomme & Mokobi in Ncube *Children's Rights in Eastern and Southern Africa* 184.

<sup>46</sup> Also see "5 6 2 Arguments against intercultural adoption".

<sup>47</sup> See "5 6 2 Arguments against intercultural adoption".

<sup>48</sup> See "7 2 1 *Adoption of Children Act* 9 of 1881".

<sup>49</sup> Molokomme & Mokobi in Ncube *Children's Rights in Eastern and Southern Africa* 184.

<sup>50</sup> See "5 6 2 Arguments against intercultural adoption".

## 8 2 2 Adoption in terms of customary law

There are no written rules or fixed procedures to be followed for the adoption of children in terms of customary law.<sup>51</sup> The parents as the natural guardians of the child have the sole right to decide whether the child should stay with them or go to a relative.<sup>52</sup> In *Marman v Marman*<sup>53</sup> it was confirmed that an agreement to adopt along with the implementation of the adoption constitutes a customary adoption, in other words the transfer of a child from his/her biological family to an adoptive family is effected by agreement between the two families.<sup>54</sup> The child's views are not taken into account. The parents are expected to have the best interests of the child at heart in all matters affecting the child, and are regarded as the spokespersons of the child in all matters of customary law.<sup>55</sup>

In customary law, two kinds of adoption are known, namely temporary adoption and permanent adoption. In terms of the system of temporary adoption a child is sent to live for a while with some paternal or maternal relative, sometimes as a sign of the attachment between two families, and sometimes for a special reason such as the child being ill or unhappy at home.<sup>56</sup> The biological parents have the sole right to decide whether a child should be sent to stay with relatives.<sup>57</sup> In the case of temporary adoption the biological parents remain the guardians and there

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<sup>51</sup> Molokomme *Children of the Fence* 27; Sigweni 2008 *LLM* 7.

<sup>52</sup> Schapera *Tswana Law and Custom* 173.

<sup>53</sup> 2003 (1) BLR 97 (HC) at 98.

<sup>54</sup> Schapera *Tswana Law and Custom* 173.

<sup>55</sup> Sigweni 2008 *LLM* 35.

<sup>56</sup> Schapera *Tswana Law and Custom* 173.

<sup>57</sup> Schapera *Tswana Law and Custom* 173.

is no change in the child's status.<sup>58</sup> The ties of the biological parents are never extinguished,<sup>59</sup> and the child could return to his/her biological parents at any time. In my view this arrangement should not be referred to as adoption. As the biological parents remain the guardians, referring to this custom as adoption just creates unnecessary confusion. This could rather be compared to a form of foster care. This temporary system will not be regarded as adoption in the remainder of this discussion.

A child may also be permanently adopted under customary law. This form of adoption generally takes place when the people to whom the child is sent have no children of their own, or have children of one sex only.<sup>60</sup> Prospective adoptive parents request relatives or friends to give them a child, or the biological parents may decide that when their next child is born, the child will be given to some special relative or friend.<sup>61</sup> This form of adoption is therefore a way in which members of the extended family assist other family members or even friends who do not have biological children.<sup>62</sup> In other words, the focus is on the needs of the adults and the tribe, not the needs and best interests of the children.

When a child is adopted permanently in terms of customary law, a distinction is made between adoption by relatives and adoption by friends. If adopted by relatives, the child is considered the child of the adoptive parents in every way,

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<sup>58</sup> Schapera *Tswana Law and Custom* 173-174.

<sup>59</sup> Roberts *Tswana Family Law* 22- 23, 64, 101, 132, 166, 199-200, 237, 265-266, 296.

<sup>60</sup> Schapera *Tswana Law and Custom* 174.

<sup>61</sup> Schapera *Tswana Law and Custom* 174.

<sup>62</sup> Schapera *Tswana Law and Custom* 174.

as if he/she was born to the adoptive parents.<sup>63</sup> This is similar to statutory adoption.<sup>64</sup> There is one difference, however: If the child is ill-treated by the adoptive parents the biological parents may take him/her back or the child may flee to them.<sup>65</sup> Although it could be argued that this arrangement serves the best interests of the child because the biological parents may step in if the child is not looked after properly, it creates a situation similar to fostering where there is always a sword over the heads of the adoptive parents and the child. The adoptive parents never know when the child may be taken away from them, and the child cannot develop the sense of belonging that he/she needs to form an attachment to the adoptive parents.<sup>66</sup>

On the other hand, if the adoption is by friends, they do not exercise the same control over the child as do adoptive parents who are relatives.<sup>67</sup> They have to inform and consult the biological parents about all important matters affecting the child's welfare.<sup>68</sup> In other words, the parent-child relationship between the biological parents and the child is not severed and could be resumed at any time.<sup>69</sup> The child thus lives in an uncertain and non-permanent situation which, in my view, is not in his/her best interests. Again, referring to this as adoption is

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<sup>63</sup> Schapera *Tswana Law and Custom* 174.

<sup>64</sup> See "8 5 2 2 Legislation" below.

<sup>65</sup> Schapera *Tswana Law and Custom* 174. Presumably the biological parents determine whether the child is ill-treated.

<sup>66</sup> For a discussion of the value of attachment, see "3 3 ATTACHMENT" and "4 3 ATTACHMENT AND ADOPTION".

<sup>67</sup> Schapera *Tswana Law and Custom* 174.

<sup>68</sup> Schapera *Tswana Law and Custom* 174.

<sup>69</sup> This seems to be similar to temporary adoption, discussed above.

probably not the best way of describing this kind of relationship and should, in my opinion, rather be called fostering.

The value of the customary adoption system cannot be denied. Where permanent adoption by relatives takes place, the child is raised in a familiar environment by people who (it is hoped) love and care for him/her. However, in Botswana permanent adoption in terms of customary law is aimed at serving the interests of society in general<sup>70</sup> and adults in particular, instead of the interests of the child because the focus is on the needs of the adults and the tribe instead of on the best interests of the child. That the adoption is not primarily intended to serve the child's interests also appears from the fact that the child has no direct say about the adoption.<sup>71</sup> Furthermore, the non-permanency of the system is not in the best interests of the child. The administration of customary adoptions by traditional leaders, who have not been trained specifically to deal with children's rights issues and human rights in general,<sup>72</sup> could also lead to a situation where the child's best interests may not necessarily be protected. The system of customary adoption should be reconsidered. As I shall argue in "9 CONCLUSION", the principles of customary adoption in South Africa should be included in adoption legislation so that there is one system that regulates adoption. The same argument applies to adoption in Botswana.<sup>73</sup>

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<sup>70</sup> See Sigweni 2008 *LLM* 15.

<sup>71</sup> Sigweni 2008 *LLM* 23.

<sup>72</sup> Sigweni 2008 *LLM* 37.

<sup>73</sup> Also see "8 7 CONCLUSION".

## 8 3 LEGISLATION

### 8 3 1 Introduction

Adoption in terms of statute is the legal process by which the parental rights of a child's biological parents are extinguished and replaced by a set of legal relations between the child and his/her adoptive parents,<sup>74</sup> in other words, it is an act whereby the relationship of parent and child is created between persons who are not necessarily biologically so related.<sup>75</sup> The important thing to remember about statutory adoption is that legally the relationship between the child and the biological parents is terminated while a new legal relationship is created between the child and the adoptive parents. After the adoption the child is treated for all purposes as the legitimate child of his/her adoptive parents.<sup>76</sup> These adoptions are administered by Magistrates' Courts in accordance with the provisions of the *Adoption of Children Act*.<sup>77</sup>

### 8 3 2 *Adoption of Children Act*

Statutory adoptions were introduced in Botswana by the *Adoption of Children Act*, which came into effect on 12 December 1952. The contents of this Act are in

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<sup>74</sup> Quansah *Family Law in Botswana* 138.

<sup>75</sup> Kiggundu *Private International Law in Botswana* 239.

<sup>76</sup> S 6(2) of the *Adoption of Children Act*.

<sup>77</sup> "Court" is defined in s 2 of the *Adoption of Children Act* as a Magistrates' Court. Unfortunately there is no provision in the Act for the involvement of social workers in the adoption process.

many ways similar to the South African Children's Act of 1937, which has not regulated adoption in South Africa for the past 48 years. As will be seen throughout the rest of this chapter, much of the contents of the *Adoption of Children Act* are, in my opinion, outdated. There are currently plans to present a draft of the Children's Bill 2007, which might eventually replace both the *Children's Act* and the *Adoption of Children Act*,<sup>78</sup> to the National Assembly. This draft Bill will be referred to throughout this chapter, where relevant.

The introduction of the *Adoption of Children Act* did not replace customary law adoptions — both systems today operate together.<sup>79</sup> This situation is similar to that in South Africa, where both customary adoptions and statutory adoptions are also known.<sup>80</sup> The *Adoption of Children Act* is the first and only piece of legislation regulating the adoption of children in Botswana.<sup>81</sup> According to Quansah,<sup>82</sup> this Act ensures that neither the adopting parents nor the child who is being adopted is taken advantage of or unnecessarily prejudiced, and that the rights of the parents<sup>83</sup> of the child who is being adopted are properly protected. I believe this should be the aim of any adoption legislation. However, as I shall point out below,<sup>84</sup> there are several aspects of the *Adoption of Children Act* which might fall short of this aim and might need reconsideration.

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<sup>78</sup> CI 137. The Bill is still in its early stages.

<sup>79</sup> Also see “8 1 INTRODUCTION” and my comments below under “8 7 CONCLUSION”.

<sup>80</sup> For a discussion of customary adoptions, see “2 4 2 Customary law and adoption”. For a discussion on statutory adoptions in South Africa, see “6 THE CHILD CARE ACT AND THE CHILDREN'S ACT”.

<sup>81</sup> Sigweni 2008 *LLM* 39.

<sup>82</sup> Quansah *Family Law in Botswana* 138.

<sup>83</sup> Presumably these are the biological parents.

<sup>84</sup> Also see the discussion under “8 5 2 2 Legislation” below.

The court<sup>85</sup> of the district in which the child resides is the court which has jurisdiction to grant an adoption order on the application of the adoptive parent(s).<sup>86</sup> This Act defines a child as a person under the age of 19 years.<sup>87</sup>

An application for an adoption order cannot be granted unless the court is satisfied that the requirements that are contained in section 4(2) of the *Adoption of Children Act* are met. These requirements are:

4(2) A court to which application for an order of adoption is made shall not grant the application unless it is satisfied—

- (a) that the applicant is or that both applicants are qualified to adopt the child;
- (b) that the applicant is or that both applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child and possessed of adequate means to maintain and educate the child;
- (c) that the proposed adoption will serve the interests and conduce to the welfare of the child;
- (d) that consent to the adoption has been given—
  - (i) by both parents of the child or, if the child is illegitimate, by the mother of the child whether or not such mother is a minor or married woman and

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<sup>85</sup> In terms of s 2 of the *Adoption of Children Act* “court” means a Magistrates’ Court established under the *Magistrates’ Courts Act* 1974. In *Mbambo v Ndlovu* 2001 (2) BLR 611 (HC) at 614 it was held that the adoption of a minor that is not covered by the *Adoption of Children Act* 1952 can be brought before the High Court — see the discussion of this case under “8 5 2 2 Legislation” below.

<sup>86</sup> S 4(1) of the *Adoption of Children Act*.

<sup>87</sup> S 2 of the *Adoption of Children Act*. The Children’s Bill 2007 defines a child as a person under the age of 18 years. This is more in line with international instruments. In terms of s 49 of the *Interpretation Act* 1984 the age of majority is attained at the age of 21 years. The current South African legislation defines a child as someone under the age of 18 years. Also see the discussion about the age of the adopted child under “8 5 2 2 Legislation” below.

whether or not she is assisted by her parent, guardian or husband, as the case may be,

- (ii) if both parents are dead, or in the case of an illegitimate child, if the mother is dead, by the guardian of the child,
  - (iii) if one parent is dead, by the surviving parent and by any guardian of the child who may have been appointed by the deceased parent,
  - (iv) if one parent has deserted the child, by the other parent, or
  - (v) by a guardian specially appointed under section 5; and
- (e) that the child, if over the age of 10 years, consents to the adoption.

Some of these requirements need further consideration. A very important requirement is the one in section 4(2)(c), namely that the proposed adoption will serve the interests and conduce to the welfare of the child. As this issue is so important, it will be discussed separately below.<sup>88</sup>

According to section 4(2)(b) the applicants have to possess adequate means to maintain and educate the child. In my view, financial strength should not be a prerequisite if a person would like to adopt a child.<sup>89</sup> This requirement would exclude many people living in Botswana from adopting and is therefore discriminatory.<sup>90</sup> I do not advocate a situation where people who cannot adequately feed, clothe and educate the child should be allowed to adopt a child,

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<sup>88</sup> See “8 5 2 2 Legislation”.

<sup>89</sup> See my discussion under “6 4 2 The financial means of the applicant(s)”. Unfortunately, this requirement remains in the Children’s Bill 2007 – see cl 117(2)(a).

