

# The legal implications of customary law adoptions in South Africa

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For Mia and Kayla.  
*Dankie Jesus*

Amazing Grace; How Sweet the Sound.

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## SUMMARY

Customary law is an integral part of South African law. Various pieces of legislation were enacted under the *Constitution*, resulting in the statutory regulation of certain aspects of customary law. The primary rationale for doing so is improving women's and children's lives. However, the *Children's Act* indirectly caters for common law adoption only, and customary law child adoption is excluded. Customary law adoptions are, therefore, dealt with on a case-by-case basis. Customary law adoption is also an area where differentiation between the common and customary law systems creates inequality before the law.

The legal implications of customary law adoptions are uncertain, undermining their status. Factors contributing to the uncertainties include the pre-constitutional non-recognition of customary law, cultural considerations, and a lack of uniform judicial interpretations and other views, including interpreting customary law adoptions as informal or *de facto*, even under the *Constitution*. Determining the legal implications of customary law adoptions would require conceptualisation through analysing judicial interpretation and the *Children's Act* as an option for providing for customary law adoptions. However, determining the legal implications of customary law adoptions first requires understanding the context in which common and customary law adoptions operate; otherwise, legal reform results in paper law.

Roman-Dutch law did not recognise adoption, but the need for regulation in South Africa was apparent. Consequently, the first South African common law adoption legislation took effect in 1924. Similarities and differences exist between adoption under Roman law and adoption under customary law. However, it is important to note that the similarities do not mean that customary law adoptions must be assumed to be purely family-centred instead of child-centred. Customary law adoptions have developed, and adoption under customary law is an established practice.

On the other hand, Roman law did not affect adoption in Holland; as mentioned, adoption in Roman-Dutch law was not recognised. Therefore, no legal consequences were attached to adoption agreements in the Cape. Yet, a need for regulation arose. The 1923 adoption legislation that took effect in 1924 and the three acts that preceded

the *Children's Act* clarified the legal consequences of adoptions. Informal, unofficial or *de facto* adoptions did and still do not attract legal consequences under common law.

Meanwhile, customary law showed resilience and communities continued to practice their adoption laws in accordance with African values and the workings of the African family. In the African family, a child "belongs". Depending on the parents' marital status, a child may refer to more than one person as "father" and belong to either the father's or the mother's family. Consequently, consent from a to-be-adopted child's biological father or mother is not necessarily needed for a customary law adoption. Members of an African family know that one lives "through" other people.

Though African values aim to ensure that every child has a home, the reality is that many African children need a family. Customary law adoptions also occur outside the family set-up, and different "forms" of customary law adoptions have developed; several types of customary law adoptions exist within and outside the family. The motive(s) behind customary law adoption is multi-faceted. The adoptions may not be dismissed for being conducted to save a family from extinction and not having regard for a child's best interests, though the matter of a child's best interests is a study on its own. The generic requirements of a valid customary law adoption are an adoption agreement between the families and the publication of the adoption. Reporting the adoption to a traditional leader was established as a relative requirement as opposed to being obligatory. However, the reality is that there are many practical reasons (such as keeping children safe) why reporting and keeping a record of customary law adoptions should be a validity requirement. Specifics pertaining to customary law adoption agreements and publication must not be unclear. The continued existence of uncertainties in this respect would lead to the piece-meal recognition of customary law adoptions and interpreting, viewing and branding them as *de facto*, leading to the overall devaluing of the status of customary law.

This thesis enquired into the legal implications of customary law adoptions. Determined legal implications of customary law adoptions include conferring *ilobolo* rights in an adopted daughter on the adoptive parent(s) and conferring an obligation on the adopted parent(s) or their family to deliver *ilobolo* for their adopted son's first

marriage. In the context of customary law adoptions, *ilobolo* does not amount to the buying and selling of a child. The adopted child is provided with their adopted parent(s)' surname and is recognised as their intestate heir with a right to succession. The child has a right to maintenance, too. With customary law adoption, the status of several role-players changes. However, the status of the child and other relevant people may change without the biological parent(s) or the child consenting to the adoption. In some instances, valid adoption also takes place by being inferred.

While showing regard for the context in which customary law adoptions operate, legislation must clarify the legal implications of customary law adoptions. The *Children's Act* must recognise customary law adoptions, particularly removing the risk of abolishing otherwise valid customary law adoptions through the 2020 *Children's Amendment Bill*.

## OPSOMMING

Die gewoontereg is 'n integrale deel van die Suid-Afrikaanse reg. Verskeie wetgewing is onder die *Grondwet* gepromulgeer wat gelei het tot die statutêre regulering van sekere gewoonteregtelike aspekte; die primêre rasionaal is om vroue en kinders se lewens te verbeter. Die *Kinderwet* maak egter indirek slegs voorsiening vir gemeenregtelike aanneming, en kinder-aanneming onder die gewoontereg is uitgesluit. Gewoonteregtelike aannemings word op 'n saak-tot-saak basis hanteer. Gewoonteregtelike aanneming is ook 'n area waar onderskeid tussen die gemenereg en gewoontereg lei tot ongelykheid voor die reg.

Die regsimplikasies van gewoonteregtelike aannemings is onseker, en só word hul status ondermyn. Faktore wat bydra tot die onsekerhede sluit voormalige nie-erkenning van die gewoontereg, kulturele oorwegings, en 'n gebrek aan eenvormige geregte interpretasies en ander beskouings, in; insluitende om gewoonteregtelike aannemings as informeel of *de facto* te interpreteer, selfs onder die *Grondwet*. Konseptualisering deur middel van die analisering van geregte interpretasie en die *Kinderwet* as 'n opsie om vir gewoonteregtelike aannemings te voorsien, was nodig om die regsimplikasies van gewoonteregtelike aannemings vas te stel. Die vaststelling van die regsimplikasies van gewoonteregtelike aannemings verg egter eerstens 'n begrip van die konteks waarin gemeen- en gewoonteregtelike aannemings funksioneer; andersins sal regshervorming oneffektief wees.

Die Romeins-Hollandse reg het nie aanneming erken nie, maar die behoefte aan regulering daarvan in Suid-Afrika was voordiehandliggend. Gevolglik het die eerste Suid-Afrikaanse gemeenregtelike aannemingswetgewing in 1924 in werking getree. Ooreenkomste en verskille bestaan tussen aanneming onder die Romeinse reg en aanneming onder die gewoontereg. Dit is egter belangrik om kennis te neem dat die ooreenkomste nie beteken dat daar aanvaar moet word dat gewoonteregtelike aannemings suiwer familie- en dus nie kinder-georiënteerd, is nie. Gewoonteregtelike

aannemings het ontwikkel, en aanneming onder die gewoontereg is 'n gevestigde praktyk.

Aan die ander kant, het die Romeinse reg nie aanneming in Holland beïnvloed nie; soos genoem, is aanneming nie in die Romeins-Hollandse reg erken nie. Dus is geen regsgevolge aan aannemingsooreenkomste in die Kaap gekoppel nie. Tog het 'n behoefte aan regulering ontstaan. Die 1923 aannemingswetgewing wat in 1924 in werking getree het en die drie wette daarna, wat die *Kinderwet* voorafgegaan het, het die regsgevolge van aannemings duidelik gemaak. Daar is steeds geen (en daar word ook steeds geen) regsgevolge aan informele, nie-amptelike of *de facto* aannemings gekoppel onder die gemenereg nie.

Intussen het die gewoontereg veerkragtigheid getoon en gemeenskappe het aangehou om hul aannemingsreg toe te pas in die konteks van Afrika-waardes en die Afrika-familie. 'n Kind "behoort" in die Afrika-familie. 'n Kind kan ook na meer as een persoon verwys as "vader" en behoort aan óf die pa óf die ma se familie, afhangende van hul huwelikstatus. Die gevolg is dat die toestemming van 'n kind wat in aanmerking kom vir aanneming se biologiese vader of moeder nie noodwendig vereis word om toestemming te gee tot 'n gewoonteregtelike aanneming nie. Lede in die Afrika-familie weet dat 'n mens "deur" ander mense leef.

Alhoewel Afrika-waardes ten doel het om elke kind 'n huis te gee, is die realiteit dat baie kinders 'n behoefte aan 'n familie het. Gewoonteregtelike aanneming vind ook buite die familie plaas en verskeie "vorme" van gewoonteregtelike aannemings het ontwikkel; 'n aantal voorbeelde van gewoonteregtelike aannemings bestaan binne en buite die familie opset. Die motief/motiewe vir gewoonteregtelike aannemings is veelsydig. Hierdie aannemings kan nie afgemaak word omdat dit blykbaar slegs bestaan om 'n familie van uitwissing te red en dus nie ag slaan op 'n kind se beste belange nie. Toegegee, die beste belange van die kind is 'n studie op sy eie. Die generiese vereistes vir 'n geldige gewoonteregtelike aanneming is 'n aannemings-ooreenkoms tussen die families en publisiteit van die aanneming. Die aanmelding van die aanneming by 'n tradisionele leier is as 'n relatiewe vereiste bepaal. Die realiteit is egter dat daar menigte praktiese redes is, soos om kinders veilig te hou, waarom

aanmelding en rekordhouding 'n vereiste vir 'n geldige gewoonteregtelike aanneming moet wees. Besonderhede rakende die gewoonteregtelike aannemingsooreenkomste en die publisiteit daarvan moet nie onduidelik wees nie. Onsekerhede lei tot stuksgewyse erkenning van gewoonteregtelike aannemings en om na gewoonteregtelike aannemings as "*de facto*" te verwys, dit as "*de facto*" te interpreteer en dit as sodanig te ag, lei tot die algehele ondermyning van die ware status van die gewoontereg.

Die tesis het gevra na die regsimplikasies van gewoonteregtelike aannemings. Regsimplikasies van gewoonteregtelike aannemings wat vasgestel is sluit die aannemende ouer(s) se *ilobolo* regte in hul aangenome dogter en die verpligting van die aannemende ouer(s) of hul familie om die *ilobolo* vir hul aangenome seun se eerste huwelik te lewer, in. *ilobolo*, in die konteks van gewoonteregtelike aannemings, is nie gelykstaande aan die koop en verkoop van 'n kind nie. Die aangenome kind kry hul aannemende ouer(s) se van en word erken as hul intestate erfgenaam met 'n reg op opvolging. Die kind het ook 'n reg op onderhoud. Verskeie rolspelers se status verander met gewoonteregtelike aanneming. 'n Kind en ander relevante mense se status kan egter verander sonder dat die biologiese ouer(s) of die kind tot die aanneming toegestem het. In sekere gevalle word aanneming ook afgelei.

Terwyl daar ag geslaan word op die konteks waarin gewoonteregtelike aannemings plaasvind, moet wetgewing die regsimplikasies daarvan bepaal. Die *Kinderwet* moet gewoonteregtelike aannemings uitdruklik erken en die risiko van die afskaffing daarvan deur die 2020 *Children's Amendment Bill*, vermy.

## **KEYWORDS**

customary law - customary law adoption - child adoption - African customary law - African extended family - African values - *ubuntu* - *ilobolo* - common law adoption - *Children's Act* - *de facto* adoption - inequality - status of customary law - adoption legislation - Roman law adoption

## **TREFWOORDE**

gewoontereg - gewoonteregtelike aanneming - kinderaanneming - Afrika-gewoontereg - uitgebreide Afrika-familie - Afrika waardes - *ubuntu* - *ilobolo* - gemeenregtelike aanneming - *Kinderwet* - *de facto* aanneming - ongelykheid - status van die gewoontereg - aannemingswetgewing - Romeinsregtelike aanneming

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|                      |  |
|----------------------|--|
| AHRLJ                | African Human Rights Law Journal   |
| AJCL                 | American Journal of Comparative Law  |
| BCLR                 | Butterworths Constitutional Law Reports  |
| CILSA                | Comparative and International Law Journal of Southern Africa                   |
| Constitution         | Constitution of the Republic of South Africa, 1996                             |
| DSD                  | National Department of Social Development                                      |
| EILR                 | Emory International Law Review   |
| GG                   | Government Gazette   |
| GN                   | Government Notice  |
| Interim Constitution | Constitution of the Republic of South Africa 200 of 1993                       |
| IUCN                 | International Union for Conservation of Nature and Natural Resources           |
| JAL                  | Journal of African Law   |
| JJS                  | Journal for Juridical Science  |
| JOL                  | Judgments Online   |
| LARC                 | Land and Accountability Research Centre  |
| LEAD                 | Legal Education and Development  |
| LSSA                 | Law Society of South Africa  |
| PELJ / PER           | Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regstydskrif |

|                    |  |
|--------------------|--|
| PMG                | Parliamentary Monitoring Group   |
| RACAP              | Register on Adoptable Children and Prospective Adoptive Parents                        |
| Reform Act         | Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 |
| Res Soc Work Pract | Research on Social Work Practice   |
| RoCMA              | Recognition of Customary Marriages Act 120 of 1998                                     |
| SAJHR              | South African Journal on Human Rights  |
| SALC               | South African Law Commission (as it was formerly known)                                |
| SALJ               | South African Law Journal  |
| SALRC              | South African Law Reform Commission  |
| STELL LR           | Stellenbosch Law Review  |
| THRHR              | Tydskrif vir Hedendaagse Romeins-Hollandse Reg   |
| TSAR               | Tydskrif vir die Suid-Afrikaanse Reg   |

## **GLOSSARY OF ROMAN LAW TERMS ASSOCIATED WITH ADOPTION**

|                           |  |
|---------------------------|--|
| <i>adoptio</i>            | adoption of a person under the legal authority of another    |
| <i>adrogatio</i>          | adoption of an independent person                            |
| <i>alieni iuris</i>       | a person under the legal authority of another                |
| <i>dos</i>                | dowry  |
| <i>familia</i>            | the smallest recognised family group under Roman law         |
| <i>in potestate</i>       | under paternal control                                       |
| <i>manus, or cum manu</i> | power of the husband or the head of the family over the wife |
| <i>paterfamilias</i>      | family head  |
| <i>patria potestas</i>    | paternal control   |
| <i>sine manu</i>          | without the family head's power over the wife                |
| <i>sui iuris</i>          | independent  |

## Chapter 1 Introduction

### 1.1 Background

Customary law<sup>1</sup> is a constitutionally recognised legal system and an integral part of South African law.<sup>2</sup> Since 1994<sup>3</sup> it has no longer been "merely tolerated and viewed through a common law lens"<sup>4</sup> but acknowledged as a separate legal system.<sup>5</sup> The *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) determines the validity of customary law.<sup>6</sup> Courts are now constitutionally obliged to apply customary law where applicable, subject to the provisions of the *Constitution* and any legislation dealing specifically with customary law.<sup>7</sup> Therefore, according to the *Constitution*, customary law must, in reality, enjoy equal status with common law.

