

Intercountry adoption and the South African child's right to culture

SS Shongwe

 orcid.org/0000-0001-9777-0877

Mini dissertation accepted in partial fulfilment of the
requirements for the degree *Master of Laws in International
Child Law* at the North-West University

Supervisor: Adv SS Serumaga-Zake

Graduation: July/August 2023

Student number: 39433935



LIEZEL TAALDIENSTE
LANGUAGE SERVICES

DECLARATION OF LANGUAGE EDITING

14 Kapokbos Crescent
Fynbos Lyfestyle Estate
Still Bay
6674

15 November 2022

Dear Sir/Madam,

I, Liezel de Vries-Strydom, hereby declare that I have personally read through the full LLM dissertation of **Siphesihle Simanga Shongwe** and have indicated and/or corrected language errors to the best of my ability.

I am a registered member of SATI (South African Translators' Institute).

Yours sincerely

Acknowledgments

I would like to thank the Almighty God who has given me strength and grace throughout this academic journey. I would like to thank my mother Lungile Q. Shongwe and my sister Lomkhosi K. Shongwe for their unwavering support and prayers throughout my academic journey. I also thank my family and friends who have been a great source of encouragement. I dedicate this academic milestone in honour of my late father who has always believed in me at all times. I also thank my supervisor for his guidance and supervision whilst I was working on this dissertation.

Abstract: Intercountry adoption and the South African child's right to culture

For a long time, South African children have been preferred for inter-country adoption over in-country adoption or local alternative child-welfare systems. The child's cultural right has often been interpreted to be subsidiary to the best interest of the child in inter-country adoption. South Africa has ratified *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*, the *Convention on the Rights of the Child* and the *African Charter on the Rights and Welfare of the Child* and yet all these international instruments have different views on when inter-country adoption may be applied. The South African courts have tilted more towards having children leaving the country as opposed to them staying within the country. The courts have gravitated towards adhering to *The Hague Convention's* interpretation of the child's best interest as opposed to the *ACRWC*. This paper states that a child's right to culture has not been adequately addressed by South African courts when it comes to inter-country adoption.

From colonial to present times, the African traditional value system has been side-lined to the margins of justice. Therefore, there is a need for a new socio-legal discourse that takes a child's cultural rights seriously and this would be to interpret the child's best interest from the *ACRWC*'s point of view. This is mainly because inter-country adoption and the best interest of the child has for a long time been applied from an international perspective that encompasses a western perspective that is reflective of western liberalism which does not prioritise children's cultural rights. Therefore, there is a need for African values and standards to receive universal recognition as well.

key terms: The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry adoption, right to culture, Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child.

List of abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
AHRLJ	African Human Rights Law Journal
BYU Public Law	Brigham Young University Journal of Public Law
CRC	Convention on the Rights of the Child
DSD	Department of Social Development
ICA	Inter-country adoption
NGO	Non-Governmental Organisation
PELJ	Potchefstroom Electronic Law Journal
RACAP	Register for Adoptable Children and Prospective adoptive parents
SALJ	South African Law Journal
SAPR/PL	South African Public Law
SMU Law Review	Southern Methodist University Dedman School of Law
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg

Table of Contents

1	Introduction	1
1.2	Research question	6
1.3	Research Methodology.....	6
1.5	Rationale	6
1.6	Research aims and objectives	7
2.	BACKGROUND.....	9
2.1	The role of culture prior to colonialism.....	10
2.2	Is inter-country adoption of South African children a new form of modern day colonialism?	11
2.3	The child's right to culture and the best interest principle	15
2.4	Summary	18
3	The Hague Convention	20
3.1	Eurocentrism of The Hague Convention	21
3.1.2	The role of money in inter-country adoption	21
3.2	The Convention on the Rights of the Child	23
3.3	The ACRWC and the subsidiarity principle	24
3.4	Summary	27
4	Cultural rights and the 'weight' placed on the right to culture within the South African Constitution	28
4.1	Inter-country adoption in terms of the Children's Act 38 of 2005	30
4.1.2	The Department of Social Development's proposed amendments in the Children's Act	33
4.2	The Supreme Court case of AD vs DW (2007) SCA 87	34
4.3	AD VS DW 2008 (3) SA 183 (CC).....	37
4.4	The Court's obligations and interpretive task.....	38
4.5	Summary	39
5	Observations made on cultural rights.....	40
5.1	The importance of culture within the African context.....	40
5.2	The conflicting views on the role that culture should play	41
5.4	Anti-inter-country adoption advocates and the protection of cultural rights ...	44

5.5 Summary	45
6. Recommendations	47
Bibliography	50
Literature	50
Legislation	61
South African Government Publications	62
Internet sources	62

1 Introduction

South Africa, as many formerly colonised African countries still relies on legislation and principles that were applicable in colonial times.¹ The 'inherited' colonial legislation still remains embedded in South Africa's legal system.² The child's best interest is considered a universal standard that originated from family law and has been used as a guiding principle in decisions that affect children.³

Mezmur opines that, in order for a legally, socially and child-centred inter-country adoption regime to be formed, Africa's views on issues regarding inter-country adoption should be taken seriously.⁴ According to Muluneh, there is tension when it comes to inter-country adoption especially between the child's right to culture and the best interest principle.⁵ This is because inter-country adoption does not only entail the definitive rupture of the child's relationship with his/her birth parents; it usually involves the transfer of a child to a country with a culture that is different from his/her own.⁶ Mezmur opines that pro-inter-country adoption and anti-inter-country adoption both advocate the best interest of the child principle as the premise for their arguments.⁷

The African traditional political system stemmed from communalism, which was founded on family, extended family relations or kinship, and when colonial rules took root, it caused a clash between African traditional and cultural practices resulting in Africa's socio-political stability being rattled as European values differed from African values.⁸

¹ Mezmur "The sins of the saviours ": child trafficking in the context of intercountry adoption in Africa 8.

² Mezmur "The sins of the saviours ": child trafficking in the context of intercountry adoption in Africa 8.

³ Skelton 2009 *AHRLJ* 486.

⁴ Mezmur *Intercountry adoption in an African Context: a legal perspective* 4-5.

⁵ Muluneh 2015 *Jimma University Journal of Law* 75.

⁶ Muluneh 2015 *Jimma University Journal of Law* 49.

⁷ Mezmur *Intercountry adoption in an African Context: a legal perspective* 3.

⁸ Dimkpa *The Dynamics of African Societies Portfolio colonialism, independence and Under development in Africa* 8.

*The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993*⁹ (hereafter *The Hague Convention*) is the main legal framework governing inter-country adoption.¹⁰ It was domesticated in South Africa on 1 December 2003,¹¹ under chapter 16 of the *Children's Act 38 of 2005*.¹² *The Hague Convention* regards inter-country adoption to be advantageous to a child because it offers a permanent family for a child where a suitable one cannot be found in the child's state of origin.¹³

Article 1(a) states that inter-country adoption ought to be made in the best interest of the child with respect to the fundamental rights of the child recognised in international law.¹⁴ Article 16(b) states that, once a child is determined to be adoptable, then consideration should be given to the child's upbringing, ethnicity and cultural background.¹⁵ *The Hague Convention*, in promoting the child's best interest, favours inter-country adoption over placing a child in institutional or foster care.¹⁶ This is inferred from its preamble, that inter-country adoption offers the advantage of a permanent family where no suitable family can be found in the child's state of origin.¹⁷ Therefore, the child's right to family is elevated over that of culture and language.¹⁸ *The United Nations Convention on the Rights of the Child, 1989*,¹⁹ (hereafter *the CRC*) in article 21(d) stipulates that state parties recognising inter-country adoption shall practice inter-country adoption in the best interest of the child.²⁰ State parties are to

⁹ *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹⁰ *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹¹ Adalakun 2018 *Journal of Comparative Law in Africa* 34.

¹² *Children's Act 38 of 2005*.

¹³ *Preamble of The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹⁴ A 1(a) *The Preamble Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹⁵ A16(1) *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹⁶ Smolin 2007 *Capital University Law Review* 424.

¹⁷ *Preamble of Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹⁸ Sklebena *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption: Seeking Cultural Relativism of Inter-country adoption* 51.

¹⁹ *Convention on the Rights of the Child* (1989).

²⁰ A 21(d) *Convention on the Rights of the Child* (1989).

consider inter-country adoption as another means of the child's care where such child cannot be placed within foster care, with an adoptive family or cannot be properly taken care of in his/her country of origin.²¹

Article 8(1) requires state parties to the *CRC* to respect the child's right to preserve his/her cultural identity.²² The *CRC* was the first instrument to recognise inter-country adoption as a legitimate child care system.²³ *The African Charter on the Rights and Welfare of the Child, 1990*²⁴ (hereafter the *ACRWC*) emerged from African cultural heritage and social values in Africa.²⁵ It takes into account Africa's historical background, African civilisation as well as cultural heritage which reflects and characterises the rights and welfare of the child.²⁶ The *ACRWC* preamble states that in the African society children maintain a privileged position.²⁷ Article 24(b) stipulates that inter-country adoption may be considered as a matter of last resort whereby a child cannot be placed with adoptive parents, a foster family and cannot in any way be cared for in his/her own birth country.²⁸ Within the *ACRWC*, to protect the best interest of a child where there is no adoptive parents that are located within the child's birth country, such child should be placed in alternative care in his/her country of origin before inter-country adoption is considered.²⁹

Within the *ACRWC*, inter-country adoption is applied as a matter of last resort in order to preserve the cultural heritage and ethnicity of the child.³⁰ Article 25(3) further states that alternative family care, together with the best interest of the child should include the desirability to continue the child's upbringing, ethnic and linguistic background.³¹ Inter-country adoption requires the observation of the subsidiarity principle.³² The subsidiarity principle stipulates that if a child is not adopted within

²¹ A 21(d) *Convention on the Rights of the Child* (1989).

²² A 8(1) *Convention on the Rights of the Child* (1989).

²³ Adalokun 2018 *Journal of Comparative Law in Africa* 25.

²⁴ *African Charter on the Rights and Welfare of the Child* (1990).

²⁵ Ekundayo 2015 *International Journal of Humanities and Social Science* 157.

²⁶ *Preamble of the African Charter on the Rights and Welfare of the Child* (1990).

²⁷ *Preamble of the African Charter on the Rights and Welfare of the Child* (1990).

²⁸ A 24(b) *African Charter on the Rights and Welfare of the child* (1990).

²⁹ Adalokun 2018 *Journal of Comparative Law in Africa* 30.

³⁰ Adalokun 2018 *Journal of Comparative Law in Africa* 30.

³¹ A 25(3) *African Charter on the Rights and Welfare of the Child* (1990).

³² Adalokun 2018 *Journal of Comparative Law in Africa* 29.

his/her country of origin, alternative measures should be used for the child in need of care, before placing him/her for inter-country adoption.³³

Section 28 (2) of the *Constitution of the Republic of South Africa, 1996*³⁴ states that the child's best interest is of paramount importance in all matters pertaining to the child.³⁵ The Constitution in Section 31(1) stipulates that people that are part of religious, cultural and linguistic communities have a right to enjoy their culture, use their language and practice their religion.³⁶ Section 31(1)(b) of the Constitution allows people to maintain linguistic ,cultural and religious associations.³⁷ Furthermore, Section 185 of the Constitution establishes the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities.³⁸ However, when it comes to inter-country adoption, the child's right to culture is interpreted to be subsidiary, to the best interest principle as the application of the best interest of the child has favoured the child leaving the country as opposed to staying within the country.

AD v DW 2008 (3) SA 183 (CC) (hereafter the AD vs DW case),³⁹ dealt with the inter-country adoption of a South African child (Baby R) by an African American couple.⁴⁰ The baby was fostered by an African American family, in the long run, another African American couple wanted to adopt Baby R, from her foster parents.⁴¹ At the Supreme Court, the couple's application failed because the subsidiarity principle required the couple to prove that there was no suitable care that could be found in the child's birth state which they failed to prove.⁴²

The Constitutional Court however, granted the application stating that even though local potential adoptive parents were found in South Africa, Baby R was already accustomed to American culture as both her foster parents and the applicants were

³³ Bartholet and Smolin "The debate" 372.

³⁴ *Constitution of the Republic of South Africa, 1996*

³⁵ Section 28 (2) of the *Constitution of the Republic of South Africa, 1996*.

³⁶ Section 31(1) of the *Constitution of the Republic of South Africa, 1996*.

³⁷ Section 31(1) b of the *Constitution of the Republic of South Africa, 1996*.

³⁸ Section 185 of the *Constitution of the Republic of South Africa, 1996*.

³⁹ *AD v DW 2008 (3) SA 183 (CC)*.

⁴⁰ *AD v DW 2008 (3) SA 183 (CC) para 4*.

⁴¹ *AD v DW 2008 (3) SA 183 (CC) para 1*.

⁴² *AD v DW 2008 (3) SA 183 (CC) para 7*.

Americans.⁴³ The court's reasoning was that it was best for Baby R to be adopted by the American couple because she had assimilated to American lifestyle.⁴⁴ The court stated that the subsidiarity principle is important, but it is "subsidiary to the paramountcy principle."⁴⁵ The court however, did not specify whether and when inter-country adoption will be applied as a matter of last resort.

In terms of Section 251(1) of the *Children's Act*, the Department of Social Development is the Central Authority designated to oversee inter-country adoptions and accrediting adoption agencies in South Africa.⁴⁶ Section 249(2)(b) of the *Children's Act* permits attorneys as well as other professionals including private adoption agencies to receive fees for the provision of services in connection with inter-country adoption.⁴⁷ However, on 26 August 2020 the South African government published an Amendment Bill of the South African *Children's Act 38 of 2005*.⁴⁸ This Amendment Bill proposes that Section 249 that deals with the fees paid to professional service providers such as attorneys and private social workers during adoption be deleted.⁴⁹ The Department said this promoted the child's best interest as it would encourage local adoptions for those who otherwise would not be able to afford the legislated professional fees.⁵⁰ The Department of Social Development stated that adoption is not a business, hence the need to amend the Act, as there was a concern on the exorbitant fees charged by the professionals involved.⁵¹

Arguments in favour of inter-country adoption are to the effect that a child needs to grow up in a permanent family structure in order to develop normally, which is something institutional care does not afford a child.⁵² Muluneh is of the view that inter-country adoption should be preferred even if a child is deprived of his/her cultural identity provided such adoption serves the child's best interests; he further opines

⁴³ *AD v DW* 2008 (3) SA 183 (CC) para 15.