<sup>90</sup> S 15 of the 1966 Constitution prohibits discrimination. Interestingly though, this section does not apply to any law that makes provision for adoption – s 15(4)(c). Presumably this is because of the distinction with regard to customary adoptions that are only applicable to a certain portion of Botswana. Also see the discussion under “8 4 RACE AND CULTURE IN BOTSWANA ADOPTION LAW”.

as that would not be in the best interests of the child. However, I do believe that there is a way of overcoming the problem of the lack of financial security without making it a pre-requisite for adoption. South Africa faces a similar problem. My suggestion was discussed under “6 4 2 2 Children’s Act and the financial means of the applicant(s)” and will also be touched on in “9 CONCLUSION”.

Section 4(2)(e) requires that if the child is over the age of 10 years, he/she has to consent to the adoption. The involvement of the child in the adoption process is welcomed. However, the nature of the process, whereby the involvement is restricted to children over the age of 10 years is, in my opinion, not without its faults.<sup>91</sup> The 1966 Constitution enshrines the right to communicate one’s ideas and information.<sup>92</sup> Nothing in the 1966 Constitution excludes children of any age from this right, which, in my view, means that the restrictive application in the *Adoption of Children Act* of the views of the child<sup>93</sup> is unconstitutional.<sup>94</sup>

There is no indication in section 4(2) of the *Adoption of Children Act* that race has to be considered when an adoption is made, or that the culture of the child or the parents (whether biological or adoptive) plays any part in an adoption application. This is welcomed, and more will be said about this under “8 4 RACE AND CULTURE IN BOTSWANA ADOPTION LAW” below.

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<sup>91</sup> This requirement will be discussed in detail below under “8 5 2 2 Legislation”.

<sup>92</sup> S 12 of the 1966 Constitution.

<sup>93</sup> S 4(2)(e), which only grants this right to children over 10. The Children’s Bill 2007 has taken account of the problem with regard to the age of the child in case of consent. CI 117(2)(h) provides that the views of the child have to be taken into consideration subject to the child’s age, maturity and level of understanding. This reformulation is welcomed, although it is unsure how the provision will be applied, as the court only has to take the views of the child into consideration.

<sup>94</sup> Also see “8 5 2 2 Legislation”.

As will be discussed under “8 7 CONCLUSION”, I am of the opinion that the *Adoption of Children Act* needs to be reconsidered and perhaps rewritten.<sup>95</sup> In order to protect the best interests of the child, there are many issues which need urgent attention. The Botswana legislation on adoption has not advanced with the times.<sup>96</sup>

### 8 3 3 Constitution of Botswana

Until the enactment of the 1966 Constitution the protection of human rights in Botswana was largely left to the common law and statutory law.<sup>97</sup> Today the principal source of law governing human rights protection in Botswana is the 1966 Constitution, specifically the Bill of Rights in chapter 3. The 1966 Constitution came into effect on 30 September 1966. Even though it contains no explicit provision to that effect, the 1966 Constitution is the supreme law of Botswana.<sup>98</sup> Section 3 guarantees the protection and enjoyment of fundamental rights to every person in Botswana, inter alia, regardless of race.

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<sup>95</sup> Also see the remarks under “8 5 THE ROLE OF THE CHILD’S BEST INTERESTS IN BOTSWANA ADOPTION LAW” and “8 6 FUTURE REFORM OF BOTSWANA ADOPTION LAW”.

<sup>96</sup> As has been mentioned, the Children’s Bill 2007 will probably be presented to the National Assembly soon.

<sup>97</sup> Fombad in Fombad *The Law of Botswana* 7.

<sup>98</sup> Nsereko *Constitutional Law in Botswana* 9; *Attorney-General v Unity Dow*, Civ App 4/91, an unreported case referred to by Otlhogile in *Edge & Lekorwe Botswana* 156.

Section 15(1) of the 1966 Constitution protects individuals from discrimination.<sup>99</sup> Section 15(3)<sup>100</sup> limits protection from discrimination to discrimination in respect of “race, tribe, place of origin, political opinions, colour or creed” only. This section is very narrow in terms of the groups that are protected from discrimination.<sup>101</sup> There are many aspects, such as gender, age, disability and language, to name but a few, which also deserve protection, but have been left out of this section. Furthermore, adoption legislation is excluded from this section in terms of section 15(4)(c).<sup>102</sup>

Equality is not protected in the 1966 Constitution. Nsereko, however, believes that the essence of the ban on discrimination<sup>103</sup> implies that all inhabitants in the country should be treated equally.<sup>104</sup> This, in my opinion, is not necessarily so. Equality and non-discrimination are not the same thing.<sup>105</sup>

The 1966 Constitution does not specifically provide for the protection of children or the family. Fombad argues that the principles of the common law and international human rights principles which have become part of customary

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<sup>99</sup> S 15(1): “Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.”

<sup>100</sup> In terms of s 15(3) discrimination in this section means “different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

<sup>101</sup> Nsereko *Constitutional Law in Botswana* 239.

<sup>102</sup> Also see n 90 above and “8 4 5 Race and statutory adoption” below.

<sup>103</sup> See s 15(3) — n 100 above.

<sup>104</sup> Nsereko *Constitutional Law in Botswana* 239.

<sup>105</sup> See “5 4 1 3 Culture and equality”.

international law may be relied upon to fill any gaps in the 1966 Constitution.<sup>106</sup> This may be so, but it would be in line with the best interests of the child and international instruments<sup>107</sup> if a section protecting children's rights is included in the 1966 Constitution.

### 8 3 4 United Nations Convention on the Rights of the Child

Botswana acceded to the Convention on 13 April 1995. Ratification is a reflection of the country's commitment to the international minimum standards established for the protection and promotion of children's rights.<sup>108</sup> The Convention can be used by the Botswana courts in the interpretation of laws, especially determining what is in the best interests of the child.<sup>109</sup>

Article 2 of the Convention contains the non-discrimination clause.<sup>110</sup> Molokomme & Mokobi believe that Botswana does not comply with the requirements of article 2 because of its plural legal system which recognises the co-existence of state and customary laws which apply to different sections of the population and which provide different laws for persons based upon their ethnic

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<sup>106</sup> Fombad in Fombad *The Law of Botswana* 16.

<sup>107</sup> See the Convention (art 3) and the African Charter (art 4), which are both applicable to Botswana.

<sup>108</sup> Molokomme & Mokobi in Ncube *Children's Rights in Eastern and Southern Africa* 182.

<sup>109</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 85.

<sup>110</sup> 2(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(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."

or social origin, religious beliefs and other factors.<sup>111</sup> I agree with this statement. Customary adoption certainly does not comply with this article, as it only allows for adoption of a child who is a member of a tribe, which is obviously discriminatory.<sup>112</sup> The *Adoption of Children Act* is similarly discriminatory. It makes a distinction with regard to the treatment of legitimate and illegitimate children.<sup>113</sup> Section 16 is also discriminatory as it provides legislative approval for customary adoptions which, as I have already argued, are discriminatory.<sup>114</sup> Molokomme & Mokobi come to the conclusion that some of the provisions of Botswana customary law and state law are inconsistent with some of the principles of the Convention.<sup>115</sup> This is also my opinion.

The Convention has been discussed at length in this thesis. It serves no purpose to repeat what has already been said. I shall thus simply reiterate the importance of the best interests of the child in this international document and again state that the Convention can be of great assistance in determining the best interests of the child.

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<sup>111</sup> Molokomme & Mokobi in Ncube *Children's Rights in Eastern and Southern Africa* 183.

<sup>112</sup> This will be discussed under "8 4 RACE AND CULTURE IN BOTSWANA ADOPTION LAW".

<sup>113</sup> In s 4(2)(d)(i) legitimate and illegitimate children require different forms of consent from their biological parents for an adoption. The Children's Bill 2007 refers to children born out of wedlock, but still makes a distinction.

<sup>114</sup> This section, together with its predecessor, will be discussed in more detail under "8 4 RACE AND CULTURE IN BOTSWANA ADOPTION LAW" below.

<sup>115</sup> Molokomme & Mokobi in Ncube *Children's Rights in Eastern and Southern Africa* 201.

### 8 3 5 The African Charter on the Rights and Welfare of the Child

Botswana signed and ratified the Charter on 10 July 2001. Just like the Convention, it can be used by the Botswana courts in the interpretation of laws, especially determining what is in the best interests of the child.<sup>116</sup> The discussion under “5 5 2 The Charter” applies to Botswana as much as it does to South Africa, and will not be repeated here. Similar to the Preamble of the Convention, the Preamble of the Charter prohibits distinction on any ground such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Article 3 contains the non-discrimination clause. The criticism levelled against the non-discrimination article in the Convention<sup>117</sup> applies equally to article 3 of the Charter.

## 8 4 RACE AND CULTURE IN BOTSWANA ADOPTION LAW

### 8 4 1 Culture and customary adoption

The first question I shall attempt to answer is whether intercultural adoption takes place in Botswana. If we consider that customary adoptions happen within a specific tribe,<sup>118</sup> it appears as if intercultural adoptions are not a reality in terms of

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<sup>116</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 85.

<sup>117</sup> See “8 3 4 United Nations Convention on the Rights of the Child”.

<sup>118</sup> See the definition of customary law above, which describes customary law as law **in a particular tribe or tribal community**.

customary law. There does not seem to be any custom that prohibits marriage between different tribes,<sup>119</sup> but intertribal marriages are unlikely, since the women who are traditionally regarded as the man's most suitable brides are his own relatives of certain categories.<sup>120</sup> It is possible for someone to transfer his allegiance to the Chief of another tribe. It is therefore possible that there may be instances where intercultural adoption does take place, but as these will be few and far between, I believe that it is not too much of a generalisation to say that intercultural adoption would be rare. The control of parents over the marriage of their children has been greatly weakened, so that this situation might change with time, but for the moment it is my contention that intercultural adoption is unlikely.

Furthermore, customary adoptions are always either by relatives or friends. In the case of family, our definitions of culture tell us that culture is the knowledge, belief, art, morals, law, custom, and any other capabilities and habits **acquired** by man as a member of society.<sup>121</sup> This leads one to the conclusion that the persons living in the same tribe will most likely have the same culture. Even in the case of adoption by friends the chances are great that the friends are of the same tribe, and the same argument as with regard to relatives thus applies.

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<sup>119</sup> See Schapera *Tswana Law and Custom* 127-130.

<sup>120</sup> Schapera *Tswana Law and Custom* 128.

<sup>121</sup> See the definitions under "5 2 2 Culture".

#### 8 4 2 Culture and statutory adoption

Section 4(2) of the *Adoption of Children Act*, which contains the requirements that have to be met before an adoption order can be granted, does not contain any reference to culture. In fact, there is no reference to culture anywhere in the *Adoption of Children Act*.<sup>122</sup> This is not necessarily an indication that culture is not important; it is however an indication that culture should not be elevated above any of the other requirements in the case of an adoption. Furthermore, the 1966 Constitution contains no reference to culture. Although I believe that culture needs to be protected, and that the 1966 Constitution thus falls short in this regard, the complete omission of any reference to culture in the 1966 Constitution and the *Adoption of Children Act* leads me to the conclusion that intercultural adoption in Botswana, if it does happen, will not be frowned upon. This is in line with my argument that intercultural adoption should be allowed if it is in the best interests of the child.<sup>123</sup>

#### 8 4 3 Culture and case law

The decision in the matter of *In re OM [an infant]*<sup>124</sup> has to be welcomed. This is an unreported case which is discussed in Sigweni 2008 *LLM* 46, but unfortunately I could not establish whether this was a customary law or statutory

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<sup>122</sup> The Children's Bill 2007 states that the child's cultural, ethnic or religious identity is a factor to be taken into account in determining the best interests of the child.

<sup>123</sup> See in general "5 RACE VERSUS CULTURE" and specifically "5 6 3 Arguments in favour of intercultural adoption".

<sup>124</sup> MH 585 of 2000. This is an unreported case which is discussed in Sigweni 2008 *LLM* 46.

law adoption. The biological parent of the child objected to her adoption by a family of another tribe who were of the Christian religion. The focus of the objection was the difference in religion, and not a difference in culture. Considering the child's age (she was eight years old) and the fact that her mother had neglected and abandoned her, the court held that the child was still very young and would easily adjust and adapt to the new environment. Clearly the court believed that religion is less important for a young child than the opportunity to be raised as part of a family.<sup>125</sup> The court ignored religious differences between the adoptive parents and the child in order to satisfy the best interests of the child. It is encouraging to see that the best interests of the child viewed holistically were considered above all else. The same approach should be adopted in the case of cultural differences.

#### **8 4 4 Race and customary adoption**

As I explained above, customary law does not apply to everyone in Botswana, but only to members of a tribe or tribal community. Adoption in accordance with customary law is thus not possible if either the child or the prospective adoptive parent is not subject to customary law.<sup>126</sup> The members of a tribe or tribal community who practise customary law are almost exclusively black.<sup>127</sup> This in

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<sup>125</sup> Also see the discussion under “4 5 3 Attachment and the age of the child”, where it is emphasised that the younger the child is at the time of adoption, the easier it is for the child to adjust.

<sup>126</sup> See “8 2 1 Introduction”.

<sup>127</sup> See my argument under “8 4 5 Race and statutory adoption” below.

effect excludes other races from adopting in terms of customary law. This is obviously racist and discriminatory and needs to be addressed.