Customary law is mainly unwritten<sup>8</sup> and is regarded as an uncodified legal system.<sup>9</sup> However, various pieces of legislation have been enacted over the years, resulting in

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- <sup>1</sup> Also referred to as "indigenous law" in court decisions, legislation and academic writings. However, since it is referred to as "customary law" in the *Constitution of the Republic of South Africa*, 1996, this will be the term used here.
- <sup>2</sup> See *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR (CC) (the *Alexkor* case) para 51; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 13, 19.
- <sup>3</sup> The year in which the *Constitution of the Republic of South Africa* 200 of 1993 (the *Interim Constitution*) commenced. See ss 33(2), 33(3), 35(3), 181(1), 181(2) and principles XIII and XI of the *Interim Constitution*.
- <sup>4</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 19.
- <sup>5</sup> See ss 39(2), 39(3), 211, 212(2) and part A of schedule 4 to the *Constitution*. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 19, 41; *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR (CC) paras 41-43; Spies 2016 AHRLJ 248; Ngidi "Upholding the Best Interests of the Child in South African Customary Law" 226-227. Rautenbach states: "It is generally accepted that the mandatory wording of the final Constitution elevated customary law to the same position as the common law." Rautenbach 2019 PELJ 5-6 and the authorities cited.
- <sup>6</sup> As it does that of all law. Also see the *Alexkor* case para 51.
- <sup>7</sup> Section 211(3) of the *Constitution*. Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 20. However, it is not clear-cut to whom customary law applies and whether its application should be determined on the basis of race and/or culture, for example. See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 19-21.
- <sup>8</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 44. Also see the *Alexkor* case para 53; *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR (CC) para 154; Rautenbach 2019 PELJ 5.
- <sup>9</sup> "African law is not a system of 'codes, courts and constables'." See Mollema and Naidoo 2011 *JJS* 52. Customary law devolves and develops to meet the changing needs of the community. See Bennett 2011 *EILR* 1036; the *Alexkor* case para 53; *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR (CC) para 153. Customary law as practised in the community is sometimes referred to as "living customary (or indigenous) law". See *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR (CC) para 154.

the statutory regulation of certain aspects of customary law. The *Recognition of Customary Marriages Act* (the *RoCMA*),<sup>10</sup> for example, recognises customary marriages concluded before and after the commencement of the Act.<sup>11</sup> The *Reform of Customary Law of Succession and Regulation of Related Matters Act* (the *Reform Act*),<sup>12</sup> in turn, was promulgated as a result of *Bhe v Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* (the *Bhe case*)<sup>13</sup> and proposals by the South African Law Reform Commission (the SALRC).<sup>14</sup> In the *Bhe case* the customary rule of primogeniture was found to be unconstitutional.<sup>15</sup> The *Reform Act* subsequently altered the customary law of succession and in essence replaced it with the *Intestate Succession Act* (the *Intestate Succession Act*).<sup>16</sup>

In addition, legislation has been passed on traditional health practitioners,<sup>17</sup> traditional initiations<sup>18</sup> and traditional leadership,<sup>19</sup> while a law on traditional courts is in the

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<sup>10</sup> 120 of 1998.

<sup>11</sup> The Act commenced on 15 November 2000. Since then certain sections that regulated the proprietary consequences of customary marriages entered into before the commencement of the Act were found to be unconstitutional. To address this (and to "provide for matters connected therewith"), the *Recognition of Customary Marriages Amendment Act 1 of 2021* was introduced. In the meantime the SALRC has also been investigating the possibility of a "single marriage statute" for South Africa. See the long title of the *Recognition of Customary Marriages Amendment Act 1 of 2021*; SALRC *Single Marriage Statute* (Project 144 2021). However, ultimately customary marriages are now officially recognised.

<sup>12</sup> 11 of 2009.

<sup>13</sup> *Bhe v Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 BCLR (CC).

<sup>14</sup> See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 208; Rautenbach and Meyer 2012 *TSAR* 150.

<sup>15</sup> The "rule of primogeniture" entailed "a rule of succession whereby the oldest male relative of the deceased inherited his intestate estate and women could not inherit from their spouses"; therefore, precluding widows, daughters, younger sons and children born out of wedlock from inheriting from their husbands or fathers' estates. See Himonga and Nhlapo (eds) *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 11. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 207.

<sup>16</sup> 81 of 1987. See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 212; Maunatlala and Maimela 2020 *De Jure* 41; Osman 2019 *PELJ* 8.

<sup>17</sup> *Traditional Health Practitioners Act* 22 of 2007; Rautenbach 2011 *THRHR* 31; Rautenbach 2008 *EILR* 111.

<sup>18</sup> *Customary Initiation Act* 2 of 2021. Also see Gerber 2017 <http://www.news24.com/SouthAfrica/new-law-to-regulate-and-police-initiation-schools-on-the-cards-van-rooyen-20170518>.

<sup>19</sup> The *Traditional and Khoi-San Leadership Act* 3 of 2019. The Act repealed the *Traditional Leadership and Governance Framework Act* 41 of 2003, the *Traditional Leadership and Governance Framework Amendment Act* 23 of 2009 and the *National House of Traditional Leaders Act* 22 of 2009. However, due to Parliament's failure to facilitate public involvement properly, the Act was found to be unconstitutional in 2023. Also see 2.4.3.1.

pipeline.<sup>20</sup> The latter has not yet been passed due to objections regarding gender equality, amongst other things.<sup>21</sup>

Earlier examples of the codification of customary law include the *Black Administration Act*,<sup>22</sup> the so-called *KwaZulu-Natal Codes*,<sup>23</sup> and the *Transkei Marriage Act*.<sup>24</sup> However, legislation passed under colonial administrations is often objected to for representing "remnants of an apartheid South Africa" and not being an accurate account of customary law.<sup>25</sup>

The primary rationale for drafting and passing recent legislation relating to customary law is to improve the position of women and children living under a customary law system.<sup>26</sup> Women and children are identified as vulnerable groups in society, and the constitutional duty is to advance a spirit of equality.<sup>27</sup> The promulgation of

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<sup>20</sup> *Traditional Courts Bill*, 2017 [B1-2017]. After it lapsed in terms of National Assembly Rule 333(2), the Bill was revived by the National Council of Provinces in October 2019. It is currently under consideration by the National Assembly. PMG date unknown <https://pmg.org.za/bill/680/>; Alliance for Rural Democracy and LARC 2020 <http://www.larc.uct.ac.za/news/little-comfort-rural-comunities-ncop-passes-traditional-courts-bill-without-opt-out-clause>.

<sup>21</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 283-287; Alliance for Rural Democracy and LARC 2020 <http://www.larc.uct.ac.za/news/little-comfort-rural-comunities-ncop-passes-traditional-courts-bill-without-opt-out-clause>; *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly* 2017 2 ALL SA 463 (WCC) (23 November 2016) para 33.

<sup>22</sup> 38 of 1927. The *Black Administration Act* applied nationally and regulated, amongst other things, the customary law of succession as well as the consequences of civil marriages contracted by black people. The Act has been almost entirely repealed. See Himonga and Nhlapo (eds) *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 112, 167-168.

<sup>23</sup> KwaZulu Act on the Code of Zulu Law 16 of 1985 and Natal Code of Zulu Law in Proc R151 of 1987, GG 10966. See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 30; Himonga and Nhlapo (eds) *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 13. The codes, which operate in KwaZulu-Natal, are a partial codification of Zulu law and provide for aspects such as marriage and succession. Both codes stand to be repealed. See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 92, 203.

<sup>24</sup> 21 of 1978. The *Transkei Marriage Act* applies regionally. Sections 40-50 of the Act were repealed by the *Justice Laws Rationalisation Act* 18 of 1996, while ss 3, 29, and 37-39 were repealed by the *RoCMA*. The whole of the *Transkei Marriage Act* stands to be repealed by the *Marriage Amendment Bill*, 2009.

<sup>25</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 30, 203.

<sup>26</sup> Also see Ngidi "Upholding the Best Interests of the Child in South African Customary Law" 226; Rautenbach 2019 *PELJ* 2-3.

<sup>27</sup> See, for example, the *Bhe* case paras 32, 49-51. The late former chief justice Pius Langa states that the objective of so-called "transformative constitutionalism" is "the establishment of a truly equal society". Emphasis added. A "truly equal society" translates into a commitment to substantive equality. In other words, "equality in lived, social and economic circumstances and opportunities needed to experience human self-realisation". See Klare 1998 *SAJHR* 154; Langa 2006 *STELL LR* 352-353, 355.

contemporary legislation further points to an awareness on the part of the state of the need to ensure equal status for customary law alongside common law.<sup>28</sup>

The difference between customary and common law is evident in the law of (child)<sup>29</sup> adoption. Adoption under customary law is unregulated,<sup>30</sup> resulting in matters of customary law adoptions, as they will hereafter be referred to, being dealt with on a case-by-case basis. On the other hand, the *Children's Act* regulates common law adoptions.<sup>31</sup> Adoptions also seem to be one area where differentiation between the common and customary law systems creates inequality before the law. Such differentiation affects the families (adoptive and adoptee) involved, the child(ren) involved, and the actual status of customary law adoptions altogether, as illustrated next.

## **1.2 Problem statement**

### *1.2.1 Introduction*

Some authors argue that the *Children's Act* has codified South African child law<sup>32</sup> and repealed the customary law of adoption.<sup>33</sup> However, in *Motsepe v Khoza* (the *Motsepe* case)<sup>34</sup> the court recognised a customary law adoption that occurred after the commencement of the *Children's Act* for the purpose of a claim for loss of support.<sup>35</sup> This recognition supports the view held in *Kewana v Santam Insurance Co Ltd* (the

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<sup>28</sup> Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 13, 19, the *Alexkor* case para 51.

<sup>29</sup> This thesis focuses on child adoption only. Therefore, "adoptions", refer to child adoptions only. See Monye 2017 *Journal of Law, Society and Development* 2 for a brief reference to the "adoption" of "an adult male" under customary law. Examples of adult adoption in Africa exists. Also see 1.3.8 below, where it is explained that examples of adult adoption in Africa do indeed exist.

<sup>30</sup> Also see Mokotong 2015 *THRHR* 354.

<sup>31</sup> 38 of 2005. The whole of the *Children's Act* of 2005, including chapters 15 and 16 dealing with adoptions and intercountry adoptions respectively took effect on 1 April 2010. Also see Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* ix; Van der Walt 2014 *Obiter* 448. The *Children's Amendment Act* 17 of 2016 and the *Children's Second Amendment Act* 18 of 2016 took effect on 26 January 2018.

<sup>32</sup> See Schäfer *Child Law in South Africa Domestic and International Perspectives* 53.

<sup>33</sup> See Himonga "Children (Minors)" 198-199.

<sup>34</sup> (Unreported) case number 15078/2012 [2013] ZAGPJHC 87 (8 April 2013). Also cited as *ML v KG*. However, in order to avoid confusion, in this thesis it is referred to only as "the *Motsepe* case".

<sup>35</sup> Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 114.