⁴⁴ *AD v DW* 2008 (3) SA 183 (CC) para 45.

⁴⁵ *AD v DW* 2008 (3) SA 183 (CC) para 55.

⁴⁶ Section 251(1) *Children's Act 38 of 2005*.

⁴⁷ Section 249(2)(b) *Children's Act 38 of 2005*.

⁴⁸ B18 -2020 Section 249 in GGNo.43656 of 26 August 2020.

⁴⁹ B18 -2020 Section 249 in GGNo.43656 of 26 August 2020.

⁵⁰ South African Government <http://www.gov.za/speeches/adoption-fees-10-Jan-2019-0000>.

⁵¹ South African Government <http://www.gov.za/speeches/adoption-fees-10-Jan-2019-0000>.

⁵² Bartholet and Smolin "The debate" 370.

that a child's development and survival rights take precedence over a child's cultural right.⁵³ Waddington on the other hand argues that inter-country adoption is a form of western cultural imperialism where children are forced to assimilate cultural values of the new family whilst abandoning their own cultural heritage and identity.⁵⁴ Mosikatsana, opines, it's a form of modern exploitation that supports a neo-colonial bias, as the transnational movement of children follows the direction of cash flow making the process unethical.⁵⁵ The scope of the writer's study will be limited by the case law available on intercountry adoption, as the *AD v DW* case is the only South African case that the writer discusses.

1.2 Research question

Does South Africa's application of inter-country adoption adequately address the South African child's right to culture?

1.3 Research Methodology

A literature study will be followed. The writer will throughout this dissertation, review relevant legislation, international instruments, case law, electronic sources, text books, case law and academic articles in order to make recommendations at the end of this study

1.4 Rationale

The writer's study focuses on the South African child's cultural right which is often marginalized in intercountry adoption. The writer notes with concern that children's rights are considered universal yet they are mostly rooted in a western liberal concept of rights which is different from the African communitarian context of children's rights. The writer focuses and highlights some of the cultural issues and complexities that are overlooked within intercountry adoption.

⁵³ Muluneh 2015, *Jimma University Law Journal* 74.

⁵⁴ Waddington 2011 *Creighton International and Comparative Law* 88.

⁵⁵ Mosikatsana 2005 *SALJ* 118.

1.5 Research aims and objectives

- a) To demonstrate that the child's right to culture is considered to be subsidiary to the best interest of the child principle in intercountry adoption.
- b) To demonstrate that *The Hague Convention* and the *CRC* place less emphasis on culture and identity yet within the *ACRWC*, culture is a heavy component that forms part of African identity.
- c) To highlight some of the cultural issues that are overlooked or not properly addressed in intercountry adoption
- d) To highlight some of the international, regional, municipal and communal strategies that may be implemented to ensure that the child exercises his/her right to culture

Proposed framework

- 1 Introduction
- 2 Background
 - 2.1 Africa prior to colonialism and the significance of culture in forming African identity
 - 2.2 Whether or not intercountry adoption of South African children is a form of modern day colonialism
 - 2.3 The child's right to culture and the child's best interest
- 3 **Legal framework**
 - 3.1 The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption
 - 3.1.1 Eurocentrism of The Hague Convention and the role of money in intercountry adoption

3.2 African Charter on the Rights and Welfare of the child and the application of the subsidiarity principle

4. National framework

4.1 Cultural Rights within the South African Constitution

4.1.2 The significance of culture within the South African context

4.2 Intercountry adoption within the Children's Act 38 of 2005 and the proposed amendments

4.3 Case law

5. Conclusion and recommendation

2 BACKGROUND

The writer discusses the significance of culture within African communities and how culture formed African identity. However, when colonialism and apartheid took root, it caused a disruption within the African culture and traditional value systems. In this chapter the writer discusses whether or not the inter-country adoption of South African children is a modern day form of colonialism. The writer also discusses the child's right to culture and the best interest principle within intercountry adoption.

According to Bennett, culture is not only inclusive of language, knowledge and artefacts it is about the belief system and laws that give social groups their unique character and sets them apart from other groups of people.⁵⁶ Amongst the African communities, the right to culture was a very critical aspect of identity that had to be embraced because those Africans, that were previously oppressed relied on their right to culture in order to ascertain their right to self-determination.⁵⁷ The African culture dictated that the African family structure be used to bring a sense of identity and belonging within the society.⁵⁸ Therefore, there was a need to protect the community because if the community dies then there is a loss of associational rights by the society.⁵⁹

African communities embraced *Ubuntu*, whereby the individual and the community's interests were balanced and reconciled.⁶⁰ Children were viewed as a pivotal part of society who also have a functionary duty within their communities since children are viewed as the future of society and therefore, any community without children as a part of it was a community without hope.⁶¹ This meant that for the South African

⁵⁶ Bennett 1995 *Human Rights and African Custody Law* 24.

⁵⁷ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 32.

⁵⁸ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 50.

⁵⁹ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 32-33.

⁶⁰ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 32-33.

⁶¹ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 52.

children to enjoy their culture was for them to give expression to their ethnicity which was also affirming African consciousness and identity which was a concept that was previously undermined during the colonial and apartheid era.⁶² Within the South African context, the family unit is the transmission channel of which cultural and moral values are passed from generation to generation.⁶³ Within African communities the cultural norms and values differ from the western individualistic concept of family as African communities embrace a communitarian concept of family.⁶⁴

2.1 The role of culture prior to colonialism

Africa's socio-political system stemmed from communalism that was founded on family, extended family relations and kinship.⁶⁵ Culture was a determining factor that shaped families' cultural norms and values, which together shaped the child's identity within society.⁶⁶ In essence, African societies observed cultural legitimacy.⁶⁷ Cultural legitimacy entailed norms and values revered by community members because such norms formed part of the African heritage of that society.⁶⁸ Therefore, one of the African societies' legitimate goals was ensuring children's survival and development within their families and communities or else the society would 'die.'⁶⁹ Kaime advances an argument that a child's well-rounded growth and development requires a correlation between the child's culture and family, as these aspects are symbiotically linked.⁷⁰

⁶² Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 34-36.

⁶³ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 14.

⁶⁴ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 17.

⁶⁵ John 2014 *Humanities and Social Sciences* 19.

⁶⁶ Van As, Excell, Magadala and Gqoli 2020 *The Journal for Transdisciplinary Research in Southern Africa* 1.

⁶⁷ Kaime 2005 *AHRLJ* 222.

⁶⁸ Kaime 2005 *AHRLJ* 223.

⁶⁹ Kaime 2005 *AHRLJ* 225.

⁷⁰ Kaime 2005 *AHRLJ* 227.

2.2 Is inter-country adoption of South African children a new form of modern day colonialism?

Initially, inter-country adoption (hereafter *ICA*) was practised to provide parentless children with a stable and permanent family in the event that a suitable family could not be found in the child's state of origin.⁷¹ Inter-country adoption involves moving a child in one country to another country for the purposes of adoption.⁷² In the African context, due to poverty and economic instability, orphaned and abandoned children in Africa have filled media coverages and gained the attention of audiences worldwide.⁷³ Asamoah's viewpoint is that, in as much as the international community is cognisant of children's right to culture, it does not carry the same urgency, weight or interest.⁷⁴

Section 28 (1) (a) of the South African Constitution states that every child has a right to a name and nationality.⁷⁵ Mosikatsana commenting on inter-country adoption, opined that the inter-country adoption process was a form of modern exploitation that supported a neo-colonial bias, because the transnational movement of children followed the direction of cash flow, which made the process unethical.⁷⁶ Buckenberger, notes that South Africa has had a long and rich cultural history, which has impacted adoption and some factors such as ancestral beliefs, apartheid and family structure all have a bearing and impact on the adoption policy as well as on how the public views adoption.⁷⁷ Buckenberger argues that:⁷⁸

in trying to place western practices and perceptions of family structure on African culture, children and mothers are hurt in the process.

Heleta's viewpoint, is that colonial systems have not been adequately changed, neither have they been questioned, let alone transformed within the first two decades

⁷¹ *Preamble of The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

⁷² Mezmur *Intercountry adoption in an African Context: a legal perspective* 6.

⁷³ Mezmur *Intercountry adoption in an African Context: a legal perspective* 2.

⁷⁴ Asamoah 2015 *AHRLJ* 134.

⁷⁵ Section 28(1)(a) of the *Constitution of the Republic of South Africa*, 1996.

⁷⁶ Mosikatsana 2005 *SALJ* 118.

⁷⁷ Buckenberger G.N "Cultural Factors that influence Domestic Adoption in South Africa" 2.

⁷⁸ Buckenberger G.N "Cultural Factors that influence Domestic Adoption in South Africa" 5.

of democracy in South Africa.⁷⁹ South Africa is a multi-cultural and ethnic country with people of diverse cultures and beliefs who on a regular basis interact and show cultural identity, meaning South Africans are exposed to cultural influences and their cultures are being diluted.⁸⁰ Therefore, according to Ferreira, there is no distinct homogenous 'black' culture.⁸¹ Pretorius argues that a child's right to use his/her language and practice cultural life of his/her own choice is a constitutional right that must be weighed up in inter-country adoption, especially since the *ACRWC* attaches a higher degree to culture because of its importance in African communities.⁸² Similarly, Mubangizi argues that including linguistic and cultural rights in the Constitution is acknowledging the diverse culture of the South African people.⁸³ In the South African context, one's identity is linked to one's cultural heritage and hence the insistence that inter-country adoption be considered as a matter of last resort.⁸⁴

Section 30 of the Constitution provides that everyone has the right to participate in their own cultural life in a manner that does not contravene the Bill of Rights and Section 31 of the Constitution, provides that persons belonging to linguistic and cultural communities; may not be denied the right to enjoy and practice that culture and use that language or join and maintain linguistic associations.⁸⁵ According to Ferreira, the fact that cultural rights are not exerted in a manner inconsistent with the Constitution, is indicative that such rights are subject to the limitation clause; since Section 28 has no such limitation.⁸⁶ Ferreira opines that:⁸⁷

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.

Moyo, argues that there has been a tendency of having the deeply rooted African cultural beliefs and practices undermined and as a matter of necessity, new strategies

⁷⁹ Heleta 2018 *Ufhamu: A Journal of African Studies* 47.

⁸⁰ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 228.

⁸¹ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 238.

⁸² Pretorius *Inter-country adoptions and the best interest of the Child* 68-70.

⁸³ Mubangizi 2012 *African Journal of Legal Studies* 19.

⁸⁴ Pretorius *Inter-country adoptions and the best interest of the Child* 37.

⁸⁵ Section 30 and 31 of the *Constitution of the Republic of South Africa* 1996.

⁸⁶ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 201.

⁸⁷ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 201.

need to be developed to promote and respect children's cultural identities without compromising their rights.⁸⁸ In fact, cultural and moral values tend to be transmitted generationally through family and therefore, children's cultural beliefs have an impact on their rights.⁸⁹ From a cultural viewpoint, inter-country adoption breaks up a child's family and community ties, which may be tragic for the child who suffers the loss of his/her culture, language, heritage and ancestral lineages.⁹⁰ Pretorius notes that a child's language is critical especially for those older children who use language to link them to their past.⁹¹ Therefore, a child's identity plays a role when determining whether or not such a child is to be adopted.⁹²

According to Moyo, a child's culture is evident at the municipal and international level of law and it should be given due consideration, because of the importance of the cultural values and traditions of each people which are important for the protection and harmonious development of the child.⁹³ This is because in as much as children's rights are universal in nature, they cannot be abstracted from the social, cultural and political contexts within which they operate from.⁹⁴ Grant argues that South Africa is a culturally diverse country,⁹⁵ and that the majority of cultures, including the legal culture is subjected to western culture that initially manifested in terms of colonialism and expanded through the apartheid era.⁹⁶

South Africa has 11 recognised national languages, which is indicative of South Africa's cultural identity.⁹⁷ Culture is an important aspect of society,⁹⁸ because when a child is born he/she becomes part of that specific culture because it is the culture to

⁸⁸ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 12.

⁸⁹ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 14.

⁹⁰ Dodds 2015 *Sociology between the gaps: Forgotten and Neglected Topics* 77.

⁹¹ Pretorius *Inter-country adoptions and the best interest of the Child* 18.

⁹² Pretorius *Inter-country adoptions and the best interest of the Child* 37.

⁹³ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 4.

⁹⁴ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 5.

⁹⁵ Grant 2006 *Journal of African Law* 3.

⁹⁶ Grant 2006 *Journal of African Law* 3.

⁹⁷ Section 6(1) of the *Constitution of the Republic of South Africa* 1996.

⁹⁸ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 171.

which their birth parents belong.⁹⁹ This is why Isanga argues that the Children's Act in South Africa places emphasis on the raising of South African children within the context of South African cultural and traditional values.¹⁰⁰ The South African communitarian concept of family is influenced by cultural traditional values and hence a child's care is very much a communal endeavour as opposed to it being only about two individuals.¹⁰¹ *Re: Certification of the Constitution of the Republic of South Africa, 1996 1996 10 BCLR 1253 (CC)*,¹⁰² the court held that, due to the fact that there was no universal consensus of the need to recognise the right to family life as being fundamental, there was no need for such to be awarded Constitutional protection.¹⁰³ The court's reasoning was that, within African families, there were no family rights reflected because of the multicultural character of these societies, as families are formed in various ways, thus, constitutionalising family rights would cause uncertainty.¹⁰⁴ It is Okon's view that family should be defined within the parameters of social and cultural circumstances.¹⁰⁵

In South Africa, the reality is that not all children that are in need of care will benefit from inter-country adoption, given the fact that there are more than 5.2 million children who are abandoned and in need of care.¹⁰⁶ Smolin argues that inter-country adoption results in depriving some of the rights of the child such as his/her right to identity, language, culture as well as the family bond he/she would have had with his/her birth parents, and that, though relinquishment is made voluntarily by the child's parents, most relinquishments stem from the background of depriving most of the parent's

⁹⁹ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 179.