#### 8 4 5 Race and statutory adoption

When the *Adoption of Children Act* first came into effect in 1952, it was racist in nature. Blacks were expressly excluded from participating in the statutory form of adoption which it created.<sup>128</sup> They could only adopt African children in accordance with Tswana customary law.<sup>129</sup> This was in terms of section 15, which read as follows:

This Proclamation shall not apply to Africans, and nothing in this Proclamation contained shall be construed as preventing or affecting the adoption of an African child by an African or Africans in accordance with Tswana law and custom.

As can be seen from the section, the idea was that blacks would adopt in accordance with custom. The section referred to “Africans”. The term is not defined, but the classification was clearly ethnic<sup>130</sup> and the wording of the section referred to the indigenous people of Botswana who lived in accordance with customary law.<sup>131</sup> Furthermore, textbooks about customary law deal with “Native

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<sup>128</sup> S 15.

<sup>129</sup> Customary law was until 1968 referred to as “Tswana law and custom” – see Himsworth 1972 *Journal of African Law* 14.

<sup>130</sup> Himsworth 1972 *Journal of African Law* 12.

<sup>131</sup> Although it is possible that there is the rare tribesman who is not African (see Himsworth 1972 *Journal of African Law* 12), the members of the tribes are mainly black.

Customary Law”<sup>132</sup> and “Tswana law”.<sup>133</sup> Clearly thus customary law is reserved for the indigenous blacks of Botswana.<sup>134</sup> Not providing them with the choice to adopt in terms of statute was, of course, discriminatory.

The provision excluding blacks from participating in the statutory form of adoption was repealed in 1964 by the *General Law (Removal of Discrimination) Revision Law*.<sup>135</sup> Currently, the *Adoption of Children Act* does not draw a distinction with regard to race. This means that anybody, no matter what their race, can adopt in terms of statute provided they comply with the requirements of the *Adoption of Children Act*. This has opened up the possibility of statutory adoption to blacks, which is welcomed.

Section 16 of the *Adoption of Children Act* makes provision for the adoption in accordance with customary law of a child **who is subject to customary law** by a person **who is also subject to customary law**,<sup>136</sup> with the result that indigenous blacks now have the choice to adopt either in terms of customary law or in terms of statute, while other races do not have this same opportunity. This is discriminatory and falls foul of section 15(1) & (3) of the 1966 Constitution which

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<sup>132</sup> Schapera *Tswana Law and Custom* vii. Sykes *Concise Oxford Dictionary* 674 defines the term “native” as indigenous or black.

<sup>133</sup> Roberts *Tswana Family Law* ix.

<sup>134</sup> As I have indicated (see “8 4 1 Culture and customary adoption”) it is certainly possible for a person of another race to belong to a tribe, but, if it does happen, it will be extremely rare.

<sup>135</sup> No 28 of 1964, as quoted in *Sigweni* 2008 *LLM* 12.

<sup>136</sup> This provision is also found in cl 129 of the Children’s Bill 2007.

prohibits discrimination on the ground of race.<sup>137</sup> Granted, section 15(4)(c) of the 1966 Constitution excludes adoption from the discrimination clause, but, as I shall argue directly below, it is my opinion that this subsection is in itself discriminatory. My argument finds support in the Convention<sup>138</sup> and the Charter<sup>139</sup> which both prohibit discrimination against children.

The provisions of the *Adoption of Children Act*, specifically section 16, are clearly discriminatory. People subject to customary law have two forms of adoption available to them, while that is not the case for people who are not subject to customary law.<sup>140</sup> In terms of section 15(3) of the 1966 Constitution no law may make any provision that is discriminatory either of itself or in its effect. However, section 15(4)(c) excludes adoption from the general prohibition on discrimination. Section 15(4)(c) reads as follows:

(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision— ...

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

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<sup>137</sup> S 15(1) prohibits discriminatory provisions in any laws, while s 15(3) states that different treatment of persons inter alia attributable to race, is discriminatory. However, also see the discussion below under the same heading about s 15(4)(c) of the 1966 Constitution.

<sup>138</sup> Art 2.

<sup>139</sup> Art 3.

<sup>140</sup> See the discussion above under this heading.

The reasoning behind this provision is not clear. I believe it is probably an attempt to incorporate the provisions of the customary law in such a way that there is no contravention of the provisions in the 1966 Constitution.<sup>141</sup> Firstly, there is no limit as far as the exclusion in section 15(4)(c) is concerned. In other words, with respect to adoption no provision in any law can be discriminatory, no matter how far-fetched or unequal. Providing that the non-discrimination clause does not apply to adoption matters does not make any sense and it contravenes the non-discrimination clause of the Convention<sup>142</sup> and the Charter. The interests and welfare of the child have to be protected in an adoption.<sup>143</sup> However, these interests and welfare could be at risk if the non-discrimination section does not apply to the child.

## **8 5 THE ROLE OF THE CHILD'S BEST INTERESTS IN BOTSWANA ADOPTION LAW**

### **8 5 1 Introduction**

Traditional customary law does not treat the rights of the child separately from those of the rest of the family as a unit.<sup>144</sup> However, the principle of the best

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<sup>141</sup> As I shall argue in “8 7 CONCLUSION”, I believe that it is time that the statutory system and the customary system are integrated into one set of laws that are applicable to everyone and acceptable to everyone.

<sup>142</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 87.

<sup>143</sup> S 4(2)(c) of the *Adoption of Children Act*.

<sup>144</sup> Molokomme & Mokobi in Ncube *Children's Rights in Eastern and Southern Africa* 186.

interests of the child was introduced into the law of Botswana by section 6 of the *Customary Law (Application and Ascertainment) Act*<sup>145</sup> in 1969,<sup>146</sup> to apply specifically to custody cases.<sup>147</sup> Section 6 provides that “in any case relating to the custody of children the welfare of the children concerned shall be the paramount consideration irrespective of which law or principle is applied.”<sup>148</sup> It can be argued that statutory adoption would fall under this provision, as the effect of such adoption is that custody is awarded to the adoptive parents,<sup>149</sup> and Himsworth says this section lends statutory confirmation to a well-established rule that the welfare of the children involved must be the paramount consideration.<sup>150</sup> This to me clearly indicates that the intention is that section 6 applies to all cases dealing with the welfare of the child where custody is concerned. The welfare of children has in any event become part of the law of Botswana and has been relied upon in a number of cases.<sup>151</sup> Although not enshrined in the 1966 Constitution, the principle of the best interests of the child has become the standard against which decisions affecting children are now measured.<sup>152</sup> Within the courts it has become a guiding principle for **all** actions involving children. The courts have generally interpreted it to mean that in all

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<sup>145</sup> *Customary Law (Application and Ascertainment) Act* 1969.

<sup>146</sup> Molokomme & Mokobi in Ncube *Children’s Rights in Eastern and Southern Africa* 184.

<sup>147</sup> Molokomme & Mokobi in Ncube *Children’s Rights in Eastern and Southern Africa* 189.

<sup>148</sup> Whether the term “interests” or “welfare” is used, they both relate to the best interests of the child and can be interpreted as synonymous — Molokomme & Mokobi in Ncube *Children’s Rights in Eastern and Southern Africa* 189; Quansah *Family Law in Botswana* 132. The court in *Ex parte Veen in re Infant Otlogetswe Kgosietsile* 1978 BLR 43 (HC) at 47, 52 also used these terms as synonyms. My view is that no meaningful distinction can be drawn between the two concepts — see “7 4 2 I Determining welfare and interests”.

<sup>149</sup> In terms of s 6(2) of the *Adoption of Children Act* 1952 an adopted child shall for all purposes whatsoever be the legitimate child of the adoptive parents.

<sup>150</sup> Himsworth 1972 *Journal of African Law* 11.

<sup>151</sup> Quansah *Family Law in Botswana* 132.

<sup>152</sup> Rwezaura in Ncube *Children’s Rights in Eastern and Southern Africa* 41.

cases involving children the welfare of the child should be the paramount consideration irrespective of what law is applied.<sup>153</sup>

In 1996 a Presidential Task Group was appointed to work on Vision 2016, a project of the Botswana National Vision Council. This is Botswana's strategy to propel its socio-economic and political development into a competitive, winning and prosperous nation.<sup>154</sup> Vision 2016 has as part of its aims the eradication of all negative social attitudes towards the role of women, youths, the disabled and so forth. Specifically it provides that "[n]o citizen of the future Botswana shall be disadvantaged as a result of gender, age, religion or creed, colour, national or ethnic origin ..."<sup>155</sup> Like the Convention, Vision 2016 envisions a future where children are able to develop to their fullest potential, acknowledging the vital roles played by family life and parents in children's development, and the need to protect Botswana's vulnerable children.<sup>156</sup> If this vision comes to fruition, it can only be beneficial to the best interests of the child.

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<sup>153</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 87. In terms of the Children's Bill 2007 the best interests of the child are the paramount consideration (cl 6), and it contains a list of factors that have to be taken into account in determining the best interests of the child (cl 7).

<sup>154</sup> Vision 2016 at <http://www.vision2016.co.bw/index.html>.

<sup>155</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 87.

<sup>156</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 83.

## 8 5 2 Adoption and the child's best interests

### 8 5 2 1 Customary law

Customary courts rarely keep records of proceedings.<sup>157</sup> Although customary law is generally known by customary court members and the community,<sup>158</sup> it is not easy to establish what the customary courts consider important in the case of a customary adoption if no records are kept.<sup>159</sup> Customary law develops constantly, and it is very difficult to determine what development has taken place under these circumstances. This could be detrimental to the best interests of the child.

Customary law does not provide for child participation in adoption decisions, although an elder would speak on the child's behalf.<sup>160</sup> This, to my mind, is not in the best interests of the child. As I have argued already,<sup>161</sup> a child who is mature enough to participate should be allowed to participate in any adoption proceedings, failing which such adoption should not proceed.<sup>162</sup>

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<sup>157</sup> Sigweni 2008 *LLM* 28.

<sup>158</sup> Molokomme *Children of the Fence* 27.

<sup>159</sup> This was a problem in *Marman v Marman* 2003 (1) BLR 97 (HC), where the court had to decide whether a customary adoption had in fact taken place. The applicants' case was that there was no adoption, and the court had to call an expert in customary law to explain the procedures in such an adoption. This is a problem in South Africa as well. In *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (TskA) at 773-774 various experts in customary law were called in order to determine whether a customary adoption had indeed taken place.

<sup>160</sup> Sigweni 2008 *LLM* 23.

<sup>161</sup> See "8 3 2 *Adoption of Children Act*".

<sup>162</sup> Also see "8 5 2 2 *Legislation*" below.

Where a child does not have biological parents, the head of the extended family makes the decision about which of the family members will raise the child.<sup>163</sup> This, I believe, is also not in the best interests of the child. Not only are the views of the child ignored, but also the views of the adoptive parents. In fact, the adoptive parents may not even want a child at all, but they are not in a position to refuse to adopt the child.<sup>164</sup> As I have explained elsewhere,<sup>165</sup> it is important that the views of all parties to the adoption<sup>166</sup> are taken into account. If this is not done, it could lead to a situation where there are unwilling parties to an adoption, which will obviously not be in the best interests of the child.

There is no independent party involved in customary adoptions who is there specifically to look after and make decisions in the best interests of the child. In the absence of such a person, I would suggest that a campaign is launched to educate people about adoption, its consequences and the best interests of the child. Below in this chapter I will argue<sup>167</sup> that customary adoption needs to be incorporated into statute law in such a way that the interests of **all** the people of Botswana are served.

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<sup>163</sup> Sigweni 2008 *LLM* 31.

<sup>164</sup> Sigweni 2008 *LLM* 31.

<sup>165</sup> See “4 2 6 Parent-centered versus child-centered approach”, where I discuss the importance of taking into account the views of all relevant parties before an adoption order is made.

<sup>166</sup> Before an adoption takes place, all relevant parties have to be consulted. Where there are no biological parents, it would mean that the adoptive parents and the child, if he/she is able to give an opinion, have to be consulted.

<sup>167</sup> See “8 7 CONCLUSION” below.

With customary adoptions contact is maintained between the child and the biological family,<sup>168</sup> which is in line with both the Convention<sup>169</sup> and the Charter,<sup>170</sup> and also with the guidelines of open adoption.<sup>171</sup> Keeping contact with the biological family is usually in the best interests of the child, although the relationship between the child and the biological family should always be monitored.<sup>172</sup>

#### 8 5 2 2      *Legislation*

In terms of section 4(2)(c) of the *Adoption of Children Act* an adoption application shall not be granted unless the proposed adoption will serve the interests and conduce to the welfare of the child.<sup>173</sup> Whether the *Adoption of Children Act* actually serves these best interests, will be investigated next.

This Act makes no provision for the involvement of a social worker or similarly trained welfare official in the adoption process. Without such a person, it is not certain how much protection there is for the child and his/her best interests in the adoption process. It is certainly possible that the best interests of the child are protected by the current adoption process, but there is nothing in the *Adoption of*

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<sup>168</sup> See the discussion under “4 4 OPEN VERSUS CLOSED ADOPTION”.

<sup>169</sup> Art 9(3). Botswana acceded to the Convention on 13 April 1995.