*Kewana* case)<sup>36</sup> that legislation regulating adoptions does not override customary law.<sup>37</sup> In the *Kewana* case the court held that the previous *Children's Act* of 1960<sup>38</sup> had been enacted to fill a vacuum in the common law<sup>39</sup> but did not modify or replace adoption under customary law.<sup>40</sup> The same argument may be raised concerning the current *Children's Act*. Consequently, Mokotong reasons as follows:<sup>41</sup>

The academic writing to the effect that the Children's Act applies to all the children in South Africa may be challenged, as the Children's Act excludes cultural adoptions and therefore disregards children who have been adopted under customary law.

Even if promulgated after the *Constitution*, it should not be assumed that the *Children's Act* caters for customary law adoption. According to Bennett and Peart, adoption practices in customary law resemble early Roman law *adoptio*, with the primary purpose being the perpetuation of the bloodline, not the interests of the parentless child.<sup>42</sup> Bennett states that "adoption cannot be considered an established practice of customary law" and that, in customary law, the "nearest equivalent" to adoption is "the institution of an heir by a family head who has no male progeny of his own."<sup>43</sup>

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<sup>36</sup> 1993 4 SA 771 (TkA).

<sup>37</sup> See *Maswanganye v Baloyi* 2015 JOL 34005 (GP) paras 8-9; *Maneli v Maneli* 2010 JOL 25353 (GSJ) paras 19, 23, 29, 35-36.

<sup>38</sup> 33 of 1960.

<sup>39</sup> As formal adoption was non-existent in Roman-Dutch law. See the *Kewana* case 776.

<sup>40</sup> The *Kewana* case 776.

<sup>41</sup> Mokotong 2015 *THRHR* 354.

<sup>42</sup> Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 375-376. Also see Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 22-23; Bennett *Human Rights and African Customary Law under the South African Constitution* 107.

<sup>43</sup> Bennett *Human Rights and African Customary Law under the South African Constitution* 107. Ferreira states that customary law adoption "happens within a family and for different purposes than statutory adoption." Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 2. Furthermore, according to Denson and Nxumalo: "Adoption of children is not universally practiced by black communities. The reason is probably that they believe that an adopted child is not a child in the proper sense – it is not the result of the *ilobolo* agreement: it cannot be accounted for by the living to the deceased ancestors. Probably the main reason, however, why formal adoption does not generally occur in customary law is that parents have other remedies than adopting children, for example, seed-bearers or the *ukungena* custom." Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 92. *Ukungena* is discussed in chapter 3. Moore and Himonga go on: "Adoption does not occur in customary law and it has been argued that any attempt to equate customary care arrangements with adoption or fostering should be resisted. There are many reasons for this: the notion of the state regulating family care arrangements contradicts the presumption that *a child belongs to everyone in the wider family ...*". Moore and Himonga 2018 *South African Child Gauge* 63 and the authority cited. Emphasis added. For a discussion of belonging within the African extended family, see 2.4.3.

Therefore, because the latter practice is not necessarily in the child's best interests, it does not qualify as "adoption" in the true sense of the word.<sup>44</sup>

Despite arguments against adoption in customary law, courts have recognised customary law adoption in several cases.<sup>45</sup> In *Rakhav v Road Accident Fund* (the *Rakhav* case)<sup>46</sup> Kubushi J states that "[i]t is trite that adoption in customary law is recognised in our law."<sup>47</sup> In *Mxhosana v Mxhosana* (the *Mxhosana* case)<sup>48</sup> the court confirmed that "customary law adoption is *widely practised* by Xhosas" in both the Eastern and Western Cape.<sup>49</sup> Mokotong states that customary law adoption occurs in various ways:<sup>50</sup> a relative or friend may adopt a child; the natural or biological<sup>51</sup> father of a child born out of wedlock may adopt the child and affiliate the child to his family group; a male may adopt his deceased brother's child; a female may adopt her deceased sister's child; and a childless couple may adopt an orphaned child.

Adoption practices in customary law also include so-called "step-parent adoption"<sup>52</sup> and may include *umlanjwane yingane kaninalume*<sup>53</sup> (an illegitimate child belongs to the maternal side). It has been said that customary law adoption is a process with legal consequences similar to those of adoption in the common law.<sup>54</sup> However, it is evident from the discussion below that the legal implications of customary law

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<sup>44</sup> See Bennett *Human Rights and African Customary Law under the South African Constitution* 107.

<sup>45</sup> For example, see 1.2.3.

<sup>46</sup> *Rakhav v Road Accident Fund* (38754/2018) [2019] ZAGPPHC 257 (27 June 2019).

<sup>47</sup> The *Rakhav* case para 6. Though the statement is made with a general reference to the *Kewana* case only.

<sup>48</sup> *Mxhosana v Mxhosana* 2022 JOL 52127 (GP).

<sup>49</sup> The *Mxhosana* case para 54. Emphasis added.

<sup>50</sup> See Mokotong 2015 *THRHR* 347 and the authority cited for this non-exhaustive list. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 114.

<sup>51</sup> The terms "natural" and "biological" are used interchangeably in this thesis.

<sup>52</sup> See Mokotong 2015 *THRHR* 347.

<sup>53</sup> A possible Zulu adoption practice. See Ombudsman for Long-Term Insurance 2018 <https://www.ombud.co.za/download-attachment/5093> para 29.2.1. Discussed in Chapter 3.

<sup>54</sup> See, amongst other things, Bekker *Seymour's Customary Law in Southern Africa* 236; Maithufi 2001 *De Jure* 391; Van der Walt 2014 *Obiter* 433 for confirmation that adoption has a "profound effect" on a person's status. Van der Walt continues: "... it may even be argued that adoption has a more profound impact on status than any other legal action or application." Van der Walt 2014 *Obiter* 433. Also see the discussion of the legal implications of common law adoption under 1.3.5; and see 1.3.9 for a discussion of different meanings of "status".

adoptions are not clear.<sup>55</sup> They differ from those of adoptions that occur under common law, leading to inequality before the law and threatening the actual status of customary law adoptions. The inequalities can be illustrated with examples in the laws of succession and maintenance, amongst others.

### 1.2.2 Succession

The South African law of succession has a dual character, consisting of common law and customary law.<sup>56</sup> The common law of succession comprises testamentary and intestate succession rules. The customary law of succession comprises mainly intestate succession rules.<sup>57</sup>

The common law intestate succession rules are codified in the *Intestate Succession Act* and the common law, and the common law testate succession rules are to be found in the *Wills Act*,<sup>58</sup> the common law and other "standard works" on the law of succession.<sup>59</sup> For customary law, the *Reform Act* determines the customary law intestate succession rules. As stated earlier, the *Reform Act* altered the customary law of intestate succession and replaced it with the *Intestate Succession Act*.<sup>60</sup> Otherwise put, as stated by the court in the *Mxhosana* case after considering the purpose<sup>61</sup> of the *Reform Act*:<sup>62</sup>

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<sup>55</sup> Also see Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 462, where the author states that the precise legal implications ("*presiese regsimplikasies*") of customary law adoptions are uncertain.

<sup>56</sup> Jamneck and Rautenbach (eds) *The Law of Succession in South Africa* 4.

<sup>57</sup> It has been stated that testamentary succession is unfamiliar in customary law. However, the "notion of wills" might have applied, in that a family head could make certain allocations of property on his deathbed, although not in the common law sense. For a brief discussion in this regard see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 193-194; Jamneck and Rautenbach (eds) *The Law of Succession in South Africa* 57.

<sup>58</sup> 7 of 1953.

<sup>59</sup> See the *Wills Act*; Schoeman-Malan 2007 *PER* 7.

<sup>60</sup> See 1.1.

<sup>61</sup> The purpose of the *Reform Act* is stated in the Act as follows: "To modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to *clarify certain matters relating to the law of succession* and the law of property *in relation to persons subject to customary law*; and *to amend certain laws* in this regard; and to provide for matters connected therewith." Emphasis added.

<sup>62</sup> The *Mxhosana* case para 30.

It [the *Reform Act*] in an actual sense modifies the Intestate Succession Act to accommodate customary law intestate succession.

Furthermore, regarding the *Reform Act*, people subject to customary law may also dispose of assets in terms of a will, making testate succession in customary law official.<sup>63</sup>

Returning to adoption: as Roman-Dutch law did not recognise adoptions,<sup>64</sup> adoption was not recognised under the common law of succession in South Africa either.<sup>65</sup> Indeed, informal or *de facto* adoptions<sup>66</sup> took place, but the courts did not regard such arrangements as binding agreements and no legal consequences were attached.<sup>67</sup> After common law adoptions were catered for in legislation,<sup>68</sup> the law eventually developed for formally adopted children to be included as intestate heirs of their adoptive parents.<sup>69</sup> In other words, to be included as an intestate heir of one's adoptive parent in common law, an adopted child must be adopted in terms of adoption legislation.<sup>70</sup> In *Flynn v Farr* (the *Flynn* case)<sup>71</sup> the court decided against reforming the common law of intestate succession to include *de facto* adoptions.

In the *Flynn* case the mother of a child born from a previous marriage ("Flynn") married "Farr" ("the deceased"). The couple married in 1964 when Flynn was fourteen, but the

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<sup>63</sup> Section 4(3) of the *Reform Act*. Also see s 2 of the *Reform Act*; Jamneck and Rautenbach (eds) *The Law of Succession in South Africa* 268.

<sup>64</sup> A reference to South African "common law" usually refers to the South African law's Roman-Dutch law heritage. Also see 1.3.3; Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 18.

<sup>65</sup> See 2.3.

<sup>66</sup> Explained below.

<sup>67</sup> Even though a *de facto* parent-child relationship resembles an adoptive relationship, it has to be formalised in terms of adoption legislation. Before 1923 no common law adoption legislation existed in South Africa. The courts did not attach any consequences to adoption agreements between parties, neither did they recognise a relationship which factually resembled an adoptive relationship. See Louw 2017 *Obiter* 460, 462. Also see the comprehensive discussion on the history of South African adoption law in chapter 2. For a discussion by Louw of the doctrine of "equitable adoption" (also called "*de facto* adoption") in the USA, see Louw 2017 *Obiter* 479-480.

<sup>68</sup> For a comprehensive discussion and timeline, see chapter 2. However, at the time of the court case in 2008 the *Intestate Succession Act* provided for "adopted children" to be included as intestate heirs.

<sup>69</sup> See s 1(4)(e) of the *Intestate Succession Act*; Jamneck and Rautenbach (eds) *The Law of Succession in South Africa* 30.

<sup>70</sup> Currently, the *Children's Act*.

<sup>71</sup> *Flynn v Farr* 2009 1 SA 584 (C).

deceased had already been part of Farr's life from age five.<sup>72</sup> His mother and Farr raised Flynn in a family home and he became a well-known actor, always with Farr's "support and the affection which any father would have been credited for so exhibiting."<sup>73</sup> However, due to Flynn's biological father's refusal to consent to the adoption,<sup>74</sup> Flynn was never formally adopted by the deceased.<sup>75</sup> From the evidence before the court, it seemed that Farr,<sup>76</sup>

... may well have regarded him [Flynn] as his child and that he [Farr] took him into his home, looked after him, raised him and treated him at all times *as his own child*.

Flynn also accepted Farr as his father. In a letter to his attorney, written before Flynn died in 2007,<sup>77</sup> Flynn refers to Farr as "my dad". In the letter Flynn proceeds to provide reasons for Farr's failure to make a will before his sudden death at age seventy-three and also states:<sup>78</sup>

A few days ago *my dad's* lawyer has informed ... - due to my dad's own intestacy, *the law dictates that he and mom's combined estate*, including our family home and everything in it ... *will automatically be passed on to his nearest surviving relatives* – namely his elder brother and younger sister, their offspring, as well as the offspring of his deceased brothers and sisters ... I now find myself in the very painful situation of having to accept that the *50 years he and my mom and I spent together as a very close-knit family* have been simply wiped out as though those years and that *very specific relationship between us* never existed. I am being most sincere when I say

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<sup>72</sup> More detail is not provided. See the *Flynn* case para 5.

<sup>73</sup> As the court stated in the *Flynn* case in para 6.

<sup>74</sup> "Ostensibly". Therefore, the court was not convinced that the biological father's refusal to provide consent was really the reason for Flynn's not being formally adopted by the deceased. However, the court did not pursue the matter further. According to the court: "... Flynn was never legally adopted by Farr, ostensibly because Flynn's biological father would not grant his consent for such adoption to take place. *Whatever the reason, a legal process of adoption was never formally initiated nor in any other way pursued.*" The *Flynn* case para 6. Emphasis added.