¹⁰⁰ Isanga 2012 *BYU Journal of Public Law* 277.

¹⁰¹ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 17.

¹⁰² *In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 1 BCLR 1253 (CC)*.

¹⁰³ *In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 1 BCLR 1253 (CC)* paras 98-99.

¹⁰⁴ *In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 1 BCLR 1253 (CC)* para 99.

¹⁰⁵ Okon 2012 *AHRLJ* 391.

¹⁰⁶ Van der Walt 2018 *Obiter* 615.

human rights.¹⁰⁷ Therefore, making the practice 'abnormal' from a child's rights perspective.¹⁰⁸ Pretorius notes with concern that *The Hague Convention*¹⁰⁹

does not address the cultural needs of children in sending countries [and it instead] creates a false perception of transnational identities.

In addition to this, when a child is removed from South Africa through intercountry adoption, the South African courts lose the authority they had as upper guardian over the child.¹¹⁰

2.3 The child's right to culture and the best interest principle

According to Pieterse, the right to culture implores that cultural principles are accommodated such that they promote the Bill of Rights objectives.¹¹¹ Section 30 of the South African Constitution states that:¹¹²

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

Section 31(1) (a) of the Constitution states that those belonging to linguistic or cultural communities may not be denied that right, while with other members of that community, to enjoy their culture and use their language.¹¹³ This becomes relevant when dealing with inter-country adoption and interpreting the child's right to culture, which is a right protected in the Constitution. An argument advanced by Bennett regarding the Bill of Rights is that the Bill of Rights hardly contains any provisions that are indicative of or reflective of African values or ostensibly African.¹¹⁴ This may be problematic especially because children are not only perpetuators of their lineage, but are revered societal treasures that also have a functionary duty towards their

¹⁰⁷ Smolin 2013 *Law and Family Studies* 85.

¹⁰⁸ Smolin 2013 *Law and Family Studies* 86.

¹⁰⁹ Pretorius *Inter-country adoptions and the best interest of the Child* 19.

¹¹⁰ Pretorius *Inter-country adoptions and the best interest of the Child* 54.

¹¹¹ Pieterse 2001 *SAJHR* 402.

¹¹² Section 30 of the *Constitution of the Republic of South Africa*, 1996.

¹¹³ Section 31(1)(a) the *Constitution of the Republic of South Africa*, 1996.

¹¹⁴ Bennett 2011 *PELJ* 52.

communities and parents.¹¹⁵ This sentiment is echoed further by The *African Charter on Human and Peoples' Rights*, 1981,¹¹⁶ whereby article 18(2) states that the state needs to assist families because they are custodians of traditional values and morals that are recognised by the community.¹¹⁷

The South African Constitution, made provision for the 'right to self-determination' for people with a shared common language, heritage and culture.¹¹⁸ According to Currie and De Waal it means that, the right to self-determination is a hybrid right of collective and individual rights because, for one to enjoy their culture, it is indicative of it being enjoyed in existence with individuals of a community.¹¹⁹ Therefore, according to Currie and De Waal, one's right to participate in their cultural right gets infringed if any harm comes to the cultural community of which the individual is part, therefore, making Section 31 of the Constitution a cultural integrity right that protects the cultural identity of groups and individuals.¹²⁰ According to Moyo, cultural beliefs have implications when it comes to children's rights, and affects how the best interest of the child principle is analysed and constituted.¹²¹

Van Bueren, is of the view that one's identity is at the core of an acknowledgement of one's existence, which makes such person visible in society.¹²² Inter-country adoption impacts a child's psychology, attachment and emotional development,¹²³ as some children suffer attachment disorders and identity crises; either because the child has been removed from the place to which he/she has become attached already or his/her failure to attach to the new environment, which negatively affects the child's socio-emotional development.¹²⁴ Literature reveals the close link between a child's

¹¹⁵ Mezmur *Intercountry adoption in an African Context: a legal perspective* 38.

¹¹⁶ *African Charter on Human and Peoples' Rights* (1981).

¹¹⁷ A 18(2) of the *African Charter on Human and Peoples' Rights* (1981).

¹¹⁸ Section 235 of the *Constitution of the Republic of South Africa*, 1996.

¹¹⁹ Currie and De Waal *The Bill of Rights Handbook* 626-627.

¹²⁰ Currie and De Waal *The Bill of Rights Handbook* 627.

¹²¹ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 14.

¹²² Van Bueren *The International Law on the rights of the child* 117.

¹²³ Walker 2015 *Child and Family Law Quarterly* 356.

¹²⁴ Walker 2015 *Child and Family Law Quarterly* 356.

attachment and personality development in that children develop close relationships and bonds with their primary care givers as early as from six months on.¹²⁵

In support of the best interest principle, Ferreira argues that a child's right to culture should be viewed as a justified infringement if it is in the child's best interest in order to comply with Section 28 (1)(b) and 28 (2) of the Constitution.¹²⁶ Therefore, he opines that a child's right to culture might need to be infringed in order to provide a family environment for the child as such infringement is premised on the best interest of the child principle.¹²⁷ This is because, inter-country adoption provides orphaned and abandoned children with an opportunity to have a family.¹²⁸ This is inferred from *The Hague Convention's* preamble that states that inter-country adoption offers the advantage of a permanent family where no suitable family can be found in the child's state of origin.¹²⁹ This is because the family unit is an environment giving a child his/her sense of identity and security.¹³⁰ This is further supported by the fact that a child has a right to be raised in a family environment and same is recognised in international law.¹³¹

Wallace opines that it is preferable for children to be adopted as opposed to them growing up in institutional care in their country of origin.¹³² Selman argues that inter-country adoption is a necessity, and that the adoption numbers should increase in order to take care of the orphaned and institutionalised children's needs.¹³³ He submits that inter-country adoption advocates are in support of inter-country adoption because it is part and parcel of a child's holistic welfare system that allows children to be placed in permanent and loving families.¹³⁴ Article 6 of the *CRC*, deals with

¹²⁵ Walker 2015 *Child and Family Law Quarterly* 356-357.

¹²⁶ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 192.

¹²⁷ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 193.

¹²⁸ Van der Walt 2020 *Obiter* 947.

¹²⁹ *Preamble of The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹³⁰ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 15.

¹³¹ Adlakun 2018 *Journal of Comparative Law in Africa* 22.

¹³² Wallace 2003 *Arizona Journal International and Comparative Law* 707.

¹³³ Selman "Global Trends in intercountry adoption:2003-2013"10.

¹³⁴ Selman "Global Trends in intercountry adoption:2003-2013" 47-48.

children's right to life, survival and development.¹³⁵ According to Mezmur and Sloth-Nielsen, when dealing with a child's best interest the child's survival right should be inclusive of his/her basic needs being met, and him/her being afforded a sufficient standard of living.¹³⁶ This arguably can mean that inter-country adoption is one of the means used to ensure that children's survival rights are realised. Furthermore, Section 28(1)(c) of the Constitution states that children have a right to nutrition, shelter and basic health care.¹³⁷

2.4 Summary

The writer opines that the weight placed on culture can either be a propeller or barricade to inter-country adoption as each country's history and culture also has an impact in how intercountry adoption is viewed as a child care system. It is the writer's view that in the South African context, intercountry adoption could possibly be a modern day form of colonialism in that children are removed from their birth country and placed in a foreign land and separated from their cultural and traditional roots. An argument advanced by Ntlame Makhanya and Lubisi-Bizani is that, in deciding the best interest of the child and within the confines of observing human rights, it is necessary that African philosophy of law together with African values, culture and standards receive universal recognition as well.¹³⁸

The reason why the writer aligns herself with this view is that, within African communities, children are key players of shaping the culture of society even before they reach adulthood as traditional values and cultures are passed on to them generationally.¹³⁹ Moreover, in African culture, children are considered communal blessings, which in essence requires that they be kept within their community. However, what inter-country adoption does, is that it causes children to be removed from their birth countries into countries that are far away from their language, families

¹³⁵ A 6 of the *Convention on the Rights of the Child* (1989).

¹³⁶ Sloth-Nielsen and Mezmur 2008 *International Journal of children's Rights* 10.

¹³⁷ Section 28(1)(C) *Constitution of the Republic of South Africa*, 1996.

¹³⁸ Ntlame-Makhanya and Lubisi-Bizani 2021 *AHRLJ* 294.

¹³⁹ Boakye-Boaten 2010 *Journal of International Social Research* 104-115.

and culture.¹⁴⁰ From an African cultural perspective, when defining a child's best interest, Africa's historical background, cultural heritage, values and African civilisation are taken into account as elements that reflect and characterise the rights and welfare of the African child.¹⁴¹

¹⁴⁰ Skelton 2009 *AHRLJ* 499.

¹⁴¹ *Preamble of the African Charter on the Rights and Welfare of the Child* (1990).

3 The Hague Convention

Western countries predominantly influenced the development of international law dealing with inter-country adoption including *The Hague Convention* as well as the *CRC*.¹⁴² Article 1(a) of *The Hague Convention* states that inter-country adoption is to take place in the best interest of the child whilst respecting the child's fundamental human rights.¹⁴³ This is through establishing central authorities that have the role to safeguard the inter-country adoption process.¹⁴⁴ *The Hague Convention* covers adoptions initiated by public authorities, parents as well as private adoption agencies.¹⁴⁵ Article 4 of *The Hague Convention* states that one of its objectives is ensuring that no illegal activities such as child trafficking or child abduction take place.¹⁴⁶

Article 16(b) states that consideration must be given to the child's up-bringing, ethnicity and cultural background once the child is up for adoption.¹⁴⁷ Within *The Hague Convention*, a preference is made for a child to grow up in a family environment.¹⁴⁸ Article 17(1) of *The Hague Convention* states that, before the adoption can take place, the prospective adoptive parents should agree to the match before the central authority entrusts the child with the prospective parents.¹⁴⁹ Article 21 of *The Hague Convention* states that, where it becomes evident that the placement of the adopted child with the prospective adoptive parents is not in the best interest of the child, the child will be sent back to their country of origin if it is his/her best interest.¹⁵⁰

¹⁴² Smolin 2013 *Law and Family Studies* 82.

¹⁴³ A 1(a) of *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹⁴⁴ Pieterse-Spies 2008 *THRHR (Journal for Contemporary Roman- Dutch Law)* 560.

¹⁴⁵ Sloth-Nielsen and Mezmur 2007 *Law Democracy & Development* 87.

¹⁴⁶ A 4 of the of *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹⁴⁷ A 16(1) *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹⁴⁸ Walker 2015 *Child and Family Law Quarterly* 362.

¹⁴⁹ A 17(a) of *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

¹⁵⁰ A 21 of *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

3.1 Eurocentrism of The Hague Convention

The Hague Convention provisions are such that they govern adoptions that create a permanent relationship between children as well as their adoptive parents.¹⁵¹ This according to Mosikatsana, is a Eurocentric and a western type of adoption in that it totally terminates the rights that would have inherently been bestowed to the biological parents of the child.¹⁵²

Some concerns raised about *The Hague Convention* are that it places more emphasis on the legalistic formalities while economic and social rights are daily concerns for everyone.¹⁵³ Walker opines that *The Hague Convention* was drafted in such a manner that provisions that would exhibit cultural difficulties had to be omitted so as to be widely acceptable amongst states worldwide.¹⁵⁴ From an African group rights perspective, it may be argued that children's rights to preserve their ethnicity and cultural background get violated in inter-country adoption.¹⁵⁵ Another concern about *The Hague Convention* is that it does not mention any remedies for the children that have been abducted or trafficked for purposes of inter-country or transnational adoptions.¹⁵⁶

3.1.2 The role of money in inter-country adoption

Poverty results in children being abandoned or given up for inter-country adoption whilst adoption agencies make a profit.¹⁵⁷ Inter-country adoption is regulated and dependant on intermediaries in the form of adoption agencies.¹⁵⁸ Adoptions happen through intermediaries such as attorneys and private adoption agencies arguably making the whole process contractual in nature between the adoptive parents and the intermediaries. Smolin argues that it makes children the 'commodity' in the children's

¹⁵¹ Mosikatsana 2000 *SAJHR* 61.

¹⁵² Mosikatsana 2000 *SAJHR* 61.

¹⁵³ Mubangizi 2006 *African Journal of Legal Studies* 1.

¹⁵⁴ Walker 2015 *Child and Family Law Quarterly* 360.

¹⁵⁵ Lind and Johansson 2009 *International Journal of Children's Rights* 240-241.

¹⁵⁶ Smolin 2013 *Law and Family Studies* 90.

¹⁵⁷ Mezmur "The sins of the saviours ": child trafficking in the context of intercountry adoption in Africa 18.

¹⁵⁸ Dodds 2015 *Sociology between the gaps: Forgotten and Neglected* 77.

market.¹⁵⁹ He argues that inter-country adoption becomes a privatisation of family law wherein attorneys are paid to relinquish parenthood from one set of parents and have such parenthood conferred to a new set of parents via a contract.¹⁶⁰ This according to him, creates a platform wherein children are provided to adults instead of children's needs being addressed.¹⁶¹

Inter-country adoption is more costly than local adoptions and facilitates higher fees, which indirectly may cause a lack of effort to develop local orphan care systems, and with Non-Governmental Organisations, there is a preference of inter-country adoption because of potential donors for orphanages.¹⁶² There are no efforts made in terms of financial assistance if poverty is the prominent issue likely to cause separation before children are placed for inter-country adoption.¹⁶³ There is no mention of family preservation efforts or economic assistance under *The Hague Convention*.¹⁶⁴ *The Hague Convention* has no provision addressing penalties for noncompliance with regulations stipulated; such is left to each state party's discretion to determine.¹⁶⁵

Concerns about inter-country adoption is that inter-country adoption is usually preferred to the child's cultural rights, as international standards do not set a specific criteria for making an effort to keep the child within his/her family before accepting relinquishment for adoption, as systematic financial incentives have caused a preference for inter-country adoption over in-country solutions.¹⁶⁶ Pieterse-Spies argues that inter-country adoption tends to not place much emphasis on cultural differences or cultural beliefs when it comes to determining what is in the child's best interest as well as some of the socio-economic imbalances that enables its facilitation.¹⁶⁷ Eekeelar on the other hand argues that; the concept that an individual's self-esteem is experienced only by one clear-cut ethnicity is not substantiated by

¹⁵⁹ Smolin 2013 *Law and Family Studies* 105.