<sup>170</sup> Art 19(2). Botswana signed and ratified the Charter on 10 July 2001.

<sup>171</sup> See “4 4 2 Open adoption”.

<sup>172</sup> See “4 4 2 2 *Benefits of adoption contact*” and “6 2 3 The Children’s Act and growing up in a family environment”, as well as my recommendation under “9 CONCLUSION”.

<sup>173</sup> In terms of cl 117(2)(a) of the Children’s Bill 2007, an application for an adoption cannot be granted unless the court is satisfied that the adoption would be in the best interests of the child. As I argue under “6 3 3 2 *The Children’s Act, adoption and the best interests of the child*”, the protection is thus stronger in the Children’s Bill 2007.

*Children Act* to indicate what this possible protection is. If a social worker were involved in the process, there would be more certainty that there was someone to look out for the best interests of the child.

As was indicated above,<sup>174</sup> section 4(2)(e) of the *Adoption of Children Act* requires that a child, if over the age of 10 years, has to consent to an adoption, failing which an adoption order cannot be granted. Furthermore, if the child who has to consent to the adoption gives such consent in Botswana, such consent has to be in writing and signed in the presence of a District Commissioner, who has to attest to the consent. If the consent is given outside Botswana it has to be signed and attested in the manner prescribed.<sup>175</sup> The requirement regarding the written consent needs further consideration. Although some form of tangible proof of the consent is needed, there is always the possibility that a child who needs to consent to an adoption is illiterate.<sup>176</sup> In such a case, an alternative form of consent should be considered. It is a pity too that the section does not require the Commissioner to ask questions and discuss the consequences of consent with the child.<sup>177</sup> Such a requirement would certainly offer more protection with regard to the best interests of the child who may not have consented voluntarily

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<sup>174</sup> See “8 3 2 *Adoption of Children Act*” above.

<sup>175</sup> A similar provision is found in cl 117(3) of the Children’s Bill 2007.

<sup>176</sup> A national literacy survey was undertaken for the first time in Botswana in 1993 by the Central Statistics Office to establish the rate of adult literacy and the extent of inadequate literacy among the adult population of Botswana. Unfortunately the target population for the survey was citizens aged 12-65 years old who never attended school or left school before completing standard five — Commeyras & Chilisa *International Journal of Educational Development* 434-435. It is therefore not possible to know what the literacy rate of children in Botswana is, but it can be assumed that among younger children especially there has to be some illiteracy.

<sup>177</sup> There are no regulations under the *Adoption of Children Act* 1952. Confirmation of this was obtained from Professor EK Quansah of the University of Botswana via e-mail dated 25 November 2008.

or who may not be fully aware of what that consent entails. There is also the matter of the age requirement with regard to consent. As I have argued elsewhere,<sup>178</sup> the approach of stipulating a specific age is far too rigid and can actually work against the best interests of the child.

For purposes of the *Adoption of Children Act* a court is a Magistrate's Court and a child is a person under the age of 19 years.<sup>179</sup> This means that someone could be adopted in terms of this Act up to the age of 18 years and 11 months if the Magistrate's Court is approached with an adoption application and the necessary requirements are met. In *Mbambo v Ndlovu*<sup>180</sup> the applicants approached the High Court after a statutory adoption application was declined in the Magistrate's Court because the minor was 19 years old and was therefore not a child within the meaning of the *Adoption of Children Act*. The court held that the High Court has unlimited jurisdiction in terms of section 95(1) of the 1966 Constitution<sup>181</sup> and that this should include those matters in which the subordinate courts lack jurisdiction.<sup>182</sup> The application for the adoption was denied because the consent was not properly attested, but the applicants were granted leave to file proper consent before presenting the application for an appropriate order.<sup>183</sup> This

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<sup>178</sup> In this regard, see my criticism of the New Zealand legislation under “7 4 2 2 *Factors to be taken into account*” as well as my remarks under “6 5 2 1 *The Child Care Act and the consent of the child*” and “6 5 2 2 *The Children's Act and the consent of the child*”.

<sup>179</sup> S 2.

<sup>180</sup> 2001 (2) BLR 611 (HC) at 614.

<sup>181</sup> S 95(1): “There shall be for Botswana a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law”.

<sup>182</sup> At 614.

<sup>183</sup> At 615.

decision has to be criticised.<sup>184</sup> Although it is true that the High Court is the upper guardian of all minors,<sup>185</sup> I do not believe that it has the power to hear an application which is reserved for the Magistrate's Court by statute. Furthermore, the *Adoption of Children Act* is very specific about who it considers to be a child, and I do not believe the High Court should interfere with this age.

Section 5 of the *Adoption of Children Act* provides that if an application has been made for an order for the adoption of a child, the Minister may under certain circumstances appoint a guardian for the child for the purpose of proceedings under the *Adoption of Children Act*.<sup>186</sup> Although the Act stipulates that a "suitable person" may be appointed, there are no guidelines about who this person should be or whether he/she should have any specific attributes or qualifications. The reason for including such a section in the Act was surely to protect the best interests of a child who does not have parents to protect him/her in any proceedings under the Act, but this section needs rethinking. Today a social worker, who has been trained to know what the best interests of a child require in the case of an adoption, should be the one responsible for ensuring that the best interests of the child are protected under these circumstances.<sup>187</sup>

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<sup>184</sup> Also see n 85 above.

<sup>185</sup> In terms of s 49 of the *Interpretation Act* the age of majority is attained at the age of 21 years in Botswana.

<sup>186</sup> These circumstances are the following: if the child's parents are dead and no guardian has been appointed for the child; if the parents have deserted the child; if the parents are, or one of the parents is, incapable by reason of mental disorder or defect of consenting to the adoption. S 70 of the South African Children's Act of 1937 contained a similar provision. Cl 118(1) of the Children's Bill 2007 contains a similar provision.

<sup>187</sup> Also see my remarks above under this heading about the need to include social workers in the adoption process in all cases.

In terms of section 6 of the *Citizenship Act*<sup>188</sup> an adopted child who is not a citizen of Botswana will only become a citizen if the adopter is at the date of the adoption a citizen and the child is **no older than three years**. Citizenship thus automatically follows an adoption under these circumstances. However, section 7 of the *Citizenship Act* provides that the Minister may register a child over the age of three years adopted by a citizen of Botswana as a citizen upon application by the adoptive parent, provided that a child shall not be registered as a citizen if the Minister is satisfied that the child, “being sufficiently mature to have formed a character, is not of good character”. This distinction with regard to citizenship based on the age of the child is discriminatory. Further, it could have some (possibly) unintended consequences. If a child is adopted but cannot become a citizen of Botswana, it could lead to a situation where prospective adoptive parents are less likely to choose a child who is older than three years. Granted, it is not necessarily in the best interests of the child to lose his/her biological or current citizenship, but knowing that the adopted child might retain a foreign citizenship could sway prospective adoptive parents to rather choose a younger child who will automatically become a citizen of Botswana upon adoption. Another question that comes to mind is how it will be determined whether a young child has a “good character”. It could be that the Minister will wait until he/she is satisfied that the child is mature enough to have formed a character to make a decision about citizenship, which might never happen, or the Minister might decide that the child is not “of good character”. This would lead to

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<sup>188</sup> The *Citizenship Act* 1982.

tremendous uncertainty for the child and would not be in the best interests of the child. It seems to me as if the concern here is not the child's best interests.

Finally, the decision in *Ex parte Veen in re Infant Otlogetswe Kgosietsile*<sup>189</sup> has to be mentioned. This was not an adoption application, but an application by the applicants to be appointed as joint guardians and to be awarded custody of a minor. The court held that emotional security is one of the most important factors in any child's psycho-social development. As I have already argued, the importance of attachment in the development of a child's emotional security cannot be overlooked, and such emotional security can be obtained through adoption.<sup>190</sup>

Overall, the determination of the best interests of a child is a complicated matter, but there are certain factors that have been proven to work either towards or against the best interests of the child. If these factors are properly considered, it can only make it easier to achieve the goal of acting in the best interests of the child.<sup>191</sup>

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<sup>189</sup> 1978 BLR 43 (HC) at 48.

<sup>190</sup> See "4 3 ATTACHMENT AND ADOPTION" and "4 4 2 2 Benefits of open adoption".

<sup>191</sup> On 4 February 2005 the Children in Need of Care Regulations (Statutory Instrument no 8 of 2005) were introduced under s 38 of the *Children's Act* 1981. These regulations apply when there is reasonable cause to believe that a child is in need of care (reg 3(1)). Reg 7 deals with the best interests of the child and lists the factors to which the court must have regard (reg 7(2)). These or similar factors could undoubtedly assist the court in the case of adoption as well, and it would be in the best interests of the child if consideration was given to the making of regulations for the *Adoption of Children Act* 1952 too.

### 8 5 3 Open versus closed adoption

The court may at the time of making an adoption order or at any time thereafter direct that a biological parent<sup>192</sup> or guardian of the child shall have access to the child for a period not exceeding two years from the date of adoption, provided that the court will not make such an order if access will probably be to the disadvantage of the child.<sup>193</sup> At first glance this seems like approval for open adoption.<sup>194</sup> However, in my opinion this section is not in the best interests of the child. It is important that, where possible and in the best interests of a child, the biological parent(s)/family and/or guardian are part of the child's life after an adoption order is made. The benefits of open adoption have already been discussed.<sup>195</sup> Post-adoptive contact, in whichever form,<sup>196</sup> between the child and the biological parents/family is in the best interests of the child.<sup>197</sup> Once it is determined that contact between the child and the biological parents after an adoption is in the best interests of the child, there can be no justification for terminating that relationship after a period of, at most, two years if the concern is the welfare of the child. The only reason I can think of for the enactment of such a limiting provision is that it grants the biological parents the opportunity to

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<sup>192</sup> The Act does not specify, but "parent" here apparently refers to the biological parent.

<sup>193</sup> S 7. This is similar to s 72 of South Africa's Children's Act of 1937. There is no similar provision in the Children's Bill 2007, but cl 122 of the Children's Bill 2007 provides that the court shall not make any order prohibiting the adopted child from maintaining contact with his/her biological parents unless it would be in the best interests of the child for it to do so. It also contains an interesting provision (cl 120) which states that an adoptive parent has to give an undertaking, in writing, that he/she shall inform the child that the child is adopted, and the whereabouts and circumstances of the child's biological or other parents if they are still alive. Cl 120 is in line with the principles of open adoption.

<sup>194</sup> See "4 4 OPEN VERSUS CLOSED ADOPTION".

<sup>195</sup> See "4 4 OPEN VERSUS CLOSED ADOPTION".

<sup>196</sup> The different forms of contact are discussed under "4 4 OPEN VERSUS CLOSED ADOPTION".

<sup>197</sup> See "4 4 OPEN VERSUS CLOSED ADOPTION". There are, of course, exceptions.

ensure that the child is happy and well cared for, but if this is the case, a social worker can perform this task.<sup>198</sup> The parents should be part of the child's life, but not to fulfil the role of a social worker and not just for a limited period.

## 8 6 FUTURE REFORM OF BOTSWANA ADOPTION LAW

### 8 6 1 Introduction

Although it has been discussed,<sup>199</sup> reference should again be made to Vision 2016, which envisions a future where children are able to develop to their fullest potential, and which, if its aims are achieved, could ultimately benefit the child and be in the best interests of the child.

As I mentioned above,<sup>200</sup> Botswana adoption legislation needs urgent attention. Currently, a draft Children's Bill, 2007,<sup>201</sup> is in the process of being prepared for eventual presentation to the National Assembly. The object of the Bill is to give effect to Botswana's obligations in terms of the Convention and the Charter regarding the well-being of children, as well as to promote the well-being of families and communities in Botswana.<sup>202</sup>

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<sup>198</sup> As discussed above under this heading, there is no involvement of a social worker or similar person in the adoption process at all. This important deficiency needs to receive attention.

<sup>199</sup> See "8 5 1 Introduction".

<sup>200</sup> See "8 3 2 *Adoption of Children Act*".

<sup>201</sup> Hereafter referred to as "the Bill". The Bill does not have a number yet. If enacted, it will be cited as the *Children's Act, 2008*.

<sup>202</sup> Memorandum to the Bill.

The Bill provides, amongst other things, for the protection and care of children in circumstances in which parents are unable to protect or care for their children. In this process the best interests of the child must be paramount.<sup>203</sup>

In the next paragraph, I shall consider the contents of this Bill and whether the proposed amendments will have any positive impact on adoption legislation in Botswana.

### 8 6 2 Reform proposals

As can be seen from the rest of this chapter, there are issues in the adoption legislation of Botswana that need attention. I shall now consider the contents of the Bill and whether it addresses the matters that need attention.

- The protection of the best interests of the child is undoubtedly more comprehensive in the Children's Bill than it is in the *Adoption of Children Act*. In terms of section 4(2)(c) of the Act an adoption order shall not be made unless the court is satisfied that the proposed adoption will serve the interests and conduce to the welfare of the child.<sup>204</sup> The Children's Bill, however, mandates a person or the court performing a function or exercising a power under the Bill to regard the best interests of the child

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<sup>203</sup> Memorandum to the Bill.