<sup>75</sup> In 1964 the *Children's Act* 33 of 1960 regulated common law adoptions. In terms of the Act, consent of both parents of a child was a requirement for adoption; and, once adopted, adopted children were not entitled to inherit intestate from their adoptive parents. Instead, adopted children were still regarded the intestate heirs of their natural parents. See s 74(2)-(3) of the *Children's Act* 33 of 1960 and the discussion in 2.3.4.3. However, at the time of the *Flynn* case in 2008 the *Intestate Succession Act* had since made it possible for "an adopted child" to inherit upon intestacy. See s 1(4)(e) of the *Intestate Succession Act*, the *Flynn* case paras 9-16, *Harper v Crawford* 2018 1 SA 589 (WCC) (30 June 2017) para 17.

<sup>76</sup> See the *Flynn* case para 17. Emphasis added. The defense argued that even if this was true (that Flynn was regarded by Farr as his own son) Flynn had still not been adopted in the eyes of the law.

<sup>77</sup> The deceased died in 2006 and Flynn himself died in 2007. Flynn's mother predeceased them both. Consequently Flynn's case was brought by the executrix of his estate. The *Flynn* case paras 1, 3, 7-8.

<sup>78</sup> As quoted by the court. See the *Flynn* case para 25. Emphasis added.

that I am not speaking about any money ... I would trade ten times that amount just to have them both still alive and with us. *My outrage and dismay is aimed at the law which decrees that any verbal post-life issues my parents had* – and there were several – not only to do with my son and I but with various charities of church and my mom's sister and her family who have been struggling financially for years. *These wishes of my parents have now been consigned to the scrap heap by a law which in situations like these should be flexible and open to interpretation – if the facts and history of the family concerned warrant it* – as I believe they do.

Therefore, a factually adoption-like relationship seemed to have existed between Flynn and Farr, and the court had to consider whether the law of intestate succession should recognise such a relationship. In other words, the court had to consider whether section 1(4)(e) of the *Intestate Succession Act* was broad enough to include *de facto* adopted children. If it found that the section cannot include *de facto* adopted children, the court had to proceed to consider whether there is a legitimate purpose for the discrimination between *de facto* and *de lege*<sup>79</sup> (or *de iure*) adopted children – as required by the *Constitution*.<sup>80</sup>

The common law adoption legislation during the *Flynn* case required a court order to legalise an adoption.<sup>81</sup> Consequently, the court in the *Flynn* case held that an "adopted child", as per section 1(4)(e) of the *Intestate Succession Act*, did not include *de facto* adopted children. Consequently, the next issue for the court to consider was whether the discrimination was fair.

In coming to its conclusion the court in the *Flynn* case relied heavily on an affidavit by the chief director of the National Department of Social Development (the DSD) at the time,<sup>82</sup> highlighting the lack of regulation of *de facto* adoptions as a major concern.<sup>83</sup> Practical justifications for the "insistence upon a process of legal adoption" were

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<sup>79</sup> As referred to in the *Flynn* case. "Legal" adoptions or adoptions formalised by means of common law adoption legislation are also referred to as "*ex-lege*" or "*de iure*" adoptions; so-called "legal" or "formal" adoptions. See the *Flynn* case paras 17, 19, 49; Louw 2017 *Obiter* 459, 460, 467.

<sup>80</sup> Therefore, whether the discrimination is fair. See ss 9, 36 of the *Constitution*. Also see the *Flynn* case paras 1-2, 22-23,

<sup>81</sup> Section 20 of the *Child Care Act* 74 of 1983. Also see the *Flynn* case para 20; 2.3.4.4 for a discussion of the *Child Care Act* 74 of 1983.

<sup>82</sup> Ms Maria Mabetoa. The *Flynn* case para 46.

<sup>83</sup> The *Flynn* case paras 46, 49.

provided in the affidavit, along with certain "customary law circumstances" which, according to the chief director, do not amount to adoption.<sup>84</sup>

[A] system of factual adoptions is not reconcilable with keeping track of all adoptions, ... there would be no record or information in the public domain of such adoptions ... should a child wish in later life to find out who they are and where they came from, the DSD would not be able to assist ... The DSD is alive to the reality that in the South African context, the HIV-Aids pandemic has resulted in an increase of the number of children being raised outside the traditional family nucleus and who are in the care of family members, or even concerned community members without any formal legal adoption process ... followed. ... In some contexts there is an intention to adopt the children but no steps are taken to actually do so. In others, children are absorbed into households simply because they need care and protection and there is no intention that they be adopted. In customary law circumstances there may well be instances where a family may take in a child with no intention to adopt, e.g. if a brother passes away and leaves behind children, those children often are taken in to a surviving brother's household without him ever intending that they become his children through official adoption.

The affidavit raised safety concerns, too. If *de facto* adopted children were treated the same as legally adopted children, there would be no way to monitor whether children are legitimately taken out of the country instead of being victims of child or drug trafficking.<sup>85</sup> It further highlighted that the *Children's Act* provides for "open adoptions" through access agreements – to ensure that due regard is taken of a child's relationship with their biological parents. However, if not done through an access agreement in terms of legislation, adoptive parents will find themselves in a "precarious legal position", which may lead to an unwillingness to adopt.<sup>86</sup>

Consequently, the court in the *Flynn* case found that the present legal dispensation was indeed justified.<sup>87</sup> After finding that the discrimination between *de facto* and *de lege* adopted children served a legitimate purpose, the court determined that it need not decide on whether Flynn was indeed factually adopted by Farr.<sup>88</sup> Flynn was regarded as Farr's stepchild, with no right to inherit intestate from Farr.<sup>89</sup>

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<sup>84</sup> As quoted by the court. The *Flynn* case paras 46-47. Also see *MB v NB* 2010 3 SA 220 (GSJ) para 24.

<sup>85</sup> Inter-country adoptions must be monitored too for the same reasons. The *Flynn* case para 47.

<sup>86</sup> The effect of an access agreement is that the legal relationship between biological parents and children is not fully severed. The *Flynn* case para 47. Open adoptions are discussed in chapter 4.

<sup>87</sup> The *Flynn* case para 49.

<sup>88</sup> The *Flynn* case para 51.

<sup>89</sup> Also see the *Flynn* case para 37-38.

Therefore, a *de facto* adoption arrangement refers to a situation resembling adoption, but as a matter of fact and not law.<sup>90</sup> *De facto* adoption entails taking a child into one's home and looking after and raising the child as one's own. In other words, a person regards and treats a child as her or his own but does not adopt the child in terms of adoption legislation. The child also considers the parent his or her own.<sup>91</sup> Still, common law adoption is legally recognised for intestate succession only if executed formally per the relevant adoption legislation.

Customary law adoption has been referred to as *de facto* adoption. Before the *Reform Act* commenced, in *Metiso v Padongelukfonds* (the *Metiso* case)<sup>92</sup> Maithufi<sup>93</sup> referred to a customary law adoption as a *de facto* adoption comparable to a *de facto* adoption in the common law.<sup>94</sup> Now, in terms of the *Reform Act*, a "descendant" includes:<sup>95</sup>

... a person who is not a descendant in terms of the Intestate Succession Act, but who during the lifetime of the deceased person, *was accepted by the deceased person in accordance with customary law as his or her own child.*

The court in the *Mxhosana* case considered this definition of "descendant" as an "extension" of section 1(4) of the *Intestate Succession Act*. The court stated:<sup>96</sup>

The provisions of 1(4) were subsequently amended to include s 1(4)(eA) or to *extend the provision in recognition of adoptions that take place de facto in the context of customary law.*

However, in section 1(4)(e) of the *Intestate Succession Act* adopted children are already included as descendants of their adoptive parents. If customary law adoptions

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<sup>90</sup> *De facto* adoptions are also referred to as "factual adoptions". See the *Flynn* case para 17. Also see Louw 2017 *Obiter* 460, 467. Also see Hiemstra and Gonin *Drietalige Regswoordeboek Trilingual Legal Dictionary* 175.

<sup>91</sup> Also see Louw 2017 *Obiter* 462; the facts in the *Flynn* case, as were also discussed, for an example of how a *de facto* adoption scenario would look like in practice.

<sup>92</sup> 2001 3 SA 1142 (T).

<sup>93</sup> In giving expert testimony. The late professor IP Maithufi was a professor of private law at the University of Pretoria from 1999 until 2015. He had a special interest in customary law and served as leader of the project on the harmonisation of customary and common law. He published widely in various fields of customary law, family law, law of succession and delict. University of Pretoria date unknown <http://www.universityofpretoria.co.za/en/private-law/article/1907936/prof-ipmaithufi>; University of Pretoria 2015 [http://www.universityofpretoria.co.za/en/private-law/post\\_2095509-inmemoriam-prof-papamaithufi](http://www.universityofpretoria.co.za/en/private-law/post_2095509-inmemoriam-prof-papamaithufi).

<sup>94</sup> See the *Metiso* case 1146, 1148 and 1.2.3 below for a more detailed discussion. Also see *Maswanganye v Baloyi* 2015 JOL 34005 (GP) para 16.

<sup>95</sup> Emphasis added.

<sup>96</sup> The *Mxhosana* case para 48. Emphasis added.

are legally recognised,<sup>97</sup> such adopted children are included in section 1(4) and no extension of section 1(4) is needed unless the scope is broader for children adopted in terms of customary law.<sup>98</sup> In other words, *de facto* adoptions are recognised for inheritance upon intestacy in customary law as opposed to common law. As shown above, the court in the *Mxhosana* case indeed used the concept "*de facto*" to describe customary law adoptions. An analysis of the *Mxhosana* case follows in chapter 3.

Therefore, the possibility exists that *de facto* adopted children are considered intestate heirs of their *de facto* adoptive parents in customary law. In contrast, *de facto* adopted children are not considered as such in the common law. The former may stand to inherit intestate from their *de facto* adoptive parents, while the latter are not in a position to inherit from their *de facto* adoptive parents. Consequently, *de facto* adopted children are treated differently before the law. Intricacies surrounding *de facto* adoption are further discussed in chapter 3.

### 1.2.3 Maintenance

A few judgments have dealt with the issue of whether to allow a maintenance or loss-of-support claim in cases of customary law adoptions.

In the *Metiso* case two minor children were allegedly customarily adopted by their father's brother (their uncle) after their father's death.<sup>99</sup> The children's mother left the community shortly after the father's funeral<sup>100</sup> and made no contact with nor showed any interest in her children.<sup>101</sup> The curator *ad litem* appointed for the children and the plaintiff testified that the children had been transferred into the care of their uncle through a formal ceremony and that the uncle subsequently assumed responsibility for the children's maintenance.<sup>102</sup> The uncle later died in a car accident, and an action for

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<sup>97</sup> The requirements that must be adhered to for a customary law adoption to be valid are unraveled in chapter 3.

<sup>98</sup> In the alternative, the amendment may also have been done to re-enforce the recognition of customary law adoptions. The possibility exists that the duplication could have occurred as a result of poor legislative drafting.

<sup>99</sup> The *Metiso* case 1146.

<sup>100</sup> The *Metiso* case 1146.

<sup>101</sup> The *Metiso* case 1146.

<sup>102</sup> The *Metiso* case 1146.

damages for loss of support concerning the children was instituted against the Road Accident Fund under the *Road Accident Fund Act*.<sup>103</sup> Objections against the recognition of the adoption were that the biological mother and her family had not been informed of the adoption,<sup>104</sup> the adoption had not been "confirmed in public", and the adoption had not been reported to the then traditional leader.<sup>105</sup> Still, the court found that an order holding the Road Accident Fund liable for the children's loss of support would be in the children's best interest and that the case outcome would have been the same had the mother and her family been informed.<sup>106</sup>

Based on expert evidence in the *Metiso* case,<sup>107</sup> the mother and her family seemed to have no *locus standi* to "interfere" in the adoption.<sup>108</sup> In other words, the mother and her family had no "right to be heard" in the adoption process.<sup>109</sup> Their lack of *locus*

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<sup>103</sup> The *Road Accident Fund Act* 56 of 1996 provides that the Fund pay compensation for "loss or damage wrongfully caused by the driving of motor vehicles". S 17(1) of the Act states that the "Fund ... [is] obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle." S 17(4) confirms that claims for loss of income or support are also covered by the Act. Also see s 3 of the *Road Accident Fund Act* 56 of 1996; the *Metiso* case 1143.

<sup>104</sup> The *Metiso* case 1143.

<sup>105</sup> The *Metiso* case 1149.

<sup>106</sup> The *Metiso* case 1147-1148, 1150. Heaton 2010 Annual Survey of South African Law 453; The *Metiso* case 1150. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 116.

<sup>107</sup> Professor Maithufi testified that informing the mother or her family was probably a courtesy rule only, and that the actual decision remained that of the father and his family. See the *Metiso* case 1147.

<sup>108</sup> The *Metiso* case 1149.