¹⁶⁰ Smolin 2013 *Law and Family Studies* 105-107.

¹⁶¹ Smolin 2013 *Law and Family Studies* 107.

¹⁶² Mc Quillin "Children's rights and inter-country adoption reconstructing the African Union's role 60.

¹⁶³ Smolin 2013 *Law and Family Studies* 88.

¹⁶⁴ Smolin 2013 *Law and Family Studies* 88.

¹⁶⁵ Kimball 2005 *Denver Journal of International Law and Policy* 572.

¹⁶⁶ Smolin 2007 *Capital University Law Review* 420.

¹⁶⁷ Pieterse-Spies 2008 *THRHR (Journal for Contemporary Roman- Dutch Law)* 560.

evidence.¹⁶⁸ Therefore, he is of the view that people can experience identities in a fluid and complex manner.¹⁶⁹

3.2 The Convention on the Rights of the Child

During the drafting of the *CRC*, there were calls by African states to have the *CRC* drafted in a manner that allowed for cultural diversity and cultural tempering especially on the issue of inter-country adoption.¹⁷⁰ As argued by Mc Quillin, African countries 'fought' to have children's cultural and linguistic rights recognised especially because of the past social divisions that they suffered wherein they were classified based on their identities, this resulted in cultural rights being incorporated within the *CRC*.¹⁷¹ Article 8(1) requires state parties to the *CRC* to respect the rights of the child to preserve his/her cultural identity including his/her nationality and family relations.¹⁷² Article 20 (3) of the *CRC* stipulates that it is desirable to give due regard to the continuity of a child's upbringing, which includes the child's culture, religious, ethnic and linguistic background.¹⁷³

Article 30 of the *CRC* deals with rights of ethnic, linguistic or religious minorities.¹⁷⁴ It states that children that are part of minority or indigenous groups shall not be denied the right in community with other members of enjoying their own culture, to practice and profess their own religions as well as use their own languages.¹⁷⁵ When it comes to inter-country adoption, article 21(b) recognises inter-country adoption as an alternative child care system provided the child cannot be adopted, placed with a foster family or taken care of within his/her state of origin.¹⁷⁶ The drafting of the *CRC* gave observance to the strict application of the subsidiarity principle.¹⁷⁷ Within the *CRC*, inter-country adoption is recognised as an alternative

¹⁶⁸ Eekelaar 2004 *International Journal of Law, Policy and the Family* 182.

¹⁶⁹ Eekelaar 2004 *International Journal of Law, Policy and the Family* 182

¹⁷⁰ Mc Quillin "Children's rights and inter-country adoption reconstructing the African Union's role 43.

¹⁷¹ Mc Quillin "Children's rights and inter-country adoption reconstructing the African Union's role 45.

¹⁷² A 8(1) *Convention on the Rights of the Child* (1989).

¹⁷³ A 20(3) of the *Convention on the Rights of the Child* (1989).

¹⁷⁴ A 30 of the *Convention on the Rights of the Child* (1989).

¹⁷⁵ A 30 of the *Convention on the Rights of the Child* (1989).

¹⁷⁶ A 21(b) of the *Convention on the Rights of the Child* (1989).

¹⁷⁷ Couzens and Zaai 2009 *Obiter* 288.

child care system in the event the child cannot be placed with an adoptive family, foster family and cannot be cared for within his/her state of origin.¹⁷⁸ Article 20 extends extra protection to children that are either temporary or permanently deprived of a family environment, by affording such children special assistance and protection.¹⁷⁹

3.3 The ACRWC and the subsidiarity principle

In Africa, even before states had governments, a community cared for orphaned children.¹⁸⁰ Personhood in Africa, emanated from the collectivist foundations whereby communal interests were prioritised over individuals' interests because the individual existed within the community.¹⁸¹ Therefore, the *ACRWC* emerged from cultural and social values in Africa.¹⁸² The *ACRWC* preamble states that consideration should be given to cultural heritage, historical background and values of African civilisation.¹⁸³ When it comes to inter-country adoption, the *ACRWC* applies the subsidiarity principle strictly. Article 24(b) of the *ACRWC* states that inter-country adoption may be considered as a matter of last resort provided that the child cannot be placed with adoptive parents, a foster family and cannot be taken care of in his/her own country of origin.¹⁸⁴

It is evident within the *ACRWC* that the protection of the welfare and rights of the child are critical as well as the cultural preservation of the community, hence Pretorius argues that culture can be a pivotal aspect in determining the best interest of the child.¹⁸⁵ As a result, subsidiarity is observed strictly, in the child's best interest and also to preserve the child's right to cultural heritage and ethnicity.¹⁸⁶ The *ACRWC*'s observation of the subsidiarity principle, is to the effect that a state should curb any adoption that would result in the child being placed outside the borders of his/her state of origin if there is alternative placement available in the child's country of

¹⁷⁸ Mezmur 2008 *The Comparative and International Journal of Southern Africa* 386.

¹⁷⁹ A 20 of the *Convention on the Rights of the Child* (1989).

¹⁸⁰ Bartholet 2007 *Buffalo Human Rights Law Review* 152.

¹⁸¹ Oyowe 2014 *Human Rights Review* 333.

¹⁸² Ekundayo 2015 *International Journal of Humanities and Social Science* 147.

¹⁸³ *Preamble of the African Charter on the Rights and Welfare of the Child* (1990).

¹⁸⁴ A 24(b) *African Charter on the Rights and Welfare of the child* (1990).

¹⁸⁵ Pretorius *Inter-country adoptions and the best interest of the Child* 40.

¹⁸⁶ Adalakun 2018 *Journal of Comparative Law in Africa* 30.

origin.¹⁸⁷ *The African Charter on Human and Peoples' Rights*, 1981¹⁸⁸ in article 18(2) states that the state needs to assist families because they function as the custodians of morals and traditional values recognised by the community."¹⁸⁹

In Sub-Saharan Africa, more than ninety percent of orphans are usually taken care of by extended families through the kinship system.¹⁹⁰ Roby and Stacey opine that, in dealing with the orphan hood crisis in Africa, there should be more emphasis on strengthening community-based solutions for orphan care, which requires at national level that governments place more support and protection on kinship care to support children in need.¹⁹¹ According to the writer, this suggestion by Roby and Stacey conforms more with the African communitarian child care system.

The *ACRWC* also acknowledges the practice of kinship care that promotes social values as it promotes the continuity of the child's upbringing and family autonomy whilst embracing the preservation of traditional values of a family or community.¹⁹² Within the *ACRWC*, to protect the child's best interest where no adoptive parents can be found within the child's country of origin, a child should be placed in alternative care in his/her country of origin before inter-country adoption is considered.¹⁹³ Article 25(3) further states that alternative family care together with the best interest of the child should include the desirability to continue the child's upbringing, linguistic, ethnic and religious background.¹⁹⁴ As argued by Barratt, the protection of children's cultural rights within their borders is one of the rights the *ACRWC* intends to protect.¹⁹⁵ Binford argues that the *ACRWC* mapped out children's rights within the cultural and historical context of Africa's unique history and much emphasis was on family and multilateral

¹⁸⁷ Sloth-Nielsen and Mezmur 2007 *Law, Democracy and Development* 30.

¹⁸⁸ *African Charter on Human and People's Rights* (1981).

¹⁸⁹ A 18(2) of the *African Charter on Human and People's Rights* (1981).

¹⁹⁰ Roby and Shaw 2006 *Social Work* 200.

¹⁹¹ Roby and Shaw 2006 *Social Work* 200-203.

¹⁹² Van der Walt 2020 *Obiter* 334.

¹⁹³ Adalakun 2018 *Journal of Comparative Law in Africa* 30.

¹⁹⁴ A 25(3) *African Charter on the Rights and Welfare of the Child* (1990).

¹⁹⁵ Barratt 2011 *AHRLJ* 583.

and reciprocal relationships within the family and community.¹⁹⁶ One such example is Article 31(d) of the *ACRWC* that stipulates that:¹⁹⁷

A child subject to [his/her] age and ability shall have the duty to preserve and strengthen African cultural values in relationship with other members of the society in the spirit of tolerance, dialogue and consultation and to contribute to the moral wellbeing of society.

The *ACRWC* puts emphasis on Africa's cultural heritage, virtues and historical experiences and the values of African civilisation.¹⁹⁸ As argued by Okere, the footstool of African peoples' human rights is centred in the group-centred approach.¹⁹⁹ Kaime, contends that the African fingerprint of human rights has a trademark of imploring duties on individuals, and culturally this expands to protecting children, which is a legitimate norm and value of children's rights in the African notion of children's rights.²⁰⁰ This is because communities regard children as the future and hence there is a strong urge for them to be raised within their own social norms and culture.²⁰¹ African communities largely consider children as key players of shaping the culture of society even before they reach adulthood.²⁰²

The framework of the *ACRWC* does state the need for African children to be protected, especially those with a history of violations of an extreme nature. One such example is Article 26 of the *ACRWC* where states are obligated to give the highest priority to protect children that lived under apartheid or were subjected to military destabilisation by the apartheid regime.²⁰³ The *ACRWC* in article 24(f) requires that a monitoring mechanism be developed to monitor the wellbeing of adopted children.²⁰⁴ The *ACRWC* is the only instrument that places a mandate on state parties to develop monitoring mechanisms for children that have been adopted.²⁰⁵

¹⁹⁶ Binford 2016 *New York Law School Law Review* 341.

¹⁹⁷ A 31 of the *African Charter on the Rights and Welfare of the Child* (1990).

¹⁹⁸ Preamble of the *African Charter on the Rights and Welfare of the Child* (1990).

¹⁹⁹ Okere 1984 *Human Rights Quarterly* 149.

²⁰⁰ Kaime 2005 *AHRLJ* 225.

²⁰¹ Mc Quillin "Children's rights and inter-country adoption reconstructing the African Union's role 38.

²⁰² Boakye-Boaten 2010 *Journal of International Social Research* 104-115.

²⁰³ A 26 of the *African Charter on the Rights and Welfare of the Child* (1990).

²⁰⁴ A 24 (f) of the *African Charter on the Rights and Welfare of the Child* (1990).

²⁰⁵ A 24(f) of the *African Charter on the Rights and Welfare of the Child* (1990).

3.4 Summary

Culture composes of beliefs, traditions, institutions and a way of life that people or a group express their humanity and the meaning they give to their existence and development.²⁰⁶ Within the African context, culture is crucial in establishing the identity of the African people and yet within the international treaties, which were mostly western dominated in its drafting stages cultural rights were not given much significance.

From the above discussion it is evident that the weight placed on culture within the three treaties differs vastly. It was also demonstrated that the role of money in inter-country adoption has the potential of preferring inter-country adoption over in-country solutions and by virtue of western countries being the most dominant in drafting *The Hague Convention* most of the provisions were more a reflection of western liberalism. Juxtaposed to this, the *CRC* in its drafting alludes to a strict application of the subsidiarity principle, and the *ACRWC* follows a stricter approach of the subsidiarity principle. As the African children's regional document, the *ACRWC* addresses children's rights that are critical to Africa. The *ACRWC* aims to protect children within the continent since children hold a privileged and unique position in the African society.

²⁰⁶ Barratt A, 2011 *AHRLJ* 564.

4 Cultural rights and the 'weight' placed on the right to culture within the South African Constitution

In this chapter, the writer discusses cultural rights within the South African Constitution and the intercountry adoption procedure within the *Children's Act* and the proposed amendments in the *Children's Amendment Bill* of 2020 in relation to adoption law. The writer further discusses the Supreme Court and the Constitutional Court case of *AD vs DW* as well as the court's interpretation and application of the subsidiarity principle. It should be noted that, although *The Hague Convention* was not in effect, the courts relied on *The Hague Convention* principles when making a determination on whether or not an application for intercountry adoption should be granted.

Inter-country adoption is considered a legitimate, sustainable and regulated manner of ensuring that children have homes.²⁰⁷ Its application however, is engulfed with tension, difficulties and paradoxes.²⁰⁸ *The Pretoria Declaration on Economic, Social and Cultural Rights in Africa 2004*,²⁰⁹ in its preamble, noted with concern that there was resistance in the recognition of cultural rights, as such rights continued to be marginalised and thus the majority of Africans were excluded from the enjoyment of human rights.²¹⁰ On this premise, it is Lloyd's view that:²¹¹

the jurisprudence that suits the needs of Africa and African children best will emerge within municipal courts.

According to Venter, the founding values of the Constitution have an impact on the weight afforded to culture.²¹² He argues that a person's language is a critical component of the personal identity of such a person and therefore,²¹³

to consciously attempt to suppress the language living in one's psyche would amount to gross self-denial.

²⁰⁷ Smolin 2013 *Law and Family Studies* 82.

²⁰⁸ Smolin 2013 *Law and Family Studies* 82.

²⁰⁹ *Preamble of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa* (2004).

²¹⁰ *Preamble of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa* (2004). paras 5-6.

²¹¹ Lloyd 2002 *AHRLJ* 23

²¹² Venter 1998 *SAPR/PL* 438.

²¹³ Venter 1998 *SAPR/PL* 441.