<sup>204</sup> Also see "8 5 2 2 Legislation".

as the paramount consideration,<sup>205</sup> and a court may not grant an adoption application unless it would be in the best interests of the child to do so.<sup>206</sup>

This is a definite improvement of the protection of the best interests of the child. As I explained above,<sup>207</sup> the way the Act is formulated, it would be possible that a child's interests might possibly be served without the adoption necessarily being in the **best** interests of the child. The protection of the best interests in the Bill is much better than it is in the *Adoption of Children Act*.

- Under “8 5 2 2 *Legislation*”, the requirement of consent by the child before an adoption is granted, is discussed and criticised. Whereas the Act demands the consent of a child over the age of ten years,<sup>208</sup> the Bill requires the views of the child to be taken into consideration, subject to the child's age, maturity and level of understanding, before an adoption application may be granted by the court. Even though this approach to the consent of the child is welcomed, the Bill provides that the court needs to take the views of the child **into consideration**, and it is not clear how the court will interpret this requirement. As I suggested above,<sup>209</sup> consent by the child should be a requirement, subject to the child's age, maturity and stage of development, as determined by a trained social worker.<sup>210</sup>

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<sup>205</sup>

Cl 6.

<sup>206</sup>

Cl 117(2)(a).

<sup>207</sup>

See “6 3 2 The Children's Act and growing up in a family environment”.

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S 4(2)(e) of the *Adoption of Children Act*.

<sup>209</sup>

See “6 5 2 2 *The Children's Act and the consent of the child*”.

<sup>210</sup>

Also see “7 4 2 2 *Factors to be taken into account*”.

- The Children's Bill contains a list of factors that need to be taken into account to determine the best interests of the child.<sup>211</sup> This list is generally welcomed. However, the inclusion of the child's cultural identity<sup>212</sup> as a factor to be taken into account to determine the best interests might be interpreted as an indication that intercultural adoption is not in the child's best interests. This has to be criticised.
- The financial ability of prospective adoptive parents to care for the child as a requirement of the *Adoption of Children Act*<sup>213</sup> was criticised above.<sup>214</sup> Unfortunately this requirement has been retained in the Children's Bill.<sup>215</sup>
- In terms of section 7 of the *Adoption of Children Act*, the court may at the time of making an adoption order or at any time thereafter direct that a parent or guardian of the child shall have access to the child for a period not exceeding two years from the date of adoption.<sup>216</sup> In line with the principles of adoption contact, the Children's Bill provides that the court shall not make any order prohibiting an adopted child from maintaining contact with his/her biological parents, unless it would be in the best

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<sup>211</sup> Cl 7(1).

<sup>212</sup> Cl 7(1)(e).

<sup>213</sup> S 4(2)(b) of the Act.

<sup>214</sup> See "8 3 2 *Adoption of Children Act*".

<sup>215</sup> Cl 117(2)(d).

<sup>216</sup> See "8 5 3 Open versus closed adoption".

interests of the child to do so.<sup>217</sup> This change is welcomed. Furthermore, the Bill provides that an adoptive parent has to give an undertaking, in writing, that he/she shall inform the child that the child is adopted, and of the whereabouts of the child's biological or other parents, if they are still alive.<sup>218</sup> This provision also embraces the principle of adoption contact.

- In Botswana, adoption may take place either in terms of statute law or in terms of customary law.<sup>219</sup> It is my opinion that it is not in the best interests of the child to retain such a dual system,<sup>220</sup> but that there should be one system that caters for all people. In terms of clause 129 of the Children's Bill, adoption in accordance with customary law of a child who is subject to customary law by a person who is also subject to customary law, is not affected by the Bill. It is unfortunate that the legislature retained this dual system of adoption.

Even though there are still issues in the Bill which need attention, the Bill on the whole serves the best interests of the child in adoption better than the current *Adoption of Children Act*.

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<sup>217</sup> CI 122.

<sup>218</sup> CI 120.

<sup>219</sup> See "8 2 2 Adoption in terms of customary law" and "8 3 LEGISLATION".

<sup>220</sup> See "8 2 2 Adoption in terms of customary law", "8 7 CONCLUSION" and "9 CONCLUSION".

## **8 7 CONCLUSION**

Adoption is a complicated matter as it is. As we have established, both in this chapter and in other chapters, there are numerous issues that have to be considered in any attempt to act in the best interests of the child in an adoption application and thereafter. Having a dual system of adoption does not make this task any easier. There is much disconnect between statutory law and the majority of the populace, whose living law is customary law.<sup>221</sup> It might be time to reconsider and restructure adoption procedures so that there is a single adoption system that is acceptable for, and applicable to, all the peoples of Botswana.<sup>222</sup> If this is not done, it might lead to neglect of the best interests of the child.

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<sup>221</sup> Tabengwa *et al* in Sloth-Nielsen & du Toit *Trials & Tribulations* 88.

<sup>222</sup> The Children's Bill 2007 unfortunately retains this dual system.

## **9 CONCLUSION**

<b>9 1 INTRODUCTION</b> .....	420
<b>9 2 THE BEST INTERESTS OF THE CHILD</b> .....	422
<b>9 2 1 Introduction</b> .....	422
<b>9 2 2 Growing up in a family environment</b> .....	427
<b>9 2 3 Attachment</b> .....	428
<b>9 2 4 Financial circumstances of the parties</b> .....	429
<b>9 2 5 Consent of minor parent to adoption</b> .....	431
<b>9 2 6 Child's consent to adoption</b> .....	432
<b>9 2 7 Assessment and counselling</b> .....	434
<b>9 2 8 Adoption contact</b> .....	436
<b>9 3 CULTURE</b> .....	439
<b>9 3 1 Introduction</b> .....	439
<b>9 3 2 How important is culture in the adoption process?</b> .....	441
<b>9 3 3 Least detrimental alternative?</b> .....	443
<b>9 3 4 Culture and the views of all parties</b> .....	445
<b>9 3 5 Cultural awareness</b> .....	446
<b>9 4 CUSTOMARY LAW AND ADOPTION</b> .....	450
<b>9 5 CONCLUSION</b> .....	454

## 9 1 INTRODUCTION

The aim of this thesis is to determine whether adoption, specifically intercultural adoption, is in the best interests of the child. In my opinion, the research in the preceding chapters highlights six main considerations in this regard.

- The best interests of the child are the most important issue in any matter concerning the child. This is in line with the Constitution,<sup>1</sup> international instruments<sup>2</sup> and the Children's Act.<sup>3</sup>
- It is in the best interests of the child to grow up in a family environment.<sup>4</sup> Adoption is a form of alternative care that provides a child with the opportunity to experience parental care and to benefit from growing up in a family environment.<sup>5</sup>
- Attachment between a child and a parent-figure/caregiver is extremely important in a child's life, and the younger the child is when such attachment is formed, the better it is for the child.<sup>6</sup> Adoption can provide a

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<sup>1</sup> S 28(2).

<sup>2</sup> Art 3(1) of the Convention and art 4 of the Charter.

<sup>3</sup> S 9 of the Children's Act of 2005.

<sup>4</sup> See "3 2 FAMILY CARE, PARENTAL CARE AND APPROPRIATE ALTERNATIVE CARE".

<sup>5</sup> See "3 2 3 6 *Alternative care and adoption*".

<sup>6</sup> See "4 3 ATTACHMENT", specifically "3 3 2 3 *When are attachments formed?*".

- child with the opportunity to experience parental care and the family environment, no matter what the age of the child when he/she is adopted.<sup>7</sup>
- When an adoption is considered, race is not a factor that should play any role whatsoever, and culture should not be considered more important than any other relevant factor in the adoption process.<sup>8</sup> Whether the adoption is within the child's own race/culture or not, does not determine whether the adoption is in the child's best interests.<sup>9</sup> The entire issue of culture<sup>10</sup> has to be judged in the context of the best interests of the child, viewed holistically.
  - An intercultural adoption is not only more in line with the best interests of the child than no adoption at all, but it is also preferable to an intercountry adoption. The domestic adoption of a child by suitable adoptive parents (whether of the same race or culture of the child or not) is generally preferable to intercountry adoption.<sup>11</sup>
  - A dual system of adoption, such as is found in South Africa and Botswana,<sup>12</sup> is not in the best interests of the child. In the first place, the focus of the two systems in South Africa is different. Whereas the focus of

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<sup>7</sup> See "3 3 2 3 *When are attachments formed?*".

<sup>8</sup> Race and culture and their respective roles in the adoption process are discussed under "RACE VERSUS CULTURE".

<sup>9</sup> See "5 RACE VERSUS CULTURE".

<sup>10</sup> See "5 RACE VERSUS CULTURE".

<sup>11</sup> See "5 6 3 1 *Cultural issues as a factor*".

<sup>12</sup> In both these countries statutory adoption and customary adoption co-exist.

customary adoption is the needs of the family head,<sup>13</sup> the aim of statutory adoption is to act in the best interests of the child.<sup>14</sup>

In light of the research done in the preceding chapters, I shall make certain recommendations to address the relevant issues and objections with regard to adoption in general, and specifically with regard to intercultural adoption.

## **9 2 THE BEST INTERESTS OF THE CHILD**

### **9 2 1 Introduction**

The concept “best interests of the child” has been part of South African law relating to children for a long time.<sup>15</sup> Over time, a shift has occurred in the focus of children’s interests. Whereas initially the focus in the parent-child relationship was on the rights of the parents, it later changed to emphasise the interests of the child. Instead of parental rights, parental responsibilities became important.<sup>16</sup> This shift confirms the paramountcy of the best interests of the child as provided for in the Constitution.<sup>17</sup>

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<sup>13</sup> See “6 8 CUSTOMARY LAW, ADOPTION AND THE BEST INTERESTS OF THE CHILD”.

<sup>14</sup> See “4 THE BEST INTERESTS OF THE CHILD”.

<sup>15</sup> See “4 2 1 Historical development and application in South Africa”.

<sup>16</sup> Van Heerden “Parental power” in Van Heerden *et al* *Boberg’s Law of Persons and the Family* 657-658; Clark 2002 *CILSA* 216-219.

<sup>17</sup> S 28(2) of the Constitution. Also see “4 2 4 Primacy and paramountcy”.

The two major stumbling blocks in reaching a decision about a child's best interests are the inability to predict the consequences of alternative outcomes, and the lack of consensus on what criteria to use to evaluate the alternatives.<sup>18</sup> It is up to those responsible for decisions about children and their future to make a decision that, in their opinion, will be in the best interests of the child. A few general suggestions and remarks about the best interests of the child and adoption will be made, after which some specific recommendations will follow.

- The best interests of the child, as provided for in section 28(2) of the Constitution, are always paramount when considering adoption. The focus must thus be on the needs of the child, not on the needs of the parent(s)/family. There are many factors that make up the best interests of the child. These factors have to be determined on a case-by-case basis. As is emphasised under "4 2 6 Parent-centered versus child-centered approach",<sup>19</sup> the best interests of the child demand that the views of all parties to the adoption process have to be considered before a decision could be made that will serve the best interests of the child.
- Care must be taken not to over-emphasise one aspect of the child's best interests at the expense of others. All relevant aspects/factors have to be

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<sup>18</sup> Clark 2000 *Stell LR* 18.

<sup>19</sup> See the discussion about the subjective approach versus the objective approach to determining the best interests of the child under "4 2 6 Parent-centered versus child-centered approach".

considered to determine the best interests of the child in an adoption.<sup>20</sup>

The best interests of the child thus have to be viewed holistically. A hierarchy of factors should never be created.

- Section 7 of the Children’s Act of 2005 has gone a long way to assist with the determination of the best interests of the child, by providing a list of 14 factors that have to be considered when determining the best interests of the child.<sup>21</sup> Unfortunately, this list makes no provision for any factors other than those specifically mentioned in the list to be considered to determine the best interests of the child. I believe that the way in which the list is compiled<sup>22</sup> could be detrimental to the best interests of the child. Even though Davel has a valid, realistic suggestion to overcome this problem,<sup>23</sup> it is hoped that the legislature will soon realise that there can never be an all-encompassing list that makes provision for all factors that could determine the best interests of the child, and amend the section to include as part of section 7 the possibility that the court may consider any factor which may in the specific adoption be relevant to determine the best interests of the child.

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<sup>20</sup> In the New Zealand case *B v G* [2002] NZFLR 961 it was held that the court is not limited in its consideration of matters that can be taken into account to determine the welfare and interests of the child.

<sup>21</sup> See “6 3 3 1 General”.

<sup>22</sup> In other words, the list is not open-ended.

<sup>23</sup> See “6 3 3 1 General”.

- A trained social worker should be part of the adoption process, from the time the child is considered for an adoption until the adoption has been finalised and even thereafter. Training of those responsible for placements in the adoption process is essential. The only way to ensure the placement of a child with suitable adoptive parents is, I believe, to provide extensive, organised training to the persons responsible for these placements, so as to improve cultural awareness and sensitivity, but certainly not by limiting the options available to children in need of care to become part of a family. Even though placing more financial responsibilities on the government in the adoption process is probably an important concern, I believe that the necessary training could be given to the social workers who are involved in the adoption process by the South African Council for Child Welfare.