<sup>109</sup> "*Locus standi*" is a Latin term that the Merriam-Webster online dictionary describes as "a right to appear in a court or before any body on a given question". Further described as, "a *right to be heard*". Emphasis added. Literally, it means a "place to stand". Merriam-Webster year unknown <https://www.merriam-webster.com/dictionary/locus%20standi>. When one has no "*locus standi*" in a litigation case, this means that one has not proved one's interest in such litigation. In other words, when *locus standi* is disputed the court determines "whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action". See *Four Wheel Drive CC v Leshni Rattan* (1048/17) 2018 ZASCA 124 (26 September 2018) paras 2, 7. Requirements for *locus standi* are as follows: "The plaintiff must have *an adequate interest in the subject matter* of the litigation, *usually described as a direct interest* in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove *locus standi* rests on the party instituting the proceedings." Emphasis added. See *Four Wheel Drive CC v Leshni Rattan* (1048/17) 2018 ZASCA 124 (26 September 2018) para 7 and the authorities cited.

*standi* was an indirect consequence of the applicable custom, which gave the father's family the sole discretion to approve the adoption.<sup>110</sup>

Concerning the objection based on a lack of publication of the alleged adoption, the court found that though the traditional leader at the time<sup>111</sup> had not been informed of the adoption, informing his successor indicated that the community had accepted the adoption as a fact.<sup>112</sup> The court further noted that no evidence had been led concerning a specific timeframe within which the adoption had to have been made public.<sup>113</sup>

In essence, the court in the *Metiso* case, although aware of a possible non-adherence to the validity requirements of customary law adoption, found the Road Accident Fund liable as if the children had been validly adopted in terms of customary law. The court found that even in the case of the children not being "properly" adopted in customary law, the obligation to maintain the minor children sprung from the binding offer of the deceased to support the children.<sup>114</sup> Consequently, it can be argued that the court recognised a *de facto* customary law adoption.

The court's response to the objections raised against the validity of a customary law adoption in the *Metiso* case might prove problematic. The court's conclusion regarding the notification of the biological mother and her family creates the impression that the mother and her family's consent is less critical in customary law adoption than in a civil adoption.<sup>115</sup> The latter again raises the constitutional issue of inequality between mothers and fathers during customary law adoption proceedings and between children adopted under different law systems. If a child is adopted in customary law, s/he might be subjected to a system where a woman's input is viewed as less important.<sup>116</sup>

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<sup>110</sup> The *Metiso* case 1147.

<sup>111</sup> When the alleged adoption took place.

<sup>112</sup> The *Metiso* case 1149.

<sup>113</sup> The *Metiso* case 1149.

<sup>114</sup> Therefore, despite the offer by the deceased to adopt the children's being made "in context of (possibly) incomplete customary adoption". The *Metiso* case 1144.

<sup>115</sup> Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 117.

<sup>116</sup> Possibly putting the best interests of such a child at risk, though the latter is not further evaluated in this thesis.

Furthermore, a lack of guidelines on the timeframe within which a customary law adoption must be publicised or reported to a traditional leader may heighten uncertainty should a dispute arise about the date when a customary law adoption took place, for example. Indeed, it should be kept in mind that:<sup>117</sup>

[i]n customary law, ... time plays a minimal role in determining when rights and duties come into existence. The actual occurrence of the event is the crucial factor. Undue delay may, at most, affect the credibility of the evidence.

However, even though the factual occurrence of the adoption is the decisive factor and not its reporting to the traditional authority, it does not negate the fact that a lack of guidelines could add to the uncertainty regarding the specific requirements for customary law adoptions. Along with further analyses of the *Metiso* case, reporting a customary law adoption is further attended to in chapter 3.

In another example, *Thibela v Minister van Wet en Orde* (the *Thibela* case),<sup>118</sup> the plaintiff instituted an action for damages for the loss of support against the then minister of law and order after the police had killed her husband, to whom she was married under customary law.<sup>119</sup> She also sued on behalf of her son, born from a previous relationship.<sup>120</sup> During the plaintiff's pregnancy the biological father had paid for some of the mother's clothes and hospital costs and, after that, "disappeared from the scene".<sup>121</sup> Some time after the child's birth and after the plaintiff entered a relationship with the deceased, the biological father "reappeared" and offered to pay maintenance.<sup>122</sup> On the recommendation of the deceased the mother declined the biological father's maintenance offer.<sup>123</sup>

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<sup>117</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 26.

<sup>118</sup> 1995 3 SA 147 (T).

<sup>119</sup> Mokotong 2015 *THRHR* 347-348; the *Thibela* case 148.

<sup>120</sup> Mokotong 2015 *THRHR* 348; The *Thibela* case 148.

<sup>121</sup> The *Thibela* case 149.

<sup>122</sup> The *Thibela* case 149.

<sup>123</sup> The *Thibela* case 149.

The deceased in the *Thibela* case paid *ilobolo*<sup>124</sup> for the plaintiff and her minor son from her previous relationship.<sup>125</sup> The court found that the child had, "for all practical purposes", become the child of the deceased, which implied that he had a duty to maintain the plaintiff's son.<sup>126</sup> Except for the deliverance of *ilobolo*<sup>127</sup> the court did not mention other adoption requirements. The court did not expressly recognise the "transaction"<sup>128</sup> in which the deceased delivered *ilobolo* for the plaintiff and her minor child as a customary law adoption *per se*. Again, one may argue that the court in the *Thibela* case recognised a *de facto* customary law adoption for the purpose of a maintenance claim.

Furthermore, the biological father in the *Thibela* case showed interest in his child, unlike in the *Metiso* case, where the mother abandoned the children. The father in the *Thibela* case still had no say in the child's adoption into the deceased's family.<sup>129</sup>

In *Mlate v Road Accident Fund* (the *Mlate* case)<sup>130</sup> the high court found that "where the deceased maintained the plaintiff and her minor children during his lifetime", a legal duty to maintain the plaintiff's minor children from a previous relationship came into existence.<sup>131</sup> The plaintiff and the deceased were married under customary law.<sup>132</sup> *iLobolo* was negotiated and paid in full,<sup>133</sup> although it is unclear whether the negotiations explicitly included "payment" for the plaintiff and her children. According to the plaintiff, she and her children resided with the deceased and depended on him

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<sup>124</sup> Or *bogadi*, as the plaintiff belonged to the Pedi culture. See the *Thibela* case 150; Mokotong 2015 *THRHR* 348. In the *RoCMA*, *ilobolo* (or "lobolo") is defined as "property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage." S 1 of the *RoCMA*.

<sup>125</sup> The *Thibela* case 149. Although not specifically referred to, *oe gapa le namane* was clearly addressed in this case. Also see Mokotong 2015 *THRHR* 347.

<sup>126</sup> The *Thibela* case 150; Mokotong 2015 *THRHR* 348. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 116.

<sup>127</sup> As well as the *ilobolo* negotiations or discussions between families.

<sup>128</sup> In accordance with Pedi culture. See the *Thibela* case 150.

<sup>129</sup> Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 117.

<sup>130</sup> *Mlate v Road Accident Fund* 2020 JOL 46985 (GP).

<sup>131</sup> The *Mlate* case para 35.

<sup>132</sup> Although contested by the family of the deceased, the court found that a customary marriage indeed existed. See the *Mlate* case paras 25, 37.

<sup>133</sup> The *Mlate* case para 21.

for support.<sup>134</sup> The deceased died in a car accident and the plaintiff instituted claims for loss of support against the Road Accident Fund for her and her children.<sup>135</sup>

In coming to its conclusion, the court in the *Mlate* case referred to both the *Metiso* and the *Thibela* cases. The court in the *Mlate* case referred to the facts of the *Thibela* case. In the *Thibela* case *ilobolo* was delivered for the wife and her "illegitimate" son.<sup>136</sup> However, it is not clear from the facts in the *Mlate* case that *ilobolo* was delivered for both mother and child. In its turn the *Metiso* case was referred to in recognising that a binding offer to support children creates a duty of support. Furthermore, the court in the *Metiso* case determined that a "*de facto* adoption should be acknowledged and that the formal defects be overlooked."<sup>137</sup> In other words, one may argue that in the *Mlate* case a *de facto* customary law adoption was also recognised in favour of a maintenance claim.

Also, in common law or "outside the customary law setting",<sup>138</sup> as Louw puts it, the courts have shown an increased willingness to recognise a duty of support where a "*de facto* caregiving arrangement" is present.<sup>139</sup> Therefore, it can be said that in the law of maintenance there is some movement towards treating *de facto* customary law and *de facto* common law adopted children the same, as opposed to the position in the law of succession.<sup>140</sup> On the other hand, in *Ramasodi v Road Accident Fund* (the *Ramasodi* case)<sup>141</sup> the court found that no duty of support was owed by the deceased<sup>142</sup> to his alleged fiancée (the plaintiff)<sup>143</sup> and her fifteen year old daughter born from a previous relationship.

In the *Ramasodi* case the plaintiff and her daughter lived together for approximately two years before the deceased's death.<sup>144</sup> According to the plaintiff she and the

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<sup>134</sup> The *Mlate* case para 8.

<sup>135</sup> The *Mlate* case paras 1, 2.

<sup>136</sup> The *Mlate* case para 32.

<sup>137</sup> The *Mlate* case para 34.

<sup>138</sup> As Louw puts it. Louw 2017 *Obiter* 471.

<sup>139</sup> Louw 2017 *Obiter* 471.

<sup>140</sup> As discussed above. See 1.2.3

<sup>141</sup> *Ramasodi v Road Accident Fund* (69708/2014) [2022] ZAGPPHC 277 (20 April 2022).

<sup>142</sup> A man.

<sup>143</sup> A woman.

<sup>144</sup> The *Ramasodi* case paras 6-7.

deceased were engaged to be married. Further, the deceased supported her daughter despite not being his biological child.<sup>145</sup> The deceased was unrepresented in court, and the plaintiff presented no evidence of an *ilobolo* agreement or customary marriage.<sup>146</sup> Little was presented to prove that the deceased owed the plaintiff and her daughter a duty of support.<sup>147</sup> The court found that no customary marriage, *ilobolo* agreement or intention to marry had been proven.<sup>148</sup> The court further found that "residing together for two years only does not create a legal duty to support each other."<sup>149</sup> Consequently the deceased owed no duty of support to the plaintiff and her daughter.<sup>150</sup>

About the *Ramasodi* case: if more details of the plaintiff and her daughter's relationship with the deceased had been known, one could have evaluated whether a *de facto* adoption existed. If the plaintiff could prove that she and the deceased had had a permanent relationship and that a tacit agreement of reciprocal support had existed between them, the court could have recognised a life partnership despite the short duration of their living together. Based on the decision in *Paixão v Road Accident Fund* (the *Paixão* case),<sup>151</sup> the court could have also extended the support claim to the plaintiff's daughter.

Similarly to what was averred by the plaintiff in the *Ramasodi* case, the parties in the *Paixão* case lived together, and the deceased supported his partner's (Mrs Paixão's) children born from a previous relationship.<sup>152</sup> Though an intention to get married was proven, the court in the *Paixão* case stated that a "marriage would change nothing

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<sup>145</sup> "... supported the plaintiff's daughter even though she was not his daughter ... if the deceased was alive, he would have paid for the ... university fees." The *Ramasodi* case para 7.

<sup>146</sup> The *Ramasodi* case paras 3, 12.

<sup>147</sup> "...the plaintiff did not file any affidavits or lead oral evidence to prove ... a legal duty to maintain her and her daughter." See the *Ramasodi* case para 11.

<sup>148</sup> The *Ramasodi* case para 12.

<sup>149</sup> The *Ramasodi* case para 11.

<sup>150</sup> The *Ramasodi* case paras 13-14.

<sup>151</sup> *Paixão v Road Accident Fund* (640/2011) [2012] ZASCA 130 (26 September 2012).

<sup>152</sup> In the *Paixão* case the parties had lived together for approximately four and a half years. Significantly, during their time of living together the deceased was still married to someone else (though "for all practical purposes" the marriage was over); and his partner (Mrs Paixão) was aware of the fact. However, the deceased did proceed to divorce his wife and the life partners commenced with plans to get married. The deceased supported Mrs Paixão's two daughters. See the *Paixão* case paras 7, 9-10.

except for the relationship being formally recognised."<sup>153</sup> Instead, a reciprocal duty of support was shown to have existed between the partners through tacit agreement.<sup>154</sup> A life partnership had existed. The court found that the common law dependants' action<sup>155</sup> must be extended to dependants in permanent heterosexual life partnerships,<sup>156</sup> consequently allowing Mrs Paixão's claim for loss of support.