He argues that the primary form of human communication not only contributes to communal security and social affinity, but it is a characteristic of a linguistic community because language and culture speak to the very identity of people as well as their associations.²¹⁴

An observation made by Venter regarding the principles, guidelines and values stipulated in the South African Constitution is that they align more with western humanism and liberalism.²¹⁵ Venter opines further that the stipulated values in the Constitution do not denote neutrality when it comes to interpretation, and that there are inconsistencies in the Constitution, which can conflict directly with aspects of culture that are prevalent in South Africa.²¹⁶ This is due to the fact that some of the provisions either implicitly or expressly require that the state, when dealing with cultural matters, ought to receive guidance from Constitutional values.²¹⁷ Although the South African Constitution has no specific hierarchy on rights, the way in which courts have adjudicated matters is reflective of a preference of political and civil rights being considered as first generation rights whilst socio-economic rights are regarded as second- and third-generation rights.²¹⁸

Venter postulates that "culture is not the main theme of the Constitution."²¹⁹ This is evident from the fact that, although language and culture are acknowledged, it is not mentioned in the preamble of the Constitution and according to Venter, neither is there any express reference to culture in the founding values of the Constitution.²²⁰ Therefore, participating in the cultural life of one's choice is "at the bottom of the hierarchy of rights."²²¹ According to Mokgoro, the debate sparked by culture is whether such a right is individually enforceable and secondly, the "justiciable protection given to cultural expression."²²² She advances the argument that there is

²¹⁴ Venter 1998 *SAPR/PL* 441

²¹⁵ Venter 1998 *SAPR/PL* 447.

²¹⁶ Venter 1998 *SAPR/PL* 448.

²¹⁷ Venter 1998 *SAPR/PL* 448.

²¹⁸ Mubangizi 2006 *African Journal of Legal Studies* 3.

²¹⁹ Venter 1998 *SAPR/PL* 448.

²²⁰ Venter 1998 *SAPR/PL* 448.

²²¹ Venter 1998 *SAPR/PL* 458.

²²² Mokgoro 1999 *SMU Law Review* 1554.

a clash between the individualist nature of the Bill of Rights and "the collective morality of cultural identity."²²³ She further opines that communities and individuals have a right to retain their own cultural uniqueness, hence the new Constitution seems unequivocal that there is a need for respect of cultural traditions for people who choose to live in a certain way of culture provided such is in conformity with the Constitution.²²⁴ Woodhouse opines that one's culture of origin matters to children and therefore it should matter when it comes to adoption law.²²⁵

4.1 Inter-country adoption in terms of the Children's Act 38 of 2005

In the *Children's Act 38 of 2005*, inter-country adoption is dealt with in terms of chapter 16.²²⁶ Section 254 of the *Children's Act* stipulates that its purpose is to give effect to *The Hague Convention* on inter-country adoption, to find proper and fit adoptive parents for an adoptable child, recognise foreign adoptions and regulate inter-country adoption.²²⁷ Section 249 (1) stipulates that no one may agree to give or receive cash for the adoption of a child in terms of chapter 16.²²⁸ Section 249 (2) precludes the child's biological mother who may recover compensation for any medical expenses such as pregnancy, birth and follow-ups.²²⁹

Attorneys, psychologists and other professionals may receive fees for the services rendered in connection with the adoption.²³⁰ Section 249(2)(d) permits child protection organisations accredited to provide inter-country adoption services to receive the prescribed fees.²³¹ Section 261(1) states that *The Hague Convention* on inter-country adoption is in force in the Republic and that its provisions are law in the Republic.²³² Section 256(2) stipulates that the ordinary law of the Republic applies to an adoption

²²³ Mokgoro 1999 *SMU Law Review* 1555.

²²⁴ Mokgoro 1999 *SMU Law Review* 1557.

²²⁵ Woodhouse 1995 *Duke Journal of Gender Law and Policy* 114.

²²⁶ Chapter 16 of the *Children's Act 38 of 2005*.

²²⁷ Section 254 of the *Children's Act 38 of 2005*.

²²⁸ Section 254 of the *Children's Act 38 of 2005*.

²²⁹ Section 249(2)(a)(i) of the *Children's Act 38 of 2005*.

²³⁰ Section 249(2)(b) of the *Children's Act 38 of 2005*.

²³¹ Section 249(2)(d) of the *Children's Act 38 of 2005*.

²³² Section 261(1) of the *Children's Act 38 of 2005*.

to which the Convention applies, however, should there be a conflict between the ordinary law of the Republic and the Convention, then the Convention prevails.²³³

The Central Authority in terms of section 259(1)(a) is permitted to accredit a child protection organisation to provide inter-country adoption services.²³⁴ Section 259(3) states that the child protection organisation that has been accredited to provide inter-country adoption services may receive the prescribed fee and make the necessary payments in respect of inter-country adoption.²³⁵ Furthermore, section 259(1)(b) requires that the child protection organisation submit annually their financially audited statements to the Central Authority regarding payments that were made as well as the fees received.²³⁶

Section 259 (4) permits lawyers, psychologists and other professionals to render professional services in connection with the adoption of a child.²³⁷ In terms of Section 260(1) of the *Children's Act*, an accredited child protection organisation providing inter-country adoption services can enter into working agreements with accredited adoption agencies in another country.²³⁸ The child protection organisation is, however, expected to furnish the Central Authority with certified copies of all adoption working agreements entered into by that child protection organisation for approval and may not act in terms of any adoption working agreements until it has received approval from the Central Authority.²³⁹ A person that is habitually resident in a Convention country that wants to adopt a child that is habitually resident in South Africa must apply to his/her Central Authority of the Convention concerned.²⁴⁰ If the Central Authority of that country is satisfied with the applicant being a proper and fit person to adopt, a report shall be prepared on that applicant as per the requirements stipulated by *The Hague Convention*.²⁴¹ Any other requirements

²³³ Section 256(2) of the *Children's Act* 38 of 2005.

²³⁴ Section 259(1)(a) of the *Children's Act* 38 of 2005.

²³⁵ Section 259(1)(a) of the *Children's Act* 38 of 2005.

²³⁶ Section 259(1)(b) of the *Children's Act* 38 of 2005.

²³⁷ Section 259(4) of the *Children's Act* 38 of 2005.

²³⁸ Section 260(1) of the *Children's Act* 38 of 2005.

²³⁹ Section 260(2)(a) and (b) of the *Children's Act* 38 of 2005.

²⁴⁰ Section 261 of the *Children's Act* 38 of 2005.

²⁴¹ Section 261(2) of the *Children's Act* 38 of 2005.

prescribed must be complied with and the report will be sent to the Central Authority in South Africa.²⁴² If an adoptable child is found available for adoption, the South African Central Authority shall prepare a report on the child as per the requirements of *The Hague Convention* and any other prescribed requirements, and same will be forwarded to the Central Authority of the Convention country.²⁴³

If the Central Authority of South Africa and that of the Convention country are unanimous on the adoption, the Central Authority will refer the adoption application and all relevant reports and documents to the Children's Court for consideration as per section 240.²⁴⁴ The court may make an order for such child to be adopted if the requirements of section 231 have been complied with and the application has been considered in terms of section 240 and the court is also satisfied that the adoption is in the child's best interest.²⁴⁵ The Central Authority of South Africa should have agreed to such adoption of the child.²⁴⁶ The name of the child who is to be adopted should have been registered in the RACAP list for a period of at least 60 days when no fit and proper adoptive parent could have been found within the country.²⁴⁷ The withdrawal of the Republic's Central Authority ought to be within 140 days from when the consent to adopt was given if it's in the best interest of the child to do so.²⁴⁸ When the Children's Court has approved the adoption, then the Central Authority may issue an adoption compliance certificate.²⁴⁹

²⁴² Section 261(2) of the *Children's Act* 38 of 2005.

²⁴³ Section 261(3) of the *Children's Act* 38 of 2005.

²⁴⁴ Section 261(4) of the *Children's Act* 38 of 2005.

²⁴⁵ Section 261(5) of the *Children's Act* 38 of 2005.

²⁴⁶ Section 261(5)(f) of the *Children's Act* 38 of 2005.

²⁴⁷ Section 261(5)(g) of the *Children's Act* 38 of 2005.

²⁴⁸ Section 261(6) of the *Children's Act* 38 of 2005.

²⁴⁹ Section 263 of the *Children's Act* 38 of 2005.

4.1.2 *The Department of Social Development's proposed amendments in the Children's Act*

The Department of Social Development as the Central Authority in South Africa, proposed amendments to *the Children's Act*, and in 2019, a media statement was published by the government wherein in the Department stated that:²⁵⁰

Like all other designated child protection services, fees should not be charged for adoption because it is not a business but a child protection measure.

Issues raised by the Department regarding the adoption fees were that the best interest of children would be compromised because not enough efforts were made to consider other alternative options catered for in the *Children's Act* including retaining children with their families of origin.²⁵¹ Secondly, the Department noted that the fees were a barrier to those who have an interest in nurturing and caring for children, but cannot afford the adoption fees.²⁵² As of 2019 there were 899 social workers who were undergoing training in the various provinces to render the adoption services to ensure efficient and effective services that would be free.²⁵³

Van der Walt; has issue with the proposed amendments, which includes the removal of fees and the use of private social workers in the adoption process as he argues that the implication of the amendments will be to the effect that the State's social workers will be overburdened, yet the Non-Governmental Organisations take away the strain from the DSD, and also that the proposed amendments have the possibility of slowing down adoptions or possibly stopping them.²⁵⁴ The other issue he raises is that the professional services rendered by psychologists and legal practitioners are essential in ensuring that the child's rights are protected and promoted.²⁵⁵ He argues that the proposed amendments that prohibit professionals from charging their fees are contrary to children's interest as these services are critical to the court when they make

²⁵⁰ South African government 2019 <http://www.gov.za/speeches/adoption-fee-10-Jan-2019-0000>.

²⁵¹ South African government 2019 <http://www.gov.za/speeches/adoption-fee-10-Jan-2019-0000>.

²⁵² South African government 2019 <http://www.gov.za/speeches/adoption-fee-10-Jan-2019-0000>.

²⁵³ South African government 2019 <http://www.gov.za/speeches/adoption-fee-10-Jan-2019-0000>.

²⁵⁴ Van der Walt 2020 *Obiter* 941.

²⁵⁵ Van der Walt 2020 *Obiter* 940.

decisions.²⁵⁶ Not only this, but the professionals rendering their services in processing adoptions would be barred from charging fees for executing their professional services and this duty would fall on the shoulders of the State's social workers.²⁵⁷

4.2 The Supreme Court case of *AD vs DW (2007) SCA 87*

Section 25 of the *Child Care Act* stipulated that guardianship applications by foreigners would be considered as inter-country adoption for purposes of *The Hague Convention*.²⁵⁸ In *AD V DW 2007 SCA 87*²⁵⁹ the applicants were an American couple who had in the High Court instituted a sole custody and guardianship order to adopt the minor child (Baby R) in the USA.²⁶⁰ The said child had been under the foster care of another African American couple, although at the High Court the application was dismissed; it was appealed by the applicants at the Supreme Court.²⁶¹

At the High Court, the application was dismissed by Judge Goldblatt who took concern with the order sought and hence appointed the Centre for Child Law as amicus curiae, to assist on South Africa's obligation as per *The Hague Convention* and because of the developments in South Africa after the *Fitzpatrick* case which was the first case where the court ruled that South African children may be adopted by non-South Africans.²⁶² The affidavits filed by the amicus curiae included that of the Chief Director of Children, Youth and Family in the National Department of Social Welfare who reiterated that, in terms of the Social Welfare Department Policy on inter-country adoption, a child must be adopted in South Africa first, and that inter-country adoption must be considered as an alternative where "a satisfactory solution cannot be found in South Africa."²⁶³

Concerns raised by the amicus curiae and the Minister were that, should inter-country adoption be immediately effective, issues would arise, namely, that the Department would not have adequate time to do background checks on non-citizens and there

²⁵⁶ Van der Walt 2020 *Obiter* 941.

²⁵⁷ Van der Walt 2020 *Obiter* 941.

²⁵⁸ Section 25 of the *Child Care Act* 74 of 1983.

²⁵⁹ *AD V DW (2007) SCA 87*.

²⁶⁰ *AD V DW (2007) SCA 87* para 1.

²⁶¹ *AD V DW (2007) SCA 87* para 1.

²⁶² *AD V DW (2007) SCA 87* para 4.

²⁶³ *AD V DW (2007) SCA 87* paras 6-7.

would be insufficient provision to effect to the subsidiarity principle.²⁶⁴ Section 18(1)(b) of the said *Act* made it a pre-requisite that, before an adoption order could be made, the Children's Court had to take into account the cultural and religious background of the child as well as that of the prospective parents.²⁶⁵ The principle of subsidiarity required that priority be given to having the child placed with his/her family of origin and for domestic measures to be prioritised over inter-country adoption.²⁶⁶ The court stated that,²⁶⁷

despite the fact that the subsidiarity principle has not expressly been provided for in domestic legislation, our courts are obliged, in terms of Section 39(1)(b) of the Constitution, to take the subsidiarity principle as a well-established principle of international law into account when assessing the best interest of the child, and that, within the *ACRWC*, it is emphasised in strong terms that it's a matter of last resort.

The arguments advanced on behalf of the appellants regarding the child's best interest were that the High Court should allow flexibility in determining the best interest of the child in accordance with Section 28(1)(b) of the Constitution.²⁶⁸ What the court took issue with was that, as far back as when Baby R was just 9 months old, a social worker had already contemplated that the baby would possibly be adopted by foreigners, and that Baby R's voice was not heard, which meant that the Roodepoort Child and Family Welfare Society (3rd respondent's) had failed to represent Baby R's interest.²⁶⁹ The court stated that the 3rd respondent had to investigate suitable care for the baby within the country.²⁷⁰ The court noted that the 3rd respondent's had failed to tackle the matter on the basis that adoption should be child-suited as opposed to being parent-suited.²⁷¹

Due to the fact that the appellants had failed to satisfy the court that there was no suitable care locally available for Baby R, the court ruled that the principle of subsidiarity was insufficiently established so as to justify Baby R's removal to the

²⁶⁴ *AD V DW* (2007) SCA 87 paras 7-8.

²⁶⁵ Section 18 (1)(b) *Child Care Act* 74 of 1983.

²⁶⁶ *AD V DW* (2007) SCA 87 para 12.

²⁶⁷ *AD V DW* (2007) SCA 87 para 12.

²⁶⁸ *AD V DW* (2007) SCA 87 para 16.

²⁶⁹ *AD V DW* (2007) SCA 87 para 22.

²⁷⁰ *AD V DW* (2007) SCA 87 para 23.

²⁷¹ *AD V DW* (2007) SCA 87 para 23.