The **properly trained** social worker who will be able to make a huge contribution to a successful adoption by doing everything possible to ensure that an adoption is in the best interests of the child, is a vital part of the adoption process. He/she has to assess and counsel all parties to an adoption about the decision to make the child available for adoption,<sup>24</sup> monitor the adoption process,<sup>25</sup> and determine whether the child in the adoption process is of an age and maturity to be able to give consent to

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<sup>24</sup> See “6 2 3 The Children’s Act and growing up in a family environment”. Also see “9 2 7 Assessment and counselling”.

<sup>25</sup> See “6 2 3 The Children’s Act and growing up in a family environment”.

an adoption.<sup>26</sup> The social worker furthermore has to assist with contact between the child and his/her biological parents/family.<sup>27</sup> In this regard post-adoption agreements could play an important role,<sup>28</sup> and the social worker has to assist parties with these post-adoption agreements and counsel them on the implications of such agreements.<sup>29</sup>

To be able to properly fulfil his/her role, the social worker should have knowledge of the background, biological culture and circumstances of the specific child. He/she needs to have a clear understanding of all the issues involved in an adoption.

Wait suggests that a team approach must be adopted and that the social worker should work closely with a clinical psychologist in permanency planning with regard to children, because children who are neglected, abused, etcetera, often experience not only social problems but also psychological problems.<sup>30</sup> Although the principle of involving a psychologist in the adoption process is supported, the reality is that there are probably not enough financial resources available in South Africa to follow this route for every adoption. Only when there are definite psychological problems should a psychologist be involved. In the majority of cases the presence and involvement of a **trained** social worker in the

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<sup>26</sup> See “6 5 2 The consent of the child”. Also see “9 2 6 Child’s consent to adoption”.

<sup>27</sup> See “4 4 2 2 *Benefits of open adoption*”.

<sup>28</sup> See “9 2 8 Adoption contact”.

<sup>29</sup> See “6 6 3 Post-adoption agreements”.

<sup>30</sup> Wait 1989 *Welfare Focus* 53.

adoption process should be sufficient to protect the best interests of the child.

## 9 2 2 Growing up in a family environment

Every child has the right to “family care or parental care, or to appropriate alternative care when removed from the family environment”.<sup>31</sup> The benefit for a child of growing up in a family environment in an atmosphere of happiness, love and understanding,<sup>32</sup> and experiencing parental care, is emphasised throughout this thesis. There can be no doubt about the importance of providing a child with a family environment,<sup>33</sup> even at the expense of the child’s biological culture.<sup>34</sup> The opportunity for a child of growing up in a family environment and experiencing parental care can be provided through adoption.<sup>35</sup> Adoption, including intercultural adoption, is preferable to keeping a child in an institution.<sup>36</sup> A similar argument was made by the New Zealand Law Commission that looked into the necessity or not of reviewing their adoption legislation.<sup>37</sup>

The following recommendations are made:

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<sup>31</sup> S 28(1)(b) of the Constitution.

<sup>32</sup> Preamble of the Children’s Act of 2005.

<sup>33</sup> This is established in “3 THE CHILD AND THE FAMILY”.

<sup>34</sup> See “5 5 4 Conclusion”.

<sup>35</sup> See “3 2 3 Appropriate alternative care”.

<sup>36</sup> See “5 4 3 4 *The child’s competing rights*” and “5 6 3 1 *Cultural issues as a factor*”.

<sup>37</sup> See “7 5 2 Reform proposals”.

- The benefit for a child of growing up in a family environment and experiencing parental care must not be underestimated. Every effort has to be made to allow a child to experience family life.
- Cultural differences must not stand in the way of the adoption of a child. Culture usually has to be subordinate to the benefit that the child obtains by growing up in a family environment.<sup>38</sup>

### 9 2 3 Attachment

A child who has formed an attachment with another person feels secure.<sup>39</sup> The younger the child is when he/she is adopted, the easier it will be for the child to form an attachment with the adoptive parent and the better the child will adapt.<sup>40</sup> I have the following suggestions:

- An adoption may under no circumstances be delayed for any reason other than that the best interests of the child require the adoption not to proceed. Aldridge<sup>41</sup> says that the responsibility of those involved in the adoption process is to make sure that the child is placed speedily with the most appropriate family available — a process that demands open minds

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<sup>38</sup> There may be cases where culture has to be considered. See “9 3 4 Culture and the views of the parties”.

<sup>39</sup> See “3 3 2 3 *When are attachments formed?*”.

<sup>40</sup> See “3 3 2 3 *When are attachments formed?*”.

<sup>41</sup> Aldridge in Gaber & Aldridge *In the Best Interests of the Child* 200.

to ensure an open door to the child's future. I definitely agree with this point of view.

- Because it is in the best interests of the child to form attachments as early as possible, it serves the best interests of the child better to be adopted interculturally than to be kept in an institution (or on the streets) until suitable same-race adoptive parents are available to adopt him/her.

#### 9 2 4 Financial circumstances of the parties

The Children's Act of 2005 has done away with the financial ability of an applicant to an adoption as a requirement before an adoption order may be granted,<sup>42</sup> and now provides for means-tested social assistance for adoptive parents where applicable.<sup>43</sup> The removal of the financial circumstances of the prospective adoptive parent(s) as a requirement is supported, but the reality is that a child has certain needs, both physical and psychological, that have to be met if the best interests of the child are to be served.<sup>44</sup> If the needs of the child are not taken into account, it may be detrimental to the best interests of the child. The child needs to be fed, clothed and educated, and might even need counselling related to the adoption, especially if the adoption is an intercultural

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<sup>42</sup> In terms of s 231(2)(b) of the Children's Act of 2005, the financial ability of a prospective adoptive parent is no longer relevant, and in terms of s 231(4) of the Act a person may not be disqualified from adopting a child by virtue of his or her financial status.

<sup>43</sup> S 231(5). Although an adoption grant was considered during the preliminary stages of the Children's Act of 2005, such a grant did not materialise – see “6 4 2 2 *The Children's Act and the financial means of the applicant(s)*”.

<sup>44</sup> See “6 4 2 2 *The Children's Act and the financial means of the applicant(s)*”.

one where the child has to deal with issues such as a different culture and maybe parents of a different race to him/herself.<sup>45</sup> The child also needs to maintain contact with his/her biological parents/family where contact is in the best interests of the child. Such contact also frequently has financial implications, and financial constraints could restrict options for contact. Where, for example, there is no money for a train journey, there is no money to purchase a computer for e-mailing or no money to make a telephone call, contact between the child and the biological parents/family may be a problem.

Because so many people in South Africa are poor, government assistance where an adoption has taken place may be crucial. Section 231(5) of the Children's Act of 2005 makes provision for financial assistance by the government for a person who adopts a child. How this assistance will be applied though is not clear at this stage,<sup>46</sup> and whether the government will be able to afford such financial assistance, is also unsure. I have the following suggestion:

- Government assistance to provide for the basic physical and possibly psychological needs of the child for some adoptive families will be essential, but such assistance does not have to be in the form of money. In fact, it is suggested that assistance should preferably not be in the form of money. If money is given, the system might be abused and the money might be applied for things other than the best interests of the child. It is

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<sup>45</sup> Counselling will be discussed under the next heading.

<sup>46</sup> See "6 4 2 2 *The Children's Act and the financial means of the applicant(s)*".

suggested that government assistance to the adoptive parents should be in the form of free services, such as free medical services and free education, as well as vouchers/coupons, such as food vouchers and transport vouchers. The assistance to the biological parents/family should be in the form of free telephone calls, free transport for biological parents and children to visit each other, free postage, contact by social workers to obtain and/or deliver photographs, letters, gifts, etcetera. Of course strict control will be important to avoid abuse of the system.<sup>47</sup>

### **9 2 5 Consent of minor parent to adoption**

In terms of section 233(1)(a) of the Children's Act of 2005 the minor parent of a child who is to be adopted has to be assisted by his/her guardian before consent may be given by such a parent to the adoption.<sup>48</sup> However, the Act does not make provision for circumstances where such assistance by the guardian may be dispensed with because the assistance is not possible or appropriate. This situation could be detrimental to the best interests of the child. If it is in the best interests of a child to be adopted, but it is not possible for the minor biological parent to obtain the assistance of his/her guardian to give consent to such an adoption, the adoption cannot proceed. If that happens, the best interests of the child may clearly suffer. The reality is that there are circumstances where the assistance of the guardian needs to be dispensed with and, in my opinion,

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<sup>47</sup> This is also discussed under “4 4 2 2 *Benefits of adoption contact*”.

<sup>48</sup> See “6 5 1 2 *The Children's Act and the consent of the parent*”.

section 233(1)(a) should be amended to make provision for such a situation by providing as follows:

- A child may be adopted only if consent has been given by each parent of the child, regardless of whether the parent is a minor or not, provided that if the parent is a minor, that parent is assisted by his/her guardian, or, where such assistance is not possible or not appropriate, he/she is counselled by the trained adoption social worker about, and understands the implications of, consent in the specific circumstances.

#### **9 2 6 Child's consent to adoption**

Section 233(1)(c) of the Children's Act of 2005 provides for child participation in the adoption process. It requires the consent of a child over the age of ten years to an adoption, and the consent of a child under the age of ten years who is of an age, maturity and stage of development to understand the implications of such consent, failing which the adoption may not proceed.<sup>49</sup> The involvement of the child in the adoption process is supported and is clearly in the child's best interests, but it is my opinion that the section as it currently reads is not in the best interests of the child. The following suggestions are made:

- Consent of a child to an adoption should not be linked to a specific age *per se*, but rather to age, together with maturity and stage of development.

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<sup>49</sup> See "6 5 The consent of the child".

The draft Children's Bill of Botswana recognises the fact that consent by a child to an adoption should not be linked to a specific age, but rather to a combination of the child's age, maturity and stage of development.<sup>50</sup> This will ensure that the consent of the child is meaningful, and further that an adoption may proceed even where consent of the child is not possible or not appropriate.

- The Children's Act of 2005 should provide for circumstances where the consent of the child may be dispensed with, even if he/she is of an age, maturity and stage of development to understand the implications of such consent.
- The trained adoption social worker should ensure that the child understands the meaning of giving consent to the **specific** adoption, and not just to adoption in general. This is particularly important where the adoption is intercultural, as such an adoption has added dimensions, such as the exposure of the child to a different culture than his/her biological culture, and even possibly the exposure of the child to parents of a different race to the child. Although I have argued that race should not be an issue when an adoption is considered,<sup>51</sup> it is necessary that the child understands that any racial difference between him/her and the adoptive parents could have other implications, such as cultural differences.

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<sup>50</sup> See "8 6 2 Reform proposals".

<sup>51</sup> See "5 RACE VERSUS CULTURE".

### **9 2 7 Assessment and counselling**

It has been argued throughout this thesis that adoption provides a child with the opportunity to experience parental care and to grow up in a family environment, which is in the best interests of the child. A key element of successful adoption though, is the assessment and counselling of all parties involved in the adoption process.<sup>52</sup> Assessment and counselling will prepare them for the adoption and also help them with and through the entire process. It is important that all parties to the adoption are realistic about what the specific adoption entails and how it will impact on the lives of all concerned. If the adoption is intercultural, this assessment and counselling becomes even more important, as the parties need to understand that the difference in culture (and maybe even race) adds a further dimension to the adoption, with which they have to be able to deal.<sup>53</sup> My recommendations are as follows:

- Before an adoption is considered at all, it is important that all the parties to the process, in other words the child, the biological parents and the prospective adoptive parents, are assessed. The aim of this assessment should be to determine whether all the parties are suitable candidates and understand the impact and consequences of an adoption on them and on

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<sup>52</sup> Counselling links up with the suggestion made above, under “9 2 4 Financial circumstances of the parties”. In New Zealand the Law Commission also emphasised the need for assessment and counselling in the adoption process.

<sup>53</sup> Throughout the Children’s Act, provision is made for assessment and counselling in the adoption process.

the other parties to the adoption process. If the adoption is intercultural, it has to be established whether the parties are prepared for the additional issues that may result, such as the responsibility of the adoptive parents to educate the child about his/her biological culture. If the assessment is done properly, it could to a large extent exclude problems that could arise as a result of ignorance and misconceptions of the parties to the adoption. The trained social worker has to be tasked with this responsibility.