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<sup>153</sup> The *Paixão* case para 21. For the court's reasoning in this regard, see the explanation provided by the court in para 22-23. The court also considered the *boni mores* criterion, therefore "the legal convictions of the community", and found that the decision in *Volks v Robinson* 2005 5 BCLR 446 (CC) (the *Volks* case) did not apply to the *Paixão* case. (For an explanation of how the *boni mores* criterion is applied by the courts, see the *Paixão* case para 13 and the authorities cited.) Instead, as explained by the court in the *Paixão* case, the *Volks* case dealt with the protection provided by the *Maintenance of Surviving Spouses Act* 27 of 1990 "which grants to surviving spouses the right to claim maintenance from the estates of deceased spouses". Emphasis added. In the *Volks* case, the Constitutional Court decided that a "spouse" in terms of the *Maintenance of Surviving Spouses Act* 27 of 1990 does not include a heterosexual life partner. See the *Paixão* case para 24-25; the *Volks* case paras 40-45. The judgment in the *Volks* case has since been overturned by the Constitutional Court in *Bwanya v Master of the High Court, Cape Town* [2021] ZACC 51 (the *Bwanya* case). In the *Bwanya* case the court found that excluding heterosexual life partners from the protection provided to spouses in terms of the *Maintenance of Surviving Spouses Act* 27 of 1990 and the *Intestate Succession Act* is unconstitutional. The court gave the legislator eighteen months to "address the affairs of permanent life partners", starting in 31 December 2021 (the date of the judgment). If the matter is not attended to by the legislator, the judgment comes into effect. The *Bwanya* case paras 5-6, 9-10, 203. In coming to its conclusion the court considered the reality that, according to 2016 statistics, "approximately 3.2 million South Africans cohabit outside of marriage and that this number is increasing steadily". The court in the *Bwanya* case also referred to the *Paixão* case to support it, stating that a "family centred on marriage" is not the norm anymore. See the *Bwanya* case paras 1, 52, 129, 133-134, 184, 195, 203 and the authorities cited. It can be noted that the *Bwanya* decision dealt with life partners who were planning *ilobolo* negotiations in Zimbabwe (as Ms Bwanya was from Zimbabwe originally) and getting married after the trip to Zimbabwe. However, it is not certain whether the planned marriage in South Africa was going to be concluded in terms of the *Marriages Act* 25 of 1961 or the *RoCMA*. No children were involved (though from the facts it seems that the couple planned on having a baby) in the *Bwanya* case. The *Bwanya* case paras 3-4, 6. Apart from deducing that life partnerships must probably also be provided with protection when they exist within the ambit of customary law, a more elaborate discussion of the *Bwanya* case is unnecessary.

<sup>154</sup> See the facts of the *Paixão* case as stated in paras 2-10.

<sup>155</sup> "A claim for maintenance and loss of support suffered as a result of a breadwinner's death", as recognised in the common law. The aim is "to place the dependents of the deceased in the same position, as regards maintenance, as they would have been had the deceased not been killed." The dependants' action is peculiar (or "*sui generis*") in that "the dependant derives her right not through the deceased or his estate but from the fact that she has suffered loss by the death of the deceased for which the defendant (a third party such as the Road Accident Fund) is liable." Usually, the dependants' action was available to spouses, biological children, and family related by blood ("wife, children and the like"), however, the court found that uncertainty in the common law regarding the scope of the action indeed existed. The court further found that the deceased indeed regarded Mrs Paixão and her children as "*his* family". See the *Paixão* case paras 12-15, 20 and the authorities cited.

<sup>156</sup> Opposed to protecting heterosexual married couples (spouses) only.

Furthermore, though the deceased's *de facto* adoption of Mrs Paixão's daughters was not argued before the court,<sup>157</sup> the court referred to Mrs Paixão and her children as the deceased's "adopted family".<sup>158</sup> As a result the court also upheld Mrs Paixão's daughters' claim.<sup>159</sup> Therefore, recognition of a *de facto* adoption may again be argued.

As shown later in this thesis,<sup>160</sup> valid customary law adoptions go hand in hand with customary marriage and *ilobolo* negotiations in many instances.<sup>161</sup> Customary law might have to be developed to cater for the conclusion of valid customary law adoptions by life partners. Nevertheless, life partnerships in the context of customary law adoptions are not further explored in this thesis.<sup>162</sup> Instead, what is explored as a legal implication is whether customary law adoptions are to be equated to *de facto* adoptions in the common law. Determining whether customary law adoptions are *de facto* adoptions directly links to customary law adoptions' actual status in the law.

#### *1.2.4 The actual status in the law of de facto adoptions and customary law adoptions*

Theoretically, customary law and common law enjoy equal status in the law.<sup>163</sup> Consequently, it might seem evident that customary and common law adoption enjoy equal status before the law.<sup>164</sup> However, uncertainties surrounding the legal implications of customary law adoptions may affect their actual<sup>165</sup> status.

With common law adoptions, the legal implications are clearly stated in the *Children's Act*.<sup>166</sup> The adopted child becomes a child of the adoptive parent(s) for all intents and

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<sup>157</sup> The children's biological father was deceased. The *Paixão* case para 4.

<sup>158</sup> The *Paixão* case para 36.

<sup>159</sup> Only the youngest daughter instituted a claim, as she was yet to be self-supporting. The *Paixão* case para 11.

<sup>160</sup> Or "study". Used interchangeably.

<sup>161</sup> See chapter 3, including the discussions of the Schulze matter in 3.3.1.1 and step-parent adoption in 3.4.1.

<sup>162</sup> In terms of the *Children's Act*, life partners may jointly adopt a child. See s 231 of the *Children's Act*, 4.2.4.3.

<sup>163</sup> Section 211(3) of the *Constitution* provides for customary law to be applied when applicable, subject to the *Constitution* and legislation dealing with customary law. Section 211(3) is discussed in 3.7. Also see Rautenbach 2019 *PELJ* 10.

<sup>164</sup> For example, Louw 2017 *Obiter* 481.

<sup>165</sup> In other words, the "true" legal status of customary law adoptions (their status in reality, as opposed to their status merely in theory).

<sup>166</sup> Thereby altering the adopted child's status. Also see Boezaart *Law of Persons* 127. The *Children's Act* is discussed in chapter 4.

purposes.<sup>167</sup> The adopted child is deemed a descendant of her or his adoptive parent(s) for intestate succession,<sup>168</sup> and adoptive parents have a maintenance duty towards their adopted child.<sup>169</sup> *De facto* adoptions are recognised for limited purposes only, such as a dependant's action for loss of support. In the common law of intestate succession, *de facto* adoptions are not recognised.<sup>170</sup>

On the other hand, the legal implications of customary law adoptions are unclear. Intricacies surrounding customary law adoptions have been illustrated in the case law examples given above<sup>171</sup> and are further analysed in chapter 3. Thus far, the equation of customary law adoptions with *de facto* adoptions in common law has come strongly to the fore. To equate customary law adoptions with *de facto* adoptions in common law spark contestation. According to Louw, a *de facto* adoption doctrine "can or should find no application in customary law".<sup>172</sup> To her, customary law adoption falls into a "class of its own". Bearing in mind the constitutional recognition afforded to customary law, she argues, it seems only logical that customary law adoptions cannot be regarded as *de facto* or "informal".

However, customary law adoptions being considered *de facto* in numerous instances after the commencement of the *Constitution* cannot be ignored either. Hence the importance of determining whether customary law adoptions are in fact "*de facto*" and, as such, undermining the actual status of customary law adoptions. Relevant sections in the *Constitution* applicable to the status of customary law adoptions are included in the analysis of customary law adoptions in chapter 3.<sup>173</sup>

From the outset it has to be clear that whilst the actual status of customary law adoptions might be questioned in this thesis the "legitimacy" of customary law

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<sup>167</sup> See s 242(2)(a) and 242(3) of the *Children's Act*. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 115.

<sup>168</sup> See s 1(4)(e) of the *Intestate Succession Act*.

<sup>169</sup> See, amongst other things, *Heystek v Heystek* 2002 2 All SA 401 (T) 402.

<sup>170</sup> See 1.2.2; 1.2.3.

<sup>171</sup> Again, see 1.2.2; 1.2.3.

<sup>172</sup> Louw 2017 *Obiter* 481.

<sup>173</sup> 3.7.

adoptions is not in question. Madlingozi and Field (eds) attest to the legitimacy of customary law as a whole, even under colonial rule:<sup>174</sup>

The legitimacy of indigenous law was never in question in the eyes of its adherents. It seems highly unlikely that a refusal or failure to recognise indigenous law by the colonists would have arrested its application or use in the communities of those who lived their lives in accordance with its tenets and principles.

Though customary law's "legitimacy" is not questioned, colonisation would have affected it.<sup>175</sup> Before the *Constitution*, when "officially" interfered with by colonists, adherents to customary law had to align with the latter's views of public policy and natural justice. Due to former interference and changes in African communities over the years,<sup>176</sup> it is unclear what the legal implications of customary law adoptions are. All that has been established is that there are cases where customary law adoptions have been recognised for limited purposes.

Therefore, the purpose here is to unravel customary law adoptions and determine their legal implications to obtain a degree of legal certainty<sup>177</sup> and to promote true equality<sup>178</sup> before the law.

### **1.3 Terminology**

#### *1.3.1 Introduction*

Different meanings are attached to the same terms.<sup>179</sup> The definition of a term depends on the context within which it is used and how it is interpreted. For this thesis, the following meanings apply after providing the relevant context for each term.

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<sup>174</sup> Madlingozi and Field (eds) *Introduction to Law and Legal Skills in South Africa* 148.

<sup>175</sup> Also see, for example, Watson's 1980 article on the Seleka-Barolong community titled "The Subjection of a South African State: Thaba Nchu, 1880-1884" in *The Journal of African History*.

<sup>176</sup> Also see the discussion in chapter 2.

<sup>177</sup> Although "legal certainty" is a myth according to some. Brady 1973 *Irish Jurist* 18. Still, as part of the rule of law, one should be able to "foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge." Legal certainty is required for "the intelligent exercise of legal powers (e.g. to make wills or contracts) and generally for the intelligent planning of private and public life'." See Rijpkema 2013 *Law and Philosophy* 801.

<sup>178</sup> Or substantive equality. See Langa 2006 *STELL LR* 352-353, 355.

<sup>179</sup> For example, "customary law".

### 1.3.2 Customary law

The nature of "customary law", which is the term used in this thesis for what is elsewhere sometimes also called "African customary law" or "indigenous law", has changed considerably over the years. In this regard Diala and Kangwa state:<sup>180</sup>

European laws with industrial backgrounds forcefully displaced indigenous laws with agrarian backgrounds and entrenched themselves as the dominant legal order. Significantly, state laws abolished, modified, and rigidly regulated the application of indigenous laws. By so doing, it coercively changed the normative behaviours of Africans, thereby birthing what we regard today as customary law.

Although these authors concede that "law – of whatever type – is not immutable", they argue as follows:<sup>181</sup>

Colonial rule hastened the pace of change in a manner so revolutionary that many precolonial norms lost their indigenous flavour.

An in-depth discussion of whether "customary law" is the most appropriate term to use falls outside the scope of this thesis.<sup>182</sup> The only relevant fact for the present purposes is that modern South African law affords constitutional recognition to "customary law".<sup>183</sup> Several statutes define customary law. For example, the *RoCMA* defines customary law as:<sup>184</sup>

The customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.

The *Reform Act* defines customary law as:<sup>185</sup>

[T]he customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people.

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<sup>180</sup> Diala and Kangwa 2019 *De Jure Law Journal* 190. Also see, for example, Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 22; *Bhe* case para 90.

<sup>181</sup> Diala and Kangwa 2019 *De Jure Law Journal* 200.

<sup>182</sup> See Diala and Kangwa 2019 *De Jure Law Journal* 195-200 for a discussion in this regard.

<sup>183</sup> See the discussion under 1.1 above. Therefore, the term "customary law" is preferred here.

<sup>184</sup> Section 1 of the *RoCMA*.

<sup>185</sup> Section 1 of the *Reform Act*.

Another definition appears in the *Law of Evidence Amendment Act*.<sup>186</sup> However, the definitions are not without problems. As per Rautenbach (ed):<sup>187</sup>

For legal purposes, the description<sup>188</sup> is devoid of meaning unless one knows (a) what the relevant customs and usages are, (b) who the indigenous people are, and (c) what their culture is.

Moreover, South Africa has various customary legal systems. Customary law does not refer to one unified law system.<sup>189</sup> Although these systems share many features, allowing them to be studied collectively, there are also distinct differences.<sup>190</sup> In *Mbungela v Mkabi* (the *Mbungela* case)<sup>191</sup> the Supreme Court of Appeal stated:

[A]lthough the various African cultures generally observe the same customs and rituals, it is not unusual to find variations and even ambiguities in their local practice because of the pluralistic nature of African society.

Therefore, in some instances of the customary law of adoption it will be necessary to distinguish between or use examples from specific African communities. Indeed, writing about the customs and practices<sup>192</sup> of various African communities will be no easy task and a "special burden of responsibility" rests on the researcher of African customary law to fulfil their "obligation to scholarship and to Africa itself".<sup>193</sup>

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<sup>186</sup> 45 of 1988. The *Law of Evidence Amendment Act* refers to "indigenous law" instead of "customary law" and defines "indigenous law" as "*the law of custom as applied by the Black tribes in South Africa*". S1(4) of the *Law of Evidence Amendment Act*. For critique against the definition, see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 20. However, the definition in the *Law of Evidence Amendment Act* should be applauded for clearly stating that customary law consists of the "law of custom" opposed to merely "the customs and usages" or "practices". For obvious reasons, all customs and practices in communities in general cannot be considered "law". Consequently, another definition describes customary law as being "*customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws.*" Emphasis added. Cuskelly *Customs and Constitutions: State Recognition of Customary Law Around the World* 1 and the authority cited there.