USA.²⁷² In this case, it was revealed that there were available South African prospective adoptive parents who were eager to adopt children that were young, up until the age of 5 years.²⁷³ After the majority decision, the court stated that it was not in Baby R's interest to leave the country through a guardianship and custody order without the necessary safeguards and protection of an adoption effected in the Children's Court.²⁷⁴ The court further stated that it would not allow an adoption procedure that conflicts with international treaties that South Africa ratified and that have been designed to safeguard the child's best interest.²⁷⁵ The majority judgement given by the Acting Judge of Appeal, Theron, lead to the application being dismissed.

Judge Hehler's submission on subsidiarity was that the subsidiarity principle is one recognised in the interest of the child so that as far as possible a child ought to enjoy his/her parental upbringing and culture that are familiar to them and comparable,²⁷⁶

from which he or she would have benefitted as a sharer in the opportunities open to most other children in the country of their birth.

The court went on to commend the applicants in that they had an interest in the African culture throughout their lives and had taken it upon themselves to do extensive research on African culture, history and people, as they intended to adopt Baby R and that they would raise her with an in-depth knowledge of her roots as well as her history and that they would travel to South Africa with Baby R in the future in order to acquaint her with her country of origin.²⁷⁷ Submissions by the amicus curiae were to the effect that the Department of Social Development would need to establish clear procedures and one of the submissions made by Ms Wilson was that²⁷⁸

the Johannesburg child welfare society always has prospective adoptive parents on its waiting list for girls of all ages, and there was no acceptable reason to have the child placed out of the country where there is such a demand within the country.

²⁷² *AD V DW* (2007) SCA 87 para 24.

²⁷³ *AD V DW* (2007) SCA 87 para 25.

²⁷⁴ *AD V DW* (2007) SCA 87 para 27.

²⁷⁵ *AD V DW* (2007) SCA 87 para 27.

²⁷⁶ *AD V DW* (2007) SCA 87 para 62.

²⁷⁷ *AD V DW* (2007) SCA 87 para 62.

²⁷⁸ *AD V DW* (2007) SCA 87 para 64.

The court did take issue with the fact that the 60-day period would be considered as having complied with the subsidiarity principle.²⁷⁹ The court held that by virtue of the fact that Baby R was abandoned she had no cultural or religious experience except that of her foster parents and as such "subsidiarity is largely reduced in importance."²⁸⁰ Some of the issues raised by the amicus was the possibility of having adoption agencies preparing reports that suit their clients as well as the South African court's inability to oversee the continued care of the child where the child is removed under a custody and guardianship order.²⁸¹ According to Judge Hehler the application should have succeeded. Judge Ponnann reiterated that, in evaluating a child's best interest individuals ought to, as a matter of necessity, look into the long-and short-term interests and the interplay within the two.²⁸²

4.3 AD VS DW 2008 (3) SA 183 (CC)

At the Supreme Court, Theron's judgement necessitated that the couples application fail because of the subsidiarity principle and that, unless it was established that suitable care could not be found in the child's country of origin, an inter-country adoption application would not be considered, whatever other consideration there might be.²⁸³ Observations made by the curatrix was that the baby was entrenched in American culture and thus it clearly would be in Baby R's best interest to be placed with the applicants permanently.²⁸⁴ The matter of Baby R was taken to the Constitutional Court that noted that by the time the Supreme Court entertained Baby R's matter, she had already been deeply entrenched in her foster family.²⁸⁵ This factor, favoured her to be adopted by the applicants as per the curatrix report.²⁸⁶ In its conclusion the Constitutional Court emulated that *The Hague Convention* not only set binding standards in inter-country adoption, it also introduced a supervisory entity

²⁷⁹ *AD V DW* (2007) SCA 87 para 68.

²⁸⁰ *AD V DW* (2007) SCA 87 para 68.

²⁸¹ *AD V DW* (2007) SCA 87 para 69.

²⁸² *AD V DW* (2007) SCA 87 para 96.

²⁸³ *AD v DW 2008 (3) SA 183 (CC)* para 7.

²⁸⁴ *AD v DW 2008 (3) SA 183 (CC)* para 15.

²⁸⁵ *AD v DW 2008 (3) SA 183 (CC)* para 30.

²⁸⁶ *AD v DW 2008 (3) SA 183 (CC)* para 30.

wherein legal standards were observed.²⁸⁷ The court concluded by stating that even though there are serious considerations favouring children growing up in their birth community and country, the subsidiarity principle should be seen as subsidiary when compared to the paramountcy principle.²⁸⁸ The court therefore, granted the application.

4.4 The Court's obligations and interpretive task

From an international perspective, South African courts have an obligation as stipulated by Section 39(1)(b) that, when interpreting the Bill of Rights, courts need to consider international law.²⁸⁹ This means that the court's interpretation should be guided by the principles of *The Hague Convention* when performing its interpretive task.²⁹⁰ Section 256(2) of the *Children's Act* states that in the event of a conflict between the laws of the Republic and *The Hague Convention*, *The Hague Convention* shall apply.²⁹¹ This is part of the state's compliance with its obligation in terms of international law. Sloth-Nielsen and Mezmur submit that:²⁹²

Courts should not simply disregard or give lip service to The Hague Convention, but should analyse and assess the principles of The Hague Convention when dealing with inter-country adoption to inform the development of the common law to interpret the involvement of High Courts with regard to prospective inter-country adopters acting in contravention of international law to which South Africa is bound.

They acknowledge that *The Hague Convention* places less emphasis on the child's right to culture and instead it gives room for its consideration.²⁹³ This connotes that to a narrow extent, *The Hague Convention* attempts to protect the child's cultural background.²⁹⁴ Furthermore, article 30(1) and (2) of *The Hague Convention* states that:²⁹⁵

²⁸⁷ *AD v DW 2008 (3) SA 183 (CC)* para 45.

²⁸⁸ *AD v DW 2008 (3) SA 183 (CC)* para 55.

²⁸⁹ Section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

²⁹⁰ Sloth-Nielsen and Mezmur 2007 *Law, Democracy & Development* 85.

²⁹¹ Section 256(2) of the *Children's Act* 38 of 2005.

²⁹² Sloth-Nielsen and Mezmur 2007 *Law, Democracy & Development* 86.

²⁹³ Sloth-Nielsen and Mezmur 2007 *Law, Democracy & Development* 95.

²⁹⁴ Sloth-Nielsen and Mezmur 2007 *Law, Democracy & Development* 95.

²⁹⁵ A 30(1) and (2) of *The Hague Convention Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993).

The competent authorities of a Contracting State shall ensure that information concerning the child's origin, in particular information concerning the identity of the parents, as well as the medical history is preserved. They shall ensure that the child or his or her representatives have access to such information, under the appropriate guidance, in so far as permitted by the law of that state.

4.5 Summary

From the above discussion, it seems clear that the South African courts have not been consistent with regard to applying the subsidiarity principle in inter-country adoption. Of note is that the subsidiarity principle was strictly observed in the Supreme Court, which was more in line with the *ACRWC* strict application of the principle. Juxtaposed to this, at the Constitutional Court, the subsidiarity principle was found to be subsidiary to the paramountcy principle. This is indicative of the controversial application of the subsidiarity principle. Furthermore, the new proposed amendments by the Department of Social Development line up with the *ACRWC* in that they propose a stricter observation of the subsidiarity principle. Within the South African context, it was demonstrated that culture is acknowledged in the Constitution, but is not given much significance, which inevitably will affect the justifiability of cultural rights or the weight placed on such rights because the courts are expected to adjudicate matters relating to culture still relying on international law as a guide and yet the international law is more in line with western liberalism as opposed to the African concept of human rights, which inevitably will affect how cultural rights are adjudicated.

5 Observations made on cultural rights

In this chapter, the writer assesses and highlights some of the legal, social and cultural issues that remain unresolved within the inter-country adoption system. The writer further highlights some of the cultural complexities that are not addressed in intercountry adoption as well as some views made by authors who support inter-country adoption and those authors opposed to inter-country adoption.

Seeing that Africa, has become the frontier for inter-country adoption, and that cultural values are pivotal to African countries,²⁹⁶ it is necessary that adopted children's cultural rights are respected, valued and viewed as human rights that deserve equal protection to other rights.²⁹⁷ Children are holders of rights within international human rights law and that warrants that states ratifying the treaties have an obligation to which they are bound.²⁹⁸ Therefore, whenever an adoption is to be intercultural, culture is a factor that has to be taken into consideration.²⁹⁹ Van der Walt, argues that what is in the child's best interest will always differ and vary from culture to culture and from country to country.³⁰⁰ Skelton argues that Section 28 (2) of the Constitution is not only a guiding principle, but is a right in itself.³⁰¹

5.1 The importance of culture within the African context

Cultural rights as a pivotal part of human rights are indivisible, interdependent, universal and are critical for ensuring human dignity and positive social interaction between individuals and communities.³⁰² Therefore, the concept of Afro-communitarianism recognises that how one sees the self is translated from the perspective of the community he/she belongs to and includes interactions with other

²⁹⁶ Abstract Mezmur *Intercountry adoption in an African Context: a legal perspective*.

²⁹⁷ Preamble of *The Pretoria Declaration on Economic, Social and Cultural Rights in Africa* (2004)

²⁹⁸ Van der Walt *Intercountry adoption and alternative care in South Africa: A model for determining placement in the Best Interest of the Child* 31.

²⁹⁹ Abstract Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective*.

³⁰⁰ Van der Walt *Intercountry adoption and alternative care in South Africa: A model for determining placement in the Best Interest of the Child* 53.

³⁰¹ Skelton 2019 *De Jure Law Journal* 563.

³⁰² UN Committee on *Economic, Social and Cultural Rights (CESCR) General Comment No.21 Right of everyone to take part in cultural life* (2009) E/C.12/GC/21(2021) para 1.

community members.³⁰³ This means that one's identity and self-realisation is reflected in terms of the communal self, which means that one's self-realisation is through a shared communal identity.³⁰⁴ Consequently, the ultimate goal is that one's identity is fulfilled when regarded as part of the communal self in that the community and the individual are intertwined to an extent that self-realisation and prosperity of a person happen within society.³⁰⁵

5.2 The conflicting views on the role that culture should play

Cantwell remarks that even though the best interest principle is to be upheld, there is no unanimous solution as to how the best interest is to be decided because international standards themselves, fail to stipulate the criteria as to who or how the best interest is to be determined and who should have the final decision in that regard.³⁰⁶ The other issue is that the decision makers themselves are from diverse socio-cultural backgrounds, which impacts how the best interest principle is applied.³⁰⁷ Mezmur on the other hand notes that the subsidiarity principle is not clear and that it being a matter of last resort is subjective in nature and unclear.³⁰⁸ Smolin notes that, whilst inter-country adoption is a possible intervention for vulnerable children, he questions as to what is a possible intervention for the families in extreme poverty.³⁰⁹

Furthermore, the systematic pressures of fees and donations usually indirectly incentivise children to be placed abroad.³¹⁰ He poses the question whether inter-country adoption really is a solution in families [where there is love and care for the child] but the main problem is poverty.³¹¹ The real issue is that, what is best for a child will depend on who is adjudicating because whilst some might view inter-country adoption as a solution, it does not eradicate the issues of poverty within the communities. *The Hague Convention* makes no reference to culture as an aspect of

³⁰³ Oelofsen 2015 *Phronimon* 142.

³⁰⁴ Oelofsen 2015 *Phronimon* 142.

³⁰⁵ Oelofsen 2015 *Phronimon* 142.

³⁰⁶ Cantwell *The Best interest of the child in Intercountry Adoption* 5.

³⁰⁷ Cantwell *The best interest of the child in Intercountry Adoption* 5.

³⁰⁸ Mezmur *Intercountry Adoption in an African Context: A legal Perspective* 302.

³⁰⁹ Smolin 2007 *Capital University Law Review* 421.

³¹⁰ Smolin 2007 *Capital University Law Review* 422.

³¹¹ Smolin 2007 *Capital University Law Review* 430.

what constitutes family.³¹² Issues have been raised that the current concept of human rights reflected in most of the international instruments is deeply rooted in a western nature that focuses on the individual self.³¹³

Smolin notes that, whilst international law stipulates that preference is to be made for domestic adoptions, there is usually competing policies and financial incentives that cause domestic adoptions not to be prioritised.³¹⁴ *The Hague Convention* does not establish or determine when a national or international adoption is not possible, which is an aspect that was not discussed in the negotiations.³¹⁵ What is worth noting is that the *CRC*, *ACRWC* and *The Hague Convention* all acknowledge the subsidiary principle, however, their hierarchical order in which it is applied varies and has a bearing on the placement determination.³¹⁶ Smolin notes with concern that *The Hague Convention* does not have an individual complaints system in place, which to an extent can alter the degree of effectiveness of *The Hague Convention*.³¹⁷ Another issue raised by Smolin is that the lack of a supervisory global body to check whether or not each state is complying, is left to each state's party and its central authority, which is problematic.³¹⁸

According to Van Bueren, where an inter-country adoption takes place solely because of poverty of the birth parents of the child, such adoptions contravene the international legal principles.³¹⁹ Smolin opines that reasonable efforts should be made to keep the family intact before inter-country adoption is considered especially because most abandonments or relinquishments of children stem from lack of financial means to sustain the children.³²⁰ Smolin considers inter-country adoption based on poverty as an exploitation of the less privileged who are already deprived of human rights,

³¹² Van der Walt *Inter-country adoption and alternative care in South Africa: A model for determining placement in the Best Interest of the Child* 97-98.

³¹³ Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* 11.

³¹⁴ Smolin 2007 *Capital University Law Review* 424.

³¹⁵ Isanga 2012 *BYU Journal of Public Law* 294.

³¹⁶ Isanga *BYU Journal of Public Law* 23.

³¹⁷ Pretorius *Inter-country adoptions and the best interest of the Child* 19.

³¹⁸ Isanga 2012 *BYU Journal of Public Law* 265.

³¹⁹ Van Bueren *The International Law on the Rights of the Child* 100.