- Once the assessment of the parties to the adoption has been completed successfully, the adoption process can begin. Counselling of the biological parents/family, prospective adoptive parents and the child involved in the adoption process by the social worker has to be done before, during and after the adoption process and needs to carry on for as long as the situation and circumstances and the best interests of the particular child require the counselling to continue. The New Zealand Law Commission<sup>54</sup> proposed mandatory pre-adoption counselling and post-adoption counselling. This recommendation is strongly supported.
- If the adoption is intercultural, the counselor needs to pay specific attention to this fact and prepare all parties for the consequences and impact of such an adoption. Government assistance in this process will

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<sup>54</sup> See NZLC *Report 65*, as discussed under “7.5.2 Reform proposals”.

often be indispensable, and, where needed, such counselling has to be provided by the government free of charge.<sup>55</sup>

- Where possible, the social worker should have a similar cultural background to the child involved in the process. This recommendation by the New Zealand Law Commission with regard to possible amendments to their adoption legislation is supported.<sup>56</sup>

### **9 2 8 Adoption contact**

When a child is adopted, a whole “new” set of relatives is added to his/her life. An adopted child will always have two sets of parents/family, the biological parents/family and the adoptive parents/family. It is important that both sides understand that they are not competitors. They have to realise that the role of both is to act in the best interests of the child, but they also have to know that the relationships of the adopted child with both these sets of parents/family are not the same. Where the child is adopted, the adoptive parents have the responsibility of raising the child to the best of their ability. The biological parents/family have a different responsibility towards the child. In my opinion they have the duty to maintain contact with the child and keep him/her informed of his/her biological background and culture. The relationship between all three

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<sup>55</sup> The NZLC *Report 65* also made the recommendation that counselling services should be state funded – see “7 5 2 Reform proposals”. Also see “9 2 4 Financial circumstances of the parties”, where government assistance is discussed.

<sup>56</sup> See NZLC *Report 65*, as discussed under “7 5 2 Reform proposals”.

parties needs to be monitored carefully. The following suggestions could assist in this regard:

- The child, the adoptive parents and the biological parents/family need to be prepared for the adoption. They should be informed of the implications and consequences of adoption in general, and should also be educated about the need for contact between the child and the biological parents/family after the adoption. Contact between the child and the biological parents/family is in the best interests of the adopted child.<sup>57</sup> The importance of contact between the adopted child and his/her biological family is emphasised in the *CYPF Act* of New Zealand.<sup>58</sup> Although South Africa does not have similar legislation, it does not detract from the importance of this contact. Where a biological parent is secure in the knowledge that he/she could still be a part of the child's life, he/she may also find it easier to come to terms with and consent to an adoption that will be in the best interests of the child.
- Post-adoption agreements, which are provided for in the Children's Act of 2005,<sup>59</sup> could play an important part in adoption contact. Where a post-adoption agreement is entered into by the parties to an adoption, assisted by the trained social worker, the interests of all the parties to the adoption

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<sup>57</sup> See "4 4 2 Open adoption". Of course there are cases where such contact is not in the best interests of the child.

<sup>58</sup> See "7 2 6 *Children, Young Persons, and their Families Act* 24 of 1989".

<sup>59</sup> S 234. Such an agreement may be especially useful where the adoption is intercultural.

can be protected, and the adoption social worker can ensure that any contact between the child and his/her biological parents/family is in the best interests of the child.<sup>60</sup> In New Zealand adoption contact also exists. The difference there is that this contact, known as a contact agreement, is not controlled by legislation, but is a choice between all relevant parties to the adoption. The consequence of this is that it is very hard to protect the interests of the parties to an adoption if there is no legislative control.<sup>61</sup> The inclusion of adoption contact in the Children's Act of 2005 is supported, but I do have reservations about the use of post-adoption contact agreements. There should be no pressure on any party to an adoption to enter into a post-adoption agreement. These agreements are not compulsory in terms of the Children's Act of 2005, and no party to an adoption should be allowed to abuse post-adoption agreements. The adoption social worker has to ensure that any party entering into a post-adoption agreement does so because he/she believes it is in the best interests of the child, not for any other reason or because he/she feels pressured into it.<sup>62</sup>

- In New Zealand the child usually participates in making decisions about the type and frequency of contact as he/she grows older.<sup>63</sup> This is something that should be considered in South Africa, but obviously subject

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<sup>60</sup> See "6 6 3 Post-adoption agreements".

<sup>61</sup> See "7 4 3 Open versus closed adoption".

<sup>62</sup> See "6 6 3 Post-adoption agreements", where I air my views about possible pressure for a party to an adoption to enter into such an agreement.

<sup>63</sup> See "7 4 3 Open versus closed adoption".

to the input and control of the social worker, who has to counsel the child in this regard.

- In customary adoption there is usually ongoing contact between the adopted child and the biological parents/family. This is similar to the situation in New Zealand<sup>64</sup> and Botswana.<sup>65</sup> The principles of customary adoption could be applied to aid with contact that is in the best interests of the child. I do believe, though, that there should be more control with regard to contact between the child and the adoptive parents, which is why the role of the social worker is so important.

## **9 3 CULTURE**

### **9 3 1 Introduction**

The first point that should be made is that race and culture are not the same, as already indicated.<sup>66</sup> Furthermore, it is important to emphasise again that race is irrelevant when a decision about the best interests of the child and a possible adoption has to be made. Race as a factor in an adoption was removed when section 40(b) of the Child Care Act was repealed in 1991.<sup>67</sup>

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<sup>64</sup> See “7 2 5 *Adoption Act* 93 of 1955”.

<sup>65</sup> See “8 2 2 Adoption in terms of customary law”.

<sup>66</sup> See “5 3 RACE AND CULTURE — IS THERE A DIFFERENCE?”.

<sup>67</sup> See “5 3 2 Making a distinction”.

Although intercultural adoption is not prohibited by law, legislation dealing with adoption does put some emphasis on culture in the adoption process,<sup>68</sup> and there has been much debate about the desirability or not of intercultural adoption.<sup>69</sup> Adoption legislation in Botswana contains no reference to culture, with the result that culture is not elevated above any of the other factors that are relevant in an adoption.<sup>70</sup> The point is that the best interests of the child demand that a child should have the opportunity of being adopted by **any suitable parents** and that culture on its own, although important to the child, should never stand in the way of an adoption that is in the best interests of the child.

Culture is part of who we are. This is true for all people. However, it is not always easy to determine to which culture the child belongs. The parents of the child may not necessarily share the same cultural background. Furthermore, it is my belief that, in time, the role of culture in our lives will become less significant. I am not trying to deny the importance of culture, but I believe that the divisions between different cultures over time will become blurred and as a result culture will become less defined. This, in my opinion, will happen because of various factors, such as people of different cultures living in the same areas and

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<sup>68</sup> See “6 7 CULTURAL ASPECTS”, where the role of culture in adoption legislation is pointed out.

<sup>69</sup> Intercultural adoption is usually also interracial. Interracial adoption is also not prohibited by law, but it has to be emphasised again that race is not the issue. See “5 6 2 Arguments against intercultural adoption” and “5 6 3 Arguments in favour of intercultural adoption”.

<sup>70</sup> See “8 3 2 *Adoption of Children Act*” and “8 4 2 Culture and statutory adoption”.

attending the same schools, marriage between people from different cultural backgrounds, world travel, etcetera.<sup>71</sup>

### 9 3 2 How important is culture in the adoption process?

Even though I recognise the value of culture, and even though it should be considered as a factor in respect of the best interests of the child viewed holistically, culture is not more important than any other factor that determines the best interests of the child and should not be emphasised more than, or at the expense of, the other factors.<sup>72</sup> It has to be balanced with all other relevant factors.<sup>73</sup> A child's cultural background should not stand in the way of his/her best interests. Just because a child is born as a member of a specific culture, it does not mean the child "belongs" to that group of society, or that he/she will necessarily remain part of that culture. As the child grows up he/she may form ties with another culture altogether. The importance of culture cannot be denied, but should also not be over-emphasised. There are various factors that are relevant with regard to the best interests of a child in the adoption process. Culture is one of them. With regard to the role of culture in the adoption process, I have the following suggestions:

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<sup>71</sup> See "5 7 CONCLUSION". A similar situation is found in New Zealand, where inter-marriage of Maoris and Pakeha happens on a large scale.

<sup>72</sup> A similar conclusion has been reached by the courts in New Zealand – see "7 3 RACE AND CULTURE IN NEW ZEALAND ADOPTION LAW".

<sup>73</sup> This argument finds support in New Zealand legislation – see "7 4 2 2 *Factors to be taken into account*".

- Creating a hierarchy of factors that are important for the child in the adoption process, as is suggested by specifically mentioning culture and religion in the adoption process,<sup>74</sup> creates the impression that religion and culture deserve more emphasis than other factors in the adoption process. Here the South African legislature can learn from adoption legislation in Botswana, where no reference is made to culture at all.<sup>75</sup> Section 240(1)(a) of the Children's Act of 2005, which highlights religion and culture in the adoption process, should be amended, as it would be more in line with the best interests of the child in the adoption process if section 240(1)(a) stated that the court, when considering an application for the adoption of a child, must take into account all relevant factors, without specifically emphasising any one particular factor.

Although culture on its own may not be considered more important than other issues which make up the best interests of the child, I pointed out in a previous chapter<sup>76</sup> that it is my opinion that if there are **suitable** same-culture adoptive parents available to adopt the child, these parents should receive preference over suitable adoptive parents of a different culture to the child when a decision has to be made about the adoption of the child.<sup>77</sup> This mild

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<sup>74</sup> In terms of s 240(1)(a) of the Children's Act of 2005 the court, when considering an application for the adoption of a child, has to take into account all relevant factors, including religious and cultural background. See "6 7 2 The Children's Act, adoption and culture".

<sup>75</sup> See "8 3 2 *Adoption of Children Act*" and "8 4 2 Culture and statutory adoption".

<sup>76</sup> See "5 3 2 Making a distinction".

<sup>77</sup> The Law Commission in New Zealand which was tasked with reviewing the legal framework for adoption and recommending whether it should be modified, similarly recommended that, where practicable, a child should be placed within a family of the same culture as the child – see 7 5 2 Reform proposals".

preference, if applied properly, might be in the child's best interests. Care should be taken though to ensure that it does not lead to culture matching or, even worse, race matching, at the expense of the best interests of the child.

### 9 3 3 Least detrimental alternative?

The standard of the best interests of the child is firmly rooted in our law. This standard has been applied for a long time, and there are various manifestations of it. Goldstein *et al* believe that "the least detrimental available alternative for safeguarding the child's growth and development" should be the standard used to determine placements of children, instead of the best interests of the child.<sup>78</sup> They argue that the child is already a victim of his/her environmental circumstances, is greatly at risk and that speedy action is necessary to avoid further harm being done to his/her chances of healthy psychological development.<sup>79</sup> Zaal has a similar view.<sup>80</sup> He believes that interracial adoption<sup>81</sup> is often "the least detrimental alternative" that is available and the only alternative to long-term institutionalisation, even if such placement is not ideal. I have explained that interracial adoption and intercultural adoption are closely linked. An intercultural adoption is often also interracial, and an interracial adoption is usually also intercultural. As a result, it makes sense that Zaal's view about interracial adoption may also be applied to intercultural adoption. I agree with

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<sup>78</sup> Goldstein *et al Beyond the Best Interests* 53-64. Also see the discussion under "5 6 3 1 Cultural issues as a factor".

<sup>79</sup> Goldstein *et al Beyond the Best Interests* 54.

<sup>80</sup> Zaal 1992 *Journal of SA Studies* 403.

<sup>81</sup> This is usually also intercultural.

Zaal's statement, and I believe that an intercultural adoption, even when it is not necessarily the ideal solution, may actually be more beneficial to the child than no adoption, which might leave the child entirely without the opportunity to experience parental care or a family environment. In this regard, the statement by the New Zealand court in *Hamlin v Rutherford*,<sup>82</sup> where it was said the undoubted, but uncertain, future advantages to a child of having access to her cultural heritage could not be allowed to predominate over her immediate security which is served best by her being adopted, is relevant. However, the use of the term "least detrimental alternative" to my mind suggests that the option of an intercultural adoption is detrimental to the child. I have the following suggestion instead:

- When an intercultural adoption is considered, the point of departure should not be what the least detrimental alternative is, but rather what the best alternative is under the specific circumstances. Making the mind shift from "least detrimental" to "best under the circumstances" means that the decision-maker focuses on the positives rather than on the negatives of the situation. This, I believe, is more in line with the best interests of the child.

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<sup>82</sup> (1989) 5 NZFLR 426 at 433.

### 9 3 4 Culture and the views of all parties

The equality clause in the Constitution<sup>83</sup> stresses the importance of equal protection and benefit of the law. This means that all parties to an adoption have to be treated the same, and that all prospective adoptive parents have to be treated equally and screened in the same manner. Failure to do so would be unconstitutional. The Constitution further demands that the state may not discriminate directly or indirectly against anyone on the grounds of inter alia race, culture or ethnic origin.<sup>84</sup> Discrimination based on race, culture or ethnic origin is presumed to be unfair. There must thus be no unjustified differentiation between different racial groups with regard to adoption procedures, etcetera. Having said that, it is of the utmost importance though that the viewpoints and beliefs of all the parties to an adoption regarding intercultural adoption are taken into account. With regard to the viewpoints of the parties involved in the adoption process, the following is suggested:

- The viewpoints of the biological parents/family with regard to the role of culture in the adoption process have to be considered. The preference of the biological parents regarding an intra- or intercultural adoption is also a factor that is relevant, just like all other relevant factors.<sup>85</sup> The *CYPF Act* of New Zealand warns against taking too much account of the views of the biological family, as this can lead to attention being focused on the needs

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<sup>83</sup> S 9 of the Constitution.

<sup>84</sup> See “5 4 1 3 *Culture and equality*”.

<sup>85</sup> Also see “5 6 3 1 *Cultural issues as a factor*”.

and wishes of the adults instead of the needs and wishes of the child.<sup>86</sup>

This is an important warning, as neither the preferences of the biological parents/family nor the viewpoints of the biological parents/family should be given more weight than other relevant factors.