<sup>187</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 20.

<sup>188</sup> Or "descriptions" as contained in the *RoCMA* and *Reform Act*.

<sup>189</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 19; Rautenbach 2019 *PELJ* 8.

<sup>190</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 19. Bennett states that customary law practices "differ considerably" from place to place and "change constantly over time". Bennett *Customary Law in South Africa* 44.

<sup>191</sup> 2020 1 SA 41 (SCA) para 17.

<sup>192</sup> Though the primary source of customary law is the "customs and usages" of a specific African community, other sources exist too.

<sup>193</sup> Elias states that "[i]t would be both presumptuous and unwise to attempt within the compass of such a short work as this an adequately comprehensive study of the laws and customs of the

The definition of "customary law" adopted in this thesis will be that given in the *Reform Act*. The latter is the most recent definition in the statute books. The relevant adoption "customs and practices" are considered.<sup>194</sup> Debating who the "indigenous" people are will not add to this research, and referring to "African people", the "African family", and "African communities" is preferred.<sup>195</sup> A discussion of "culture" is provided below.<sup>196</sup>

### 1.3.2.1 "Official customary law" versus "living customary law"

Closely linking with the previous discussion of "customary law" is whether customary law is considered to be "official" or "living". Even though the *Constitution* does not mention<sup>197</sup> or distinguish between so-called "official customary law" and "living customary law" (the courts have applied both),<sup>198</sup> the two types are usually distinguished. Official customary law has been described as "the version of customary law used by state courts and administrative authorities"<sup>199</sup> and is usually thought of as written customary law.<sup>200</sup> With reference to previous notions of official customary law captured some time ago, Rautenbach (ed) explains:<sup>201</sup>

Because official customary law was captured – often many years ago – in codes, restatements, judicial precedents or academic works, it was unlikely to reflect current social practice. Less obvious distorting factors were the processes of translation to

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polyglot peoples inhabiting the vast continent of Africa. ... [I]t makes the African writer's statement of principles and methods so much more open to challenge by any single discovery contrary to the generalisation which he must perforce indulge in at this stage of his enquiry. This naturally *places a special burden of responsibility on the writer on African customary law*, if he wishes to fulfil his obligation to scholarship and to Africa itself." Emphasis added. Elias *The Nature of African Customary Law* 1-2.

<sup>194</sup> Consequently, the term "customary law adoptions" will be used.

<sup>195</sup> For practical purposes, language, for example, may help identify someone as an "indigenous African" person. Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 25. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 21 for a brief discussion on the question of who is indigenous. S 1 of the *Protection, Promotion, Development and Management of Indigenous Knowledge Act* defines an "indigenous community" as "any recognisable community of people – (a) developing from, or historically settled in a geographic area or areas located within the borders of the Republic; (b) characterised by social, cultural and economic conditions, which distinguish them from other sections of the national community; and (c) who identify themselves as a distinct collective."

<sup>196</sup> See 1.3.3.

<sup>197</sup> It merely refers to "customary law". See, for example, s 211(3) of the *Constitution*.

<sup>198</sup> Living customary law was applied in *Mabena v Letsoalo* 1998 2 SA 1068 (T) (also referred to under 2.4.3.1 below). Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 44; The *Bhe* case para 111.

<sup>199</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 43.

<sup>200</sup> Also see Sibisi 2019 *Obiter* 341-342.

<sup>201</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 43.

legal language: these could never hope to present an accurate picture of the social reality.

"Living customary law", on the other hand, has always been seen as reflecting "an accurate picture of the social reality", to borrow from Rautenbach (ed), as it refers to the "rules actually observed by people in their everyday lives."<sup>202</sup> However, the fact that living customary law is by nature forever changing does not imply that these changes occur daily or "overnight".<sup>203</sup> In the *Bhe* case the Constitutional Court acknowledged that the problem with adaptations in living customary law is that they are "*ad hoc* and not uniform".<sup>204</sup> The court added:<sup>205</sup>

The difficulty lies not so much in the acceptance of the notion of 'living' customary law, as distinct from official customary law, but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights.<sup>206</sup>

In the context of the nature of living customary law, the Constitutional Court raised concerns about legal development on a case-by-case basis, which, among other concerns raised,<sup>207</sup> could prolong legal uncertainty regarding customary law rules.<sup>208</sup> However, it may be argued in the light of the constitutional dispensation that judicial precedent should indeed be viewed as an "authoritative" source of living customary law, even if it occurs on a piecemeal basis.<sup>209</sup> Rautenbach argues:<sup>210</sup>

Members of traditional communities who have the means to do so or who have access to legal aid prefer to settle their disputes in mainstream courts instead of using traditional dispute mechanisms. A culture of litigation sparked by the Constitution seems to be developing in traditional communities. Institutions and members of traditional communities are increasingly turning to the courts to litigate their issues. What does this mean, other than that they obviously trust the judiciary to solve their

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<sup>202</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 43. Also see the *Bhe* case paras 84-87 for a discussion of the contrasts between official and living customary law.

<sup>203</sup> "Once living law is reduced to writing, it becomes official customary law. Whether the official version reflects the living law will depend on the speed of change in societal practices; although difficult to keep track of it, it should be acknowledged that *they do not change overnight*." Sibisi 2019 *Obiter* 342. Emphasis added.

<sup>204</sup> The *Bhe* case para 87.

<sup>205</sup> The *Bhe* case para 109.

<sup>206</sup> As contained in chapter 2 of the *Constitution*, hereafter referred to only as the *Bill of Rights*.

<sup>207</sup> Namely that change will be very slow, and that there might be different solutions to similar problems. See the *Bhe* case para 112.

<sup>208</sup> The *Bhe* case para 112.

<sup>209</sup> Rautenbach 2019 *PELJ* 3.

<sup>210</sup> Rautenbach 2019 *PELJ* 12-13.

disputes? It would not be outrageous to argue that they regard case law as an authoritative source of customary law.

Rautenbach then goes on to say:<sup>211</sup>

When a mainstream court develops customary law to promote constitutional values or strikes customary law down for want of constitutionality, it creates new rules which are written down but which can easily be changed when society brings it to court and convinces the court that the rule needs to be changed.

Even though there might be an "ossification of customary law by precedent", it is possible to reverse or develop such precedent.<sup>212</sup> Rautenbach concedes that only by doing empirical research would one be able to tell whether communities regard case law as authoritative, but also states:<sup>213</sup>

It would be a conundrum to argue that they (community members) do not (regard case law as authoritative) while they seem to trust the mainstream courts enough to solve their customary law disputes.

Consequently, she concludes that case law in the context of customary law is binding, which is also essential for legal certainty.<sup>214</sup> The umbrella term "customary law" is used throughout this thesis, understanding that recent case law on customary law adoption may be regarded as a source of living customary law. It makes no sense to dismiss all written customary law as "official" and therefore not "living", but caution needs to be exercised when referring to older sources.<sup>215</sup>

### *1.3.3 Culture and race*

As mentioned earlier, "culture" is specifically referred to in the definition of customary law as contained in the *Reform Act*.<sup>216</sup> The Act defines customary law as:<sup>217</sup>

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<sup>211</sup> Rautenbach 2019 *PELJ* 16.

<sup>212</sup> Rautenbach 2019 *PELJ* 17.

<sup>213</sup> Rautenbach 2019 *PELJ* 17.

<sup>214</sup> See Rautenbach 2019 *PELJ* 16.

<sup>215</sup> In his work on the history of the Batswana, published in 1989, Breutz indicates that the publication is a result of "thirty years of field research". See the foreword in Breutz *History of the Batswana*. Surely one should be able to consider the source in the relevant context. It is conceded, though, that when dealing with apartheid legislation, for example, the background against which it was drafted must be borne in mind.

<sup>216</sup> See 1.3.2.

<sup>217</sup> Section 1 of the *Reform Act*. Emphasis added.

[T]he customs and practices observed among the indigenous African people of South Africa which form part of the *culture* of those people.

The possibility exists that a child of European descent raised by or adopted into an "African" family may identify as a person traditionally observing the customs and practices observed among the indigenous African people of South Africa, which form part of the culture of those people.<sup>218</sup> However, because of such a child's "race", s/he might not be viewed as an "indigenous African". In the light of South Africa's multicultural society and the reality of a past of racial segregation, it is essential to consider the concepts of "culture" and "race". The *Constitution* prohibits unfair discrimination<sup>219</sup> to the extent that discrimination on one or both grounds is presumed unfair unless established to be fair.<sup>220</sup> In the context of adoption, race (on its own) should not be relevant when determining the best interests of a child.<sup>221</sup>

"Customary law", as referred to in the *Reform Act* and as explained above,<sup>222</sup> is said to be the customs and practices that form part of the "culture" of the "indigenous African people of South Africa".<sup>223</sup> Neither the *RoCMA* nor the *Constitution* defines culture.<sup>224</sup> Ferreira calls "culture" an "extremely complex" and "multi-faceted" concept, which is "subject to change".<sup>225</sup> Culture has been defined as "the customary beliefs,<sup>226</sup> social forms, and material traits of a religious, or social group", as well as "the characteristic features of everyday existence (such as diversions or a way of life) shared by people in a place or time",<sup>227</sup> amongst other things. The *Protection, Promotion, Development and Management of Indigenous Knowledge Act*<sup>228</sup> defines "cultural and social identity" as<sup>229</sup>

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<sup>218</sup> As required by the definition of customary law in the *Reform Act*.

<sup>219</sup> Either directly or indirectly. See s 9(3) and 9(4) of the *Constitution*.

<sup>220</sup> Section 9(5) of the *Constitution*.

<sup>221</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 164.

<sup>222</sup> See 1.3.1.

<sup>223</sup> Section 1 of the *Reform Act*. Also see 1.3.1 above. For further discussion, see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 23-25 and the authorities cited.

<sup>224</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 21.

<sup>225</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 158, 161.

<sup>226</sup> For a discussion of the interplay between culture and African belief systems, see Amoah and Bennett 2008 *AHRLJ* 358-360.

<sup>227</sup> Merriam-Webster 2019 <https://www.merriam-webster.com/dictionary/culture>.

<sup>228</sup> 6 of 2019.

<sup>229</sup> Section 1.

The particular and distinctive identity or characteristics of a certain indigenous community<sup>230</sup> or of an individual as far as he or she is influenced by belonging to a certain indigenous community.

Ferreira further points out that culture "generally relates to the *traditions* and beliefs developed by a community".<sup>231</sup> She then proceeds to define "tradition" as follows:<sup>232</sup>

Tradition can thus be defined as the passing down of elements of a culture from generation to generation, especially by oral communication. When we speak of culture, we have to consider tradition at the same time, as tradition is basically the channel that passes on culture.

For some, a person's "race" might indicate whether such a person could be regarded as an "indigenous African". In the South African context, for instance, "indigenous African people" refers to "black" people.<sup>233</sup>

Ferreira states that "race and culture go hand in hand".<sup>234</sup> The Merriam-Webster online dictionary defines "race" as "a category of humankind that shares certain distinctive physical traits" but also "a family, tribe, people, or nation belonging to the same stock"<sup>235</sup> and "a class or kind of people unified by shared interests, habits, or characteristics".<sup>236</sup> Having considered various definitions of "race",<sup>237</sup> Ferreira concludes as follows:<sup>238</sup>

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<sup>230</sup> "Indigenous community" is also defined by the Act. See 1.3.2.

<sup>231</sup> Emphasis added. Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 161 and the authority cited. For a discussion of "culture", see Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 158-162 and the authorities cited.

<sup>232</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 162. For a brief discussion of "tradition and culture" see Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 162 and the authorities cited.

<sup>233</sup> For a brief discussion, see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 21 and the authorities cited. The *Law of Evidence Amendment Act* 45 of 1988 defines "indigenous law" as "the law of custom as applied by the *Black* tribes in South Africa". Emphasis added. For a critique of this definition, see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 20.

<sup>234</sup> See Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 158, 161.

<sup>235</sup> "Stock" refers to the descendants of one individual, for example, "family" or "lineage". See Merriam-Webster 2019 <https://www.merriam-webster.com/dictionary/stock>.

<sup>236</sup> Merriam-Webster 2019 <https://www.merriam-webster.com/dictionary/race>.

<sup>237</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 155-156.

<sup>238</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 156. For a discussion of "race" see Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 155-158 and the authorities cited.

From the definitions one can conclude that race is merely a matter of physical characteristics. It is something that we have no control over, and is determined by the genetics of our birth.