³²⁰ Smolin 2007 *Capital University Law Review* 429.

which is contrary to international law in that it prioritises or creates an invalid prioritisation of interventions contrary to international law.³²¹ Bartholet opines that how each nation structures its rules governing adoption will to a large extent define the adoptions future as a parenting alternative.³²²

5.3 Arguments in favour of inter-country adoption and authors' views on culture

Bennett opines that a child's cultural right remains subsidiary to the other fundamental human rights of the child.³²³ Marx holds the view that all adopted children who have cultural identities and who were adopted when they were younger, find less significance in culture.³²⁴ Bartholet, in favour of inter-country adoption argues that family bonds established through cultural and racial differences are something to celebrate and appreciate as members get to appreciate each other's differences and cultural heritage whilst simultaneously experiencing a common humanity.³²⁵ According to Waddington, arguments made by proponents of inter-country adoption are that one's culture is a multifaceted relationship, therefore, it is not location specific and one's cultural identity can neither be lost or found and in fact develops through cultural interactions.³²⁶ Another post-colonial paradigm on inter-country adoption is to the effect that cultural presence should be found in the receiving state, which expands the sending state's cultural heritage beyond its own national state borders.³²⁷ Marx submits that those experiencing some culture shock have minimal suffering as compared to the improved lifestyle and quality of life.³²⁸

Bartholet, emphasises that children should not be seen as resources of "national communities of origin."³²⁹ There is also a notion that, in protecting culture by developing nations from the western culture, is paternalistic in nature and undermines

³²¹ Smolin 2007 *Capital University Law Review* 437.

³²² Bartholet 1993 *The Future of Children* 83.

³²³ Bennett 1999 *Obiter* 155.

³²⁴ Marx 2008 *Emory International Law Review* 379.

³²⁵ Bartholet 1993 *The Future of Children* 90.

³²⁶ Waddington 2011 *Creighton International and Comparative Law Journal* 81.

³²⁷ Waddington 2011 *Creighton International and Comparative Law Journal* 96.

³²⁸ Marx 2008 *Emory International Law Review* 379.

³²⁹ Bartholet 1993 *The Future of Children* 99.

the non-western cultures and these cultures' abilities to flourish and survive in the face of western cultural hegemony.³³⁰ Bartholet in support of inter-country adoption states that, halting inter-country adoption does not in any way improve the sending states economic position.³³¹ Furthermore, the orphaned children get to benefit in that they have an opportunity to have suitable families that they could not find within their states of origin.³³² There is also an argument that a total ban on inter-country adoption would negatively affect the child's best interest, which is not acceptable.³³³.

Isanga argues that, focusing more on the abuses versus the benefits of inter-country adoption will simply amount to scapegoating instead of states putting in an effort on the regulatory plane.³³⁴ This is why he argues it should be each state's prerogative to ensure integrity of inter-country adoption on a legislative basis.³³⁵ It is his submission that regardless of the merits and demerits of inter-country adoption, he maintains that inter-country adoption is beneficial to African State's in that it assists those who cannot look after their children at the vulnerable and critical stage of their lives.³³⁶

5.4 Anti-inter-country adoption advocates and the protection of cultural rights

Martin opposes inter-country adoption and argues that it is a cultural imperialism wherein the child is expected to immerse in a culture and cultural values from an outside community that the child is expected to embrace.³³⁷ Some scepticism on the practice is that some still view inter-country adoption as a new form of imperialism that is reminiscent of colonial attempts wherein the indigenous people are indoctrinated with European values, and where citizens in developed countries remove the children in developing countries.³³⁸ The opponents of inter-country

³³⁰ Waddington 2011 *Creighton International and Comparative Law Journal* 82.

³³¹ Bartholet 1993 *The Future of Children* 100.

³³² Waddington 2011 *Creighton International and Comparative Law Journal* 86.

³³³ Isanga 2012 *BYU Journal of Public Law* 240.

³³⁴ Isanga 2012 *BYU Journal of Public Law* 239.

³³⁵ Isanga 2012 *BYU Journal of Public Law* 239.

³³⁶ Isanga 2012 *BYU Journal of Public Law* 249.

³³⁷ Martin 2007 *UC Davis Journal of International Law & Policy* 185.

³³⁸ Isanga 2012 *BYU Journal of Public Law* 244-245.

adoption from the cultural perspective argue that an adopted child's authentic cultural identity is compromised whilst his/her heritage gets misplaced.³³⁹ From an African cultural view point, arguments against inter-country adoption is that adopted children lose their cultural identity.³⁴⁰ Furthermore, there is the notion that by virtue of the fact that children are considered communal blessings, their best interest should be determined based on the community and blood ties.³⁴¹

The scepticism expressed by some is that there is no guarantee that the adopted child will receive the appropriate care in the new family and that others argue on the unfairness of separating a child from his/her group heritage, cultural and ethnic origin where in the foreign land the child may experience some form of discrimination.³⁴² According to Waddington, scepticism on the benefits of inter-country adoption are centred around cultural isolationism due to previous colonies.³⁴³ Article 21 of the *ACRWC* places an obligation on children to sustain the cultural values in their communities with other members of society.³⁴⁴

5.5 Summary

In South Africa, there are vulnerable and orphaned children that ought to be taken care of. Section 181(a) and (b) of the *Children's Act* states that foster care is the primary source of alternative care in South Africa.³⁴⁵ On this premise, the writer opines that the *ACRWC* is correct to state that solutions need to be canvassed within Africa for problems specifically unique to Africa, especially because children in the African communitarian context, are raised by the whole community. It is Africa's time to tell its own narrative because solutions for problems in Africa must come from Africa. The case of abject poverty means that not every child gets to be a beneficiary of inter-country adoption in South Africa and hence the need for more in-country solutions to be developed. Secondly, what is also highlighted and observed throughout this

³³⁹ Waddington 2011 *Creighton International and Comparative Law Journal* 86.

³⁴⁰ Isanga 2012 *BYU Journal of Public Law* 240.

³⁴¹ Snow and Covell 2006 *The International Journal of Children's Rights* 110.

³⁴² Bartholet 1993 *The Future of Children* 97.

³⁴³ Waddington 2011 *Creighton International and Comparative Law Journal* 86

³⁴⁴ A 21 of the *African Charter on the Rights and Welfare of the Child* (1990).

³⁴⁵ Section 181(a) and (b) of the *Children's Act* 38 of 2005.

dissertation is that not much emphasis is placed on a child's cultural right, which has a tendency to allude to the western individualistic nature of best interest of the child as opposed to the best interest of the child in the African concept of human rights.

The writer is of the opinion that, by virtue of the international treaties, namely, the *CRC* and *The Hague Convention* being mainly dominated by western countries in its drafting stages, it played a role or structured the 'weight' or value given to the right to culture as opposed to the value given to culture in the *ACRWC*, which is Africa's customised treaty that is relevant to Africa's unique problems. On this premise the writer opines that the *ACRWC* should be the main guiding treaty and should be the main source of guidance when interpreting the best interest of the child in an African context and that will possibly encourage more innovation in country solutions and promote the welfare of children whilst protecting their cultural rights.

In principle, even the best interest of the child differs in meaning to different people.³⁴⁶ Whilst the *CRC* recognises the child's best interest as a fundamental principle for a child's holistic development, Van der Walt argues that the drafters were unanimous that the best-interest principle should not be defined in order to allow flexibility in determining what would be the best interest of the child in a given instance.³⁴⁷ In this new dispensation, there is a need to have the African concept of human rights together with Africa's philosophy of law and cultural values and standards to be recognised as being universally valid.³⁴⁸ This can be achieved by establishing and developing "an African jurisprudence in child law."³⁴⁹ And to reiterate the words stated by Mezmur that:³⁵⁰

It is concluded that, as a predominantly sending continent, Africa's views on intercountry adoption issues should be seriously considered and taken into account, if a socially and legally sound, and child-centred, intercountry adoption regime is to be formed on the continent

³⁴⁶ Van der Walt *Intercountry adoption and alternative care in South Africa: A model for determining placement in the Best Interest of the Child* 56.

³⁴⁷ Van der Walt *Intercountry adoption and alternative care in South Africa: A model for determining placement in the Best Interest of the Child* 71.

³⁴⁸ Ntlame-Makhanya and Lubisi-Bizani 2021 *AHRLJ* 294.

³⁴⁹ Skelton 2009 *AHRLJ* 483.

³⁵⁰ Abstract Mezmur *Intercountry Adoption in an African Context: A legal Perspective*.

6. Recommendations

Throughout this dissertation, the writer highlighted and discussed how the cultural rights of the child are viewed to be subsidiary when ranked with the child's other rights in international treaties. In this final chapter the writer discusses some recommendations to enhance, protect and promote the child's cultural rights, since South Africa is signatory to all of the three treaties that are relevant to children when it comes to inter-country adoption. The writer notes that some of the recommendations made are not immediately realisable, but can be progressively realisable overtime.

The author, Smolin, suggests that inter-country adoption agencies should establish working relationships with the international development organisations, to provide local solutions that assist the entire community rather than moving children across international boundaries.³⁵¹ There should be an establishment of reporting procedures of the child's progress in the foreign country.³⁵² Bartholet also suggests that funds should be developed to benefit children within the sending country and that mechanisms should be put in place and post-adoption regulatory reports should be sent to the states of origin.³⁵³ This, the writer believes can be arranged by the central authorities of each country.

South African courts should prioritise domestic adoptions.³⁵⁴ In South Africa, the writer suggests that the 60 days' placement of the child in RACAP should be extended to more days, which will mean more adequate time to try locate the family of an abandoned child, if any.³⁵⁵ There should be structured development that will be able to handle inter-country adoptions to ascertain whether or not consent was made voluntarily by the child's parent.³⁵⁶

³⁵¹ Smolin 2007 *Capital University Law Review* 450.

³⁵² Isanga 2012 *BYU Journal of Public Law* 270.

³⁵³ Bartholet 1993 *The Future of Children* 99.

³⁵⁴ Isanga 2012 *BYU Journal of Public Law* 291.

³⁵⁵ The Fifth International Policy Conference on the African Child "Guidelines for Action on Intercountry Adoption of children in Africa 8 para 35.

³⁵⁶ Isanga 2012 *BYU Journal of Public Law* 292.

The child's participation should be encouraged and his/her views should be heard on the exact role that culture should play in the adoption process.³⁵⁷ The adoption agencies should arrange for 'root trips' to the adopted children's countries of origin, and where possible conduct cultural educational camps.³⁵⁸ The writer would suggest that as a future endeavour, African indigenous knowledge institutions should be established in the countries to which the children have been adopted. Adoptive parents should learn their adopted children's language and heritage.³⁵⁹

*The Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) suggests that there should be.*³⁶⁰

Participation at all levels in determining cultural policies and artistic activities. [There should be] measures for safeguarding, protecting and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems... [there should be] a review of all national policies that undermine the realisation of specific economic, social and cultural rights;

Open adoptions should be vouched for, especially when a child's background is known so they can maintain contact with their biological family as secrecy can negatively affect the adopted child's psychology.³⁶¹ Waddington argues that if anything the post-colonial paradigm of inter-country adoption should establish policies and practices that encourage adopted children to have hybrid identities.³⁶² Waddington, recommends that adoptive parents and adoption agencies should establish alliances with cultural groups and social groups to form cultural locations for the adopted children.³⁶³ States should cooperate with communities and collect data and assess family situations with the aim of developing strategies for family preservation and alternative care for children in a way that is culturally sensitive.³⁶⁴

³⁵⁷ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 217.

³⁵⁸ Lind and Johansson 2009 *International Journal of Children's Rights* 236.

³⁵⁹ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 448.

³⁶⁰ *The Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004)* paras 9 -11.

³⁶¹ Ferreira *Interracial and Intercultural adoption: A South African Legal Perspective* 131-132.

³⁶² Waddington 2011 *Creighton International and Comparative Law Journal* 84.

³⁶³ Waddington 2011 *Creighton International and Comparative Law Journal* 84

³⁶⁴ The Fifth International Policy Conference on the African Child "Guidelines for Action on Intercountry Adoption of children in Africa" 16.

Cultural groups should establish programmes regarding cultural awareness and stipulate mandatory cultural visits, as well as an increase in residential requirements should be established for state-based linguistic links.³⁶⁵ States should introduce the residency requirement to be completed for prospective adoptive parents³⁶⁶ Smolin suggests that there should be an inclusivism form of adoption wherein the birth parent is regarded as having a permanent place in the child's life so the child is considered to be having multiple parents all performing different roles in the child's life.³⁶⁷

Foster homes should be developed to a higher standard and efforts should be made to find both the extended and immediate family of the child.³⁶⁸ The writer would suggest that The South African Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,³⁶⁹ develop regulatory and supervisory bodies for an individual complaints mechanism when cultural rights have been violated or infringed. The writer would suggest that courts should engage cultural experts in inter-country adoption decisions to ascertain any cultural implications the adoption might have on the child. Importantly, cultural rights should no longer be marginalised within the South African jurisprudence of the law. In the words of Kofi Annan:³⁷⁰

We may have different religions, different languages, different coloured skin, but we all belong to one human race

³⁶⁵ Waddington 2011 *Creighton International and Comparative Law Journal* 98.

³⁶⁶ The Fifth International Policy Conference on the African Child "Guidelines for Action on Intercountry Adoption of children in Africa" 10.

³⁶⁷ Smolin 2007 *Capital University Law Review* 442.

³⁶⁸ Smolin 2007 *Capital University Law Review* 444.

³⁶⁹ Section 185 of the *Constitution of the Republic of South Africa*.

³⁷⁰ Annan 2018 <http://www.facebook.com/kofiannanofficial/photos/a.10151271522796043/10156171315386043/?type=3>.