- An intercultural adoption that would, ordinarily, be in the best interests of the child may under no circumstances take place if the child or the prospective adoptive parent is not willing to accept such intercultural adoption. Counselling might resolve any ambivalent feelings but, if not, such an adoption would not be in the best interests of the child because both the child and the adoptive parent have to be comfortable with an intercultural adoption.

### **9 3 5 Cultural awareness**

Simon and Altstein<sup>87</sup> come to the conclusion that interracially adopted children (which of course include interculturally adopted children) feel loved, secure, committed to their adopted families and comfortable with their racial/ethnic identities. They add, however, that love is not enough, in other words the families have to adjust and expand their lifestyles to include learning about and making contact with their adoptive children's cultural and racial/ethnic history and heritage, in order to rear emotionally healthy, stable and secure children. The

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<sup>86</sup> See "7 2 6 *Children, Young Persons, and their Families Act* 24 of 1989".

<sup>87</sup> Simon & Altstein *Adoption across Borders* 141.

adoptive parents have to make any and all attempts for the child to have knowledge of and exposure to his/her biological culture. The following suggestions should be helpful with regard to the maintenance of the child's biological culture:

- The adoptive parents should be honest about the biological culture of the child and discuss it openly.
- The nonverbal messages that are sent out by the adoptive parents are extremely important. Parents thus have to go beyond their comfort zone to create intercultural relationships within their community and form friendships with people from the same cultural background as the child. This also includes maintaining ongoing contact with the biological parents/family.<sup>88</sup> Where the parents are comfortable with the child's biological background and includes it as part of their everyday life, I believe that the child will also be comfortable with the situation and the fact that he/she has more than one culture.
- The child should attend a culturally integrated school. Even if no one from that school has a culture similar to the child's biological culture, being exposed to an environment where different cultures coexist, will help the child to understand such a situation and deal with it better at home.

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<sup>88</sup> Ramos *Children's home society* at [www.chswpire.org/scripts/northwest/paper/article.asp?articleID=354](http://www.chswpire.org/scripts/northwest/paper/article.asp?articleID=354). Also see "9 2 8 Adoption contact".

- The child should read literature relating to his/her biological culture or, if he/she is too young, the adoptive parent should read literature to him/her or tell him/her stories about his/her biological culture.
- The family should reside in an environment where the adopted child has contact with people from his/her biological culture or where he/she is exposed to aspects of his/her biological culture.<sup>89</sup>
- The focus on the biological culture of the child should be for the benefit of the child as well as for the benefit of the family. If cultural education is focused on the child alone, it may actually have a negative effect, as the child may feel different, but if all family members receive an education in the culture of the adopted child's biological parent(s)/family, the child feels part of the family.<sup>90</sup> I consider this recommendation to be very important. The child is part of the adoptive family and will feel part of the family if he/she is not treated differently, as will be the case if cultural education is only provided to him/her. The family has to learn the language of the child's biological parents/family and ensure that the child learns the language. They should also do research about his/her heritage.

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<sup>89</sup> Garrett *Adoptive parents magazine* at [www.nysccc.org/T-Rarts/Articles/commonmistakes.htm](http://www.nysccc.org/T-Rarts/Articles/commonmistakes.htm) suggests that the family should be bicultural and practice some of the child's heritage.

<sup>90</sup> Garrett *Adoptive parents magazine* at [www.nysccc.org/T-Rarts/Articles/commonmistakes.htm](http://www.nysccc.org/T-Rarts/Articles/commonmistakes.htm).

*Chapter 9: Conclusion*

- Parents must balance their acknowledgement of the differences between them and the child with their recognition of similarities.<sup>91</sup> This, I believe, is an important point that is often overlooked, and is very valuable with regard to culture. There are many values that are important for everyone, regardless of their cultural background. Examples are integrity, family values, and respect. There are also specific issues which could be focused on, such as a common interest in sport or religion.<sup>92</sup> Garrett says, quite correctly, that bonding between a parent and a child is reinforced by similarities.<sup>93</sup>
- The adoptive parents should seek out activities for the child that represent his/her biological culture, such as sport or music where other members of the child's biological cultural group participate. A good suggestion by Ramos is to offer culture camps to prospective adoptive parents. She does warn though, that these camps on their own are not enough for identity development.<sup>94</sup> In my opinion, one of the best ways to learn about something is by making the process fun. If the child shows an interest in a specific activity, his/her exposure to persons with a similar or the same cultural background as his/her own biological culture in such an environment is advised.

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<sup>91</sup> Garrett *Adoptive parents magazine* at [www.nysccc.org/T-Rarts/Articles/commonmistakes.htm](http://www.nysccc.org/T-Rarts/Articles/commonmistakes.htm).

<sup>92</sup> This recommendation also links up with the next suggestion.

<sup>93</sup> Garrett *Adoptive parents magazine* at [www.nysccc.org/T-Rarts/Articles/commonmistakes.htm](http://www.nysccc.org/T-Rarts/Articles/commonmistakes.htm).

<sup>94</sup> Ramos *Children's home society* at [www.chswpirc.org/scripts/northwest/paper/article.asp?articleID=354](http://www.chswpirc.org/scripts/northwest/paper/article.asp?articleID=354).

- My view is that it is often the prejudices of people that cause problems with intercultural adoption, and that the general public needs to be educated in this regard.<sup>95</sup> Ultimately, any decision about the desirability or not of an intercultural adoption has to be made with the best interests of the child in mind. A campaign should be launched to eliminate social prejudices, and to make people more aware of intercultural adoption. Although the following statement relates to interracial adoption, I believe it applies equally to intercultural adoption:

The debates around transracial and 'same-race' placements will continue as long as society remains racially divided. The importance of security, stability and psychological well-being of children must be given precedence over political and ideological thinking about the best way to achieve racial harmony in society.<sup>96</sup>

#### 9 4 CUSTOMARY LAW AND ADOPTION

Statutory adoption and adoption in customary law are not the same thing. The aim of customary adoption<sup>97</sup> is different to that of statutory adoption,<sup>98</sup> but the reality is that the two systems of adoption co-exist in South Africa.

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<sup>95</sup> See "5 6 2 Arguments against intercultural adoption".

<sup>96</sup> Barn in Treacher & Katz *Dynamics of Adoption* 123.

<sup>97</sup> To provide a man with an heir.

<sup>98</sup> To serve the best interests of the child and provide the child with a loving, suitable family.

Bennett believes, and I agree with him, that the institution of an heir by a family head who has no male progeny of his own, as is found in customary law, is not conceived to be in the best interests of the child,<sup>99</sup> and that this system must be adapted to put the child's interests first.<sup>100</sup> Adoption in customary law is adult-centered.<sup>101</sup> The aim is to provide a man with an heir, and it is irrelevant in this process whether the child has biological parents who are suitable to raise him/her. In my opinion, it is not in the best interests of a child to be adopted where he/she has biological parents, unless there is a valid reason why those biological parents should not raise him/her, such as abuse or abandonment.<sup>102</sup>

The reality is that customary law is a very important part of the South African culture. In fact, in South Africa, the majority of people are subject to customary law.<sup>103</sup> The problem is that the statutory system of adoption and customary adoption are too far apart. The two systems should be brought together in a

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<sup>99</sup> Bennett actually believes that this practice is not adoption at all.

<sup>100</sup> Bennett *Human Rights* 107. Customary law, also called “living” law, is not a fixed body of formally classified and easily ascertainable rules — *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 479. It is thus not always easy to establish — *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) at 81 (also reported in 2008 9 BCLR 914 (CC)). What makes it difficult to know what customary law is, is that it evolves and develops to meet the changing needs of the community — *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at 479-480; *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) at 81 (also reported in 2008 9 BCLR 914 (CC)). There are various sources of authority that show us that customary law needs to be adapted to put the child's needs first. They are the Child Care Act, the Convention, public policy, the Constitution and the Children's Act of 2005. In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at 954 (also reported in 2001 10 BCLR 995 (CC)) the court held that s 39(2) of the Constitution imposes an obligation on courts to consider whether there is a need to develop the common law to bring it in line with the Constitution and to develop it if so. In *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) at 82 (also reported in 2008 9 BCLR 914 (CC)) Judge Van der Westhuizen held that the same is true of customary law.

<sup>101</sup> See “4 2 6 Parent-centered versus child-centered approach”. Also see “8 2 2 Adoption in terms of customary law”.

<sup>102</sup> Also see the discussion under “4 4 1 Introduction”, specifically n 262.

<sup>103</sup> In New Zealand, where a similar dual system of legislation and customary law, exists, Maoris are in the minority.

relationship of equality through a process of harmonisation, accommodating the needs of all sectors of society.<sup>104</sup> Customary adoption does not form a central part of the research for this thesis, so my remarks/suggestions are limited to the following:

- There should be only one adoption procedure that is valid and acceptable to all who live in South Africa. The most important issue is that such procedure should have as a point of departure the best interests of the child. In other words, the legislature needs to take into account the circumstances and culture of all people and combine these to find a procedure that will be acceptable to **all** peoples in South Africa. What I am advocating is that the legislature should attempt to find the positives in both systems and apply those to adoption. This idea might be criticised as resulting in a situation where one group of people will have to give up far more of their cultural heritage than the other. In New Zealand it was argued that the passing of legislation which resulted in a single system regulating adoption in New Zealand created much greater changes for Maoris than for Pakeha.<sup>105</sup> The problem with the *Adoption Act of 1955* is that it is not sensitive to all peoples in New Zealand. South Africa should learn from the New Zealand experiences and take care that such a situation does not occur in South Africa. The legislature has to ensure that

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<sup>104</sup> Van Niekerk in Bekker *et al Legal Pluralism* 14.

<sup>105</sup> See “7 2 4 *Maori Land Act* 15 of 1909 and the *Maori Affairs Act* 94 of 1953” and “7 2 5 *Adoption Act* 93 of 1955”.

any uniform system of adoption takes into account the **positive** aspects of **all** cultures.<sup>106</sup>

- In my opinion, one system does not have to replace the other. The aim of customary adoption, as we have established, is different to that of statutory adoption. Statutory adoption, which is aimed at serving the best interests of the child, should be retained, with those customary adoption practices that could enhance the best interest of the child being included to make statutory adoption more in line with customary law principles. On the other hand customary adoption, which is aimed at serving the needs of adults whereby a child is “adopted” to provide a man with an heir could continue, not as adoption, but rather in some other form.<sup>107</sup> In customary law in Botswana, a similar system exists where children are sent to live with a relative, but the biological parents remain the guardians of the child. In respect of Botswana I make the suggestion that this situation should not be referred to as adoption, but rather as some form of foster care.<sup>108</sup> The value of the relationship that is created by “adoption” in terms of customary law cannot be denied, but I believe that it will be in the best interests of the child if this relationship is not called adoption.

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<sup>106</sup> A similar dual system of adoption to that in South Africa is found in Botswana.

<sup>107</sup> This does not form part of the research, and will not be elaborated upon.

<sup>108</sup> See “8 2 2 Adoption in terms of customary law”.

## 9 5 CONCLUSION

I have explained that there are many factors that determine the best interests of the child,<sup>109</sup> and that there are furthermore various factors that have to be taken into account when a decision about the adoption of a child has to be made.<sup>110</sup>

The circumstances in South Africa are different to those that are found in many other countries around the world. Poverty, famine and HIV/AIDS are some of the issues that make the children in this country extremely vulnerable. Adoption, including intercultural adoption, is a viable option that could be in the best interests of all children in need of parental care. An adopted child puts the relationships that exist as well as the impact of adoption into perspective:

Finding her [the birthmother] has taught me the difference between origin and roots. I'm here because of biology, but I am who I am because of love... It's not blood that makes a family, it's love.<sup>111</sup>

Adoption is a very successful institution. Most adoptees, no matter what their background, develop into well-adjusted and well-functioning adults.<sup>112</sup> The kind of research that is done on adopted children does not happen for children who are raised by their biological parents/family. If it were done, I have no doubt that similar issues to those that are identified for adopted children, both positive and

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<sup>109</sup> See 4 THE BEST INTERESTS OF THE CHILD”, specifically “4 2 7 Factors that determine the best interests of the child”.

<sup>110</sup> This is seen throughout the preceding chapters.

<sup>111</sup> Zeelie in Kahn *Thicker than Water* 123.

<sup>112</sup> Katz in Treacher & Katz *Dynamics of Adoption* 227.

*Chapter 9: Conclusion*

negative issues, would be found to be present. Schneider says the differences among us are real, but that our similarities are numerous and strong enough to make possible a society of mutual concern, a society which recognises the elements of common humanity that bind and oblige us to each other.<sup>113</sup>

Move the thousands of children who are available for adoption out of the institutions and out of their temporary foster placements, and into permanent homes! Apply the standard *best interest of the child* as the first and foremost criterion in child placement! Make the move without regard to race [or culture, I might add]<sup>114</sup>

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<sup>113</sup> Schneider 2003 *Law Quadrangle Notes* 80.

<sup>114</sup> Simon *et al The Case for Transracial Adoption* 116.

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