Bibliography

Literature

Adelakun 2018 *Journal of Comparative Law in Africa*

Adelakun O S "Application of the subsidiarity principle in intercountry adoption in Nigeria: lessons from South Africa" 2018 *Journal of Comparative Law in Africa* 22-44

Alston 1994 *International Journal of Law and the Family*

Alston P "The best interest's principle: towards a reconciliation of culture and human rights" 1994 *International Journal of Law and the Family* 1-25

Asamoah 2015 *AHRLJ*

Asamoah J Y "Cultural rights versus human rights: A critical analysis of the Troski practice in Ghana and the role of civil society" 2015 (15) *AHRLJ* 129-149

Barratt 2011 *African Journal of Legal Studies*

Barratt A "Indigenous Peoples and the right to culture: The potential significance for the African Indigenous communities of the Committee on Economic, Social and Cultural Rights General Comment 21" 2011 *African Journal of Legal Studies* 560-587

Bartholet 2007 *Buffalo Human Rights Law Review*

Bartholet E "International Adoption: The Child's Story" 2007 *Buffalo Human Rights Law Review* 151-203

Bartholet 1993 *The Future of Children*

Bartholet E "International Adoption: Current Status and Future Prospects" 1993 *The Future of Children* 89-103

Bartholet E and Smolin DM "The debate" in Gibbons and Rotabi (eds) *Intercountry adoption: policies, practices and outcomes* (UK Ashgate,2012) 370-396

Bennett 2011 *PELJ*

Bennett TW "Ubuntu: An African Equity" 2011 *PELJ* 30-61

Bennett 1999 *Obiter*

Bennett TW "The best interests of the child in an African context" 1999 *Obiter* 145-15

Boakye-Boaten 2010 *Journal of International Social Research*

Boakye-Boaten A " Changes in the concept of Childhood: Implications on Children in Ghana"2010 *Journal of International Social Research* 104-115

Buckenberger G N *Cultural Factors that Influence Domestic Adoption in South Africa* at Care Conference: Vulnerable Children and Viable Communities, Taylor University (5 December 2020, Indiana)

Cantwell *The Principle of best interest of the Child in Intercountry Adoption*

Cantwell N *The Principle of Best Interests of the Child in Intercountry Adoption* (*Innocenti Insight* Florence: UNICEF Office of Research 2014)

Couzens and Zaal 2009 *Obiter*

Couzens E and Zaal M "Intercountry Adoption and the Subsidiarity Principle: A Proposal for a via media" 2009 *Obiter* 286-306.

Currie I and De Waal J *the Bill of Rights Handbook* 6th ed (Juta Cape Town 2013)

Davies 2011 *Adoption and Fostering*

Davies M "Intercountry Adoption, Children's Rights and the Politics of Rescue" 2011 *Adoption and Fostering* 50-62

Devenish 1999 *THRHR*

Devenish G E "Minority rights and cultural pluralism – the protection of language and cultural identity in the 1996 Constitution" 1999 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 201-225

Dimkpa *The Dynamics of African Societies Portfolio Colonialism, Independence and Underdevelopment in Africa the Pre-eminence and Blame Game* (Master programme in African Studies University of Dalarna 2015)

Dodds 2015 *Sociology Between the gaps: Forgotten and Neglected Topics*

Dodds P F "The parallels between International Adoption and Slavery" 2015 *Sociology Between the gaps: Forgotten and Neglected Topics* 77-81

Eekelaar 2004 *International Journal of Law, Policy and the Family*

Eekelaar J "Children between cultures" 2004 *International Journal of Law, Policy and the Family* 178-194

Ekundayo 2015 *International Journal of Humanities and Social Science*

Ekundayo O "Does the African Charter on the Rights and Welfare of the Child(ACRWC) only underlines and Repeats the Convention on the Rights of the child (CRC)'s Provisions? Examining the Similarities and the Differences between the ACRWC and the CRC" 2015 *International Journal of Humanities and Social Science* 143-158

Falaiye 1997 *The Advancement of Africans and Blacks in the Diaspora*

Falaiye O A "Democracy in Africa: Problems and prospects" 1997 *The Advancement of Africans and Blacks in the Diaspora* 28-47

Ferreira 2007 *THRHR*

Ferreira S "Intercountry adoptions De Gree v Webb unrep case no 05/25316 (W)"
2007 *THRHR* 146-153

Grant 2006 *Journal of African Law*

Grant E "Human Rights, Cultural Diversity and Customary Law in South Africa"
2006 *Journal of African Law* 2-23

Heleta 2018 *Ufhamu: A Journal of African Studies*

Heleta S "Decolonizing knowledge in South Africa: Dismantling the 'pedagogy of
big lies' 2018 *Ufhamu: A Journal of African Studies* 47-65

Hollingsworth 2008 *Social Work*

Hollingsworth L D "Does The Hague Convention on Intercountry Adoption address
the protection of adoptees' cultural identity? and it?" 2008 *Social Work* 377-379

International Policy Conference "Guidelines for Action on Intercountry Adoption of
Children in Africa" in United Nations Centre Addis Ababa (29-30 May 2012 Addis Ababa)
1-18 Isanga 2012 *BYU Journal of Public Law*

Isanga J M "Surging Intercountry Adoptions in Africa: Paltry Domestication of
International Standards" 2012 *BYU Journal of Public Law* 229-298
John 2014
Humanities and Social Science

John E O "Colonialism in Africa and Matters Arising -Modern Interpretation,
Implications and the Challenge for Socio-Political and Development in Africa"2014
Humanities and Social Science 19-31

Kaime 2005 *AHRLJ*

Kaime T "The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections" 2005 *AHRLJ* 221-238

Kimball 2005 *Denver Journal of International Law and Policy*

Kimball C E "Barriers to the successful implementation of The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption" 2005 *Denver Journal of International Law and Policy* 561-584

Lind and Johansson 2009 *International Journal of Children's Rights*

Lind J and Johansson S " Preservation of the Child's Background in In- and Inter-country Adoption" 2009 *International Journal of Children's Rights* 235-260

Lloyd 2002 *AHRLJ*

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

Martin 2007 *Davis Journal of International Law and Policy*

Martin J "The Good, the Bad & the Ugly- A New way of Looking at the Intercountry Adoption debate" 2007 *Davis Journal of International Law and Policy* 174-216

Marx 2008 *Emory International Law Review*

Marx M S "Whose best interests does it really serve? A critical examination of Romania's recent self-serving international adoption 490 policies" 2008 *Emory International Law Review* 373-412

Mezmur *Intercountry Adoption in an African Context: A legal perspective* (LLD Theses University of the Western Cape 2009)

Mezmur 2009 *Sur – International Journal on Human Rights*

Mezmur B D "Intercountry adoption as a measure of last resort in Africa: advancing the rights of a child rather than a right to a child" 2009 *Sur – International Journal on Human Rights* 83-104

Mezmur B D "*The sins of the saviour*": *Child Trafficking in the context of intercountry adoption in Africa* at The Hague Conference on private International Law (June 2010 Netherlands) 3-32

Mc Quillin *Children's Rights and Inter-country Adoption Reconstructing the African Union's Role* (Senior Honors Thesis 2018 University of North Carolina)

Mezmur 2008 *The Comparative and International Journal of Southern Africa*

Mezmur B D "'As painful as giving birth': a reflection on the Madonna adoption saga" 2008 *The Comparative and International Journal of Southern Africa* 383-403

Mosikatsana 2005 *SALJ*

Mosikatsana T "[www.buybaby.com:intercountry adoption](http://www.buybaby.com:intercountry_adoption)" 2005 *SALJ* 103-136

Mosikatsana 2000 *SAJHR*

Mosikatsana T "Intercountry adoptions: is there a need for new provisions in the Child Care Act" 2000 *SAJHR* 46-70

Moyo *The relevance of culture and religion to the understanding of children's rights in South Africa* (LLM dissertation University of Cape Town 2014)

Mubangizi 2012 *African Journal of Legal Studies*

Mubangizi J C "Building a South African human rights culture in the face of cultural diversity: Context and Conflict " 2012 *African Journal of Legal Studies* 1-20

Mubangizi 2006 *African Journal of Legal Studies*

Mubangizi J C " The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A comparative Evaluation"2006 *African Journal of Legal Studies* 1-19

Muluneh 2015 *Jimma University Journal of Law*

Muluneh Y A " Intercountry Adoption: Loss of Identity of a Child" 2015 *Jimma University Journal of Law* 49-77

Ntlame-Makhanya and Lubisi-Bizani 2021 *AHRLJ*

Ntlame-Makhanya and N Lubisi-Bizani N "The 'Africa we want ' in the African Union's Agenda 2063 on the realisation of women's human rights to access justice' 2021 *AHRLJ* 290-310.

Ocheni and Nwankwo 2012 *Cross-cultural Communication*

Ocheni S and Nwankwo B C "Analysis of colonialism and Its impact in Africa" 2012 *Cross-cultural Communication* 46-54

Oelofsen 2015 *Phronimon*

Oelofsen R "Decolonisation of the African mind and intellectual Landscape" 2015 *Phronimon* 130-146

Okere 1984 *Human Rights Quarterly*

Okere B O "The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American system" 1984 *Human Rights Quarterly* 141-159

Okon 2012 *AHRLJ*

Okon E "Towards defining the 'right to family ' for the African child" *AHRLJ* 373-393

Oyowe 2014 *Human Rights Review*

Oyowe O A "An African conception of human rights? Comments on the challenges of relativism" 2014 *Human Rights Review* 329-347

Pieterse-Spies 2008 *THRHR (Journal for Contemporary Roman-Dutch Law)*

Pieterse-Spies A "Inter-country adoption: A South African Perspective" 2008 *THRHR (Journal for Contemporary Roman-Dutch Law)* 556-567

Pretorius *Inter-country adoptions and the best interests of the child* (LLB in Comparative Child Law North West University 2012)

Roby and Shaw 2006 *Social Work*

Roby J L and Shaw S A " The African Orphan Crisis and International Adoption" 2006 *Social Work* 199-210

Selman P "Global Trends in intercountry adoption :2003-2013" in Ballard R.L *et al* (eds) *The intercountry adoption debate: Dialogues across Disciplines* (Cambridge Scholars Publishers 2015) 9-48

Skelton 2009 *AHRLJ*

Skelton A "The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments" 2009 *AHRLJ* 482-500

Skelton 2019 *De Jure Law Journal*

Skelton A "Too much of a good thing? Best interests of the child in South African Jurisprudence" 2019 *De Jure Law Journal* 557-579

Sloth-Nielsen and Mezmur 2008 *International Journal of children's Rights*

Sloth-Nielsen J and Mezmur B "2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)" 2008 *International Journal of children's Rights*

Sloth-Nielsen and Mezmur 2007 *Law, Democracy & Development*

Sloth-Nielsen J and Mezmur B D "(Illicit) transfer by De Gree" 2007 *Law, Democracy & Development* 81-100

Sklebana *The Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption: Seeking the Cultural Relativism in Inter-country Adoption* (LLM dissertation University of Prague 2013)

Smolin 2007 *Capital University Law Review*

Smolin D "Inter-country Adoption and Poverty: A human rights analysis" 2007 *Capital University Law Review* 413-435

Smolin 2013 *Law and Family Studies*

Smolin D "The Future of Adoption in America" 2013 *Law and Family Studies* 81-152

Snow & Covell 2006 *The International Journal of Children's Rights*

Snow R and Covell K "Adoption and the best interests of the child: the dilemma of cultural interpretations" 2006 *The International Journal of Children's Rights* 109-117

Van As, Excell, Magadala and Ggoli 2020 *The Journal of Transdisciplinary Research in Southern Africa*

Van As A J, Excell L A, Magadala N and Gqoli N "Through the eyes of parents: culture of young children in diverse early learning spaces" 2020 *The Journal of Transdisciplinary Research in Southern Africa* 1-10

Van Bueren *The International Law on the Rights of the Child*

Van Bueren G *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1995)

Van der Walt 2020 *Obiter*

Van der Walt J A "A consideration of Sections 249,250 and 259 of the proposed amendment bill of the Children's Act in light of the best interests' principle" 2020 *Obiter* 934-947

Van der Walt 2018 *Obiter*

Van der Walt G "Alternative Care in South Africa" *Obiter* 615-651

Van Loon 1995 *The International Journal of Children's Rights*

Van Loon, H "Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption" 1995 *The International Journal of Children's Rights* 431-464.

Varnis 2001 *Social Science and Public Policy*

Varnis S L "Regulating the Global Adoption of Children" 1994 *Social Science and Public Policy* 39-46

Venter 1998 *SAPL*

Venter F "The protection of cultural, linguistic and religious rights: the framework provided by the Constitution of the Republic of South Africa, 1996" 1998 *SA Public Law* 438-459

Waddington 2011 *Creighton International and Comparative Law Journal*

Waddington G "A New Class of Persons: Intercountry Adoptees and Postcolonial Theories of Cultural Hybridity" 2011 *Creighton International and Comparative Law Journal* 81-99

Walker 2015 *Child and Family Law Quarterly*

Walker L "Intercountry Adoption and the Best Interests of the Child: The Hague Convention of 1993 and the importance of bonding" 2015 *Child and Family Law Quarterly* 355-376

Wallace 2003 *Arizona Journal of International and Comparative Law*

Wallace S R "International Adoption: The most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others?" 2003 *Arizona Journal of International and Comparative Law* 689-724

Woodhouse 1995 *Duke Journal of Gender, Law and Policy*

Woodhouse B "Are you My Mother? Conceptualising Children's Identity Rights in Transracial Adoptions" 1995 *Duke Journal of Gender, Law and Policy* 107-129

Case law

AD v DW 2008 (3) SA 183 (CC)

In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 1 BCLR 1253 (CC)

MEC for Education v Pillay 2008 BCLR 99 (CC); 2008 (1) SA 474 (CC).

Legislation

Constitution of the Republic of South Africa, 1996.

Child Care Act 74 of 1983

Children's Act 38 of 2005

International Instruments

African Charter on the Rights and Welfare of the Child (1990)

International Covenant on Economic, Social and Cultural Rights (1966)

African Charter on Human and People's Rights (1981)

Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004)

The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (1993)

United Nations Convention on the Rights of the Child (1989)

UN Committee on Economic, Social and Cultural Rights (CESCR) *General comment no.21 Right of everyone to take part in cultural life (art.15 para 1a of the Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/21 2009

South African Government Publications

B 18-2020 in GG43656 of 26 August 2020

Internet sources

Annan 2018 <http://www.facebook.com/kofiannanofficial/photos/a.10151271522793/10156171315386043/?type=3> accessed 30 October 2022

South African government <http://www.gov.za/speeches/adoption-fees-10-Jan-2019-0000> accessed 26 November 2021