Therefore, unlike "culture", "race" focuses on the physical, although their meanings sometimes overlap. Yet, although these two notions go "hand in hand",<sup>239</sup> they remain two distinct concepts:<sup>240</sup>

Thus, whereas race is strictly a question of biological heredity, culture is essentially one of tradition in the broadest sense. Consequently, while race is an issue that can be determined in a fairly objective biological manner, determining culture is dependent on various issues and has to be ascertained by looking at the facts of each specific case.

"Culture" is a broader concept than race. Culture includes more than the merely physical. Bearing the above explanations in mind and without pursuing the intricacies of these concepts any further,<sup>241</sup> "culture" and "race" are used interchangeably in this thesis.

#### *1.3.4 Common law*

The term "common law" has different meanings. The first meaning refers to the origins of the common law legal tradition. It was a tradition founded on English law, which in turn found its way to the colonies of the British Empire. In England a distinction was made between laws common to the kingdom and laws that applied only to certain parts of the territory.<sup>242</sup> A second meaning refers to a law common to some geographical regions. This meaning is also reflected in the word "common" or "shared by" - there is more than one legal system in a specific area,<sup>243</sup> and it does not necessarily refer to common law founded upon English law. A third meaning refers to law originating from sources other than legislation.

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<sup>239</sup> See Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 158.

<sup>240</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 163.

<sup>241</sup> Whilst realising that "culture" and "race" are not necessarily to be treated as synonyms, to investigate this issue further – for the purposes of this thesis - would be superfluous.

<sup>242</sup> Thomas 2005 *TSAR* 293.

<sup>243</sup> Kavanagh (ed) *South African Concise Oxford Dictionary* 232.

In a South African context, though, it is generally accepted that the common law comprises Roman-Dutch law,<sup>244</sup> adapted and developed through judicial decisions and legislation.<sup>245</sup> South African common law is not the same as English common law.

Also, contrasting "customary law" with "common law" means contrasting African and Western values. Common law includes legal sources such as case law and legislation infused with Western values, which apply to all South Africans equally; otherwise put, which are common to all South Africans. Therefore, common law excludes situations where customary law is applicable or legislation specifically dealing with customary law applies. Customary law is of limited application – it applies only under specific conditions, while common law is the law of general application.

Since adoption was not acknowledged in Roman-Dutch law, it has been provided for in legislation since 1923.<sup>246</sup> Therefore, any reference to "common law adoptions" is, in fact, "adoption as regulated by statute". In this thesis "common law adoptions" and "adoptions as regulated by the *Children's Act*" mean the same thing. The meaning of "adoption" is considered next.

### 1.3.5 Adoption

According to Ibraheem:<sup>247</sup>

Adoption is the taking of a child of a known or unknown parentage, but known for sure not to be that of the adopter as his or her own child. Adoption takes different forms and may be done under statutory or customary laws.

One exception to the above definition is where a natural child's parent<sup>248</sup> adopts such a child. For example, an "illegitimate" child previously formed part of the mother's family, but may be adopted by the biological father. The general definition of adoption

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<sup>244</sup> As influenced by English law. (At the Cape, British colonial rule commenced in 1795. Dutch rule was briefly restored between 1803 and 1806.) "Roman-Dutch law" refers to the substantive law of Holland from the mid 15<sup>th</sup> to the early 19<sup>th</sup> century, the content of which is mainly determined from the expositions of the institutional Dutch writers. Schäfer 2008 *Tijdschrift voor Rechtsgeschiedenis* 134.

<sup>245</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 13.

<sup>246</sup> Van der Walt 2014 *Obiter* 430.

<sup>247</sup> Ibraheem 2013 *Journal of Law, Policy and Globalization* 7.

<sup>248</sup> As stated, "natural" parent (or child) and "biological" parent (or child) are used interchangeably in this thesis. In other words, in context the concepts "natural" and "biological" are used as synonyms.

provided by Ibraheem is in a Nigerian context, but adoptions in South Africa also occur variously under statute<sup>249</sup> or customary law.<sup>250</sup> Therefore, adoption means that an adopted child is legally considered to be the child of the adoptive parents.<sup>251</sup>

The *Children's Act* stipulates that:<sup>252</sup>

A child is adopted if the child has been placed in the permanent care of a person in terms of a court order.

The effect of an adoption order includes the termination of all parental responsibilities and rights that any person had immediately before the adoption, and the conferment of full parental responsibilities and rights for such a child on the adoptive parent.<sup>253</sup> An adopted child must, for all purposes, be regarded as the child of the adoptive parent, and an adoptive parent must, for all purposes, be regarded as the adopted child's parent.<sup>254</sup> Therefore, common law adoption alters the child's status and transfers the child from one family to another.<sup>255</sup>

Although not practised by "all peoples in southern Africa",<sup>256</sup> according to Maithufi customary law adoption is a process with legal consequences similar to those of adoption in the common law.<sup>257</sup> It entails the adopted child's becoming a child of the adoptive parent(s) or family<sup>258</sup> and the adoptive parent(s) assuming responsibility for maintaining the adopted child.<sup>259</sup> Therefore, it has been said that adoption in customary law also alters the child's status.<sup>260</sup> However, as illustrated earlier in this chapter, compared to common law adoption, customary law adoption continues to be

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<sup>249</sup> The *Children's Act*.

<sup>250</sup> See Ibraheem 2013 *Journal of Law, Policy and Globalization* 7.

<sup>251</sup> Boezaart *Law of Persons* 99.

<sup>252</sup> Section 228 of the *Children's Act*.

<sup>253</sup> Refer to s 242 of the *Children's Act* for the full effect of an adoption order in terms of the Act.

<sup>254</sup> Section 242(3) of the *Children's Act*.

<sup>255</sup> Boezaart *Law of Persons* 127.

<sup>256</sup> For example, the Zulu and Swazi. See Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 377 and the authorities cited; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 114 and the authority cited.

<sup>257</sup> See Maithufi 2001 *De Jure* 391.

<sup>258</sup> Maithufi 2001 *De Jure* 392. See s 242(3) of the *Children's Act*.

<sup>259</sup> Maithufi 2001 *De Jure* 392. See s 242(2)(a) of the *Children's Act*.

<sup>260</sup> See, amongst other things, Bekker *Seymour's Customary Law in Southern Africa* 236; Maithufi 2001 *De Jure* 391. Also see Van der Walt 2014 *Obiter* 433 for confirmation that adoptions under the common law and under statute have a profound effect on status.

plagued by uncertainty and inequality, and its legal implications must be further explored.

In terms of this study, "adoption" refers to when a child is legally and permanently transferred to his or her adoptive parent(s) or family, who, for all intents and purposes, assume(s) parental rights and responsibilities in respect of the child. Generally adoption means that the child is not to return to the biological parents and that s/he does not keep his or her original legal status or family name, or such rights and duties as may have been acquired in the former family.<sup>261</sup> As discussed above, legally adopted children have a right to claim maintenance from and to be considered intestate heirs of their adoptive parents.<sup>262</sup> An exception, as stated above, is when a biological parent legally adopts her or his own child, which can occur. Another exception includes so-called "open adoptions" as regulated by the *Children's Act*, which are referred to in the discussion of the *Flynn* case above<sup>263</sup> and further discussed in chapter 4.

Adoption must be distinguished from fostering or social parentage.

### *1.3.6 Fostering and social parentage*

In the light of the "general responsibility" of the African extended family for its "common children",<sup>264</sup> not all African children are raised by their biological parents.<sup>265</sup> Many African children have so-called "foster parents".<sup>266</sup> According to Bennett and Peart, fostering is "ubiquitous" in Southern Africa:<sup>267</sup>

Children may be sent to live with relatives, neighbours or close friends for various reasons: the child's parents might be too poor to raise it; there might be no woman

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<sup>261</sup> Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 377-378; Maithufi 2001 *De Jure* 392. "Fosterage is concerned with flexibility and adaptability of families who are able to respond quickly to economic and social exigencies, and to build important social ties across extended social networks that are consolidated by exchanging a child." Henderson "Questions on Fostering: An Anthropologist's Perspective" 15 and the authority cited.

<sup>262</sup> See 1.2.2, 1.2.3.

<sup>263</sup> See 1.2.2.

<sup>264</sup> Discussed in chapter 2.

<sup>265</sup> For example, where a child lives with relatives in order to attend a particular school. Rwezaura and Wanitzek 1988 *JAL* 155-156.

<sup>266</sup> Bekker 2008 *Obiter* 399; Rwezaura and Wanitzek 1988 *JAL* 155-156.

<sup>267</sup> Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 377 and the authority cited. Also see Bekker 2008 *Obiter* 399, where it is stated that "social parentage is widespread".

available to look after a child on breakup of a marriage; the foster parent might be lonely or might need help to run a household.

Consequently, as fostering (or "social parentage") is a general occurrence among African people, it is essential to distinguish it from customary law adoptions.

Fostering may be distinguished from adoption because, in the former cases, it is understood that the child will return to his or her biological parents.<sup>268</sup> "Foster children" retain their original legal status, family name, rights, and duties acquired by birth in their fathers' families.<sup>269</sup> Although under the "custody and control" of the foster parent, the latter does not permanently obtain the rights and responsibilities of parenthood.<sup>270</sup> Consequently, Maithufi states:<sup>271</sup>

Adoption should be distinguished from fostering in terms of customary law. Fostering does not affect the status of a child whereas adoption does, in the sense that the adopted child becomes a member of the family of the adoptive parent(s).

The *Children's Act* describes "foster care" as care of a child as per section 180(1) of the Act, including foster care "in a registered cluster foster care scheme".<sup>272</sup> Section 180(1) stipulates:

A child is in foster care if the child has been placed in the care of a person who is not the parent or guardian of the child as a result of (a) an order of a children's court; or (b) a transfer in terms of section 171.<sup>273</sup>

"Foster parent" is defined as follows:<sup>274</sup>

A person who has foster care of a child *by order of the children's court*, and includes an active member of an organisation operating a cluster foster care scheme and who has been assigned responsibility for the foster care of a child.

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<sup>268</sup> Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 377-378; Maithufi 2001 *De Jure* 392; Henderson "Questions on Fostering: An Anthropologist's Perspective" 15 and the authority cited.

<sup>269</sup> Bekker 2008 *Obiter* 399.

<sup>270</sup> Bekker 2008 *Obiter* 399; Monye 2017 *Journal of Law, Society and Development* 5 and the authority cited.

<sup>271</sup> Maithufi 2001 *De Jure* 392.

<sup>272</sup> Section 1 of the *Children's Act*. A "cluster foster care scheme" is "a scheme providing for the reception of children in foster care, managed by a non-profit organisation and registered by the provincial head of social development for this purpose." Chapter 12 of the Act is dedicated to foster care.

<sup>273</sup> Section 171 provides for the transfer of a child from one form of alternative care to another form of alternative care. This is done in writing by the relevant provincial head of social development.

<sup>274</sup> Emphasis added. See s 1 of the *Children's Act*.

Nhlapo submits that the customary law parent-child relationship "characterised by the 'movement' of children' to someone other than the biological parent is to be called 'social parenthood' instead."<sup>275</sup> He explains that while it "sometimes" means moving a child to another residence, it may also be "notional", for example, as in the case of "a child's ritual attachment to a godparent".<sup>276</sup> "Social parentage" is a broader concept than fostering. "Foster care" requires formalities such as a court order or written document issued by the relevant provincial head of social development. "Social parentage" may include "factually" caring for a child in customary law without the child's being transferred to the caregiver's family. "Care-giver" is described as follows by the *Children's Act*:<sup>277</sup>

Any person other than a parent or guardian, *who factually cares for a child and includes*

- (a) a *foster parent*;
- (b) a *person who cares for a child with the implied or express consent of a parent or guardian of the child*;
- (c) a person who cares for a child whilst the child is in temporary safe care;
- (d) the person at the head of a child and youth care centre where a child has been placed;
- (e) the person at the head of a shelter;
- (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and
- (g) *the child at the head of a child-headed household ...* .<sup>278</sup>

Rwezaura and Wanitzek go further to state that "formal"<sup>279</sup> foster care is<sup>280</sup>

concerned with those children who are not beneficiaries of the care provided by the extended family.

Therefore, there seems to be no reason why what some have dubbed "fostering" in customary law cannot be known as "social parentage" too. It is unnecessary to venture further into the meanings of fostering and social parentage. Though "social parentage

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<sup>275</sup> Nhlapo "Biological and Social Parenthood in African Perspective: The Movement of Children in Swazi Family Law" 36; Bekker 2008 *Obiter* 399.

<sup>276</sup> Nhlapo "Biological and Social Parenthood in African Perspective: The Movement of Children in Swazi Family Law" 36; Bekker 2008 *Obiter* 399.

<sup>277</sup> Section 1 of the *Children's Act*. Emphasis added.

<sup>278</sup> A child caregiver does not have legal capacity in terms of common law or in terms of the *Children's Act*. Bekker 2008 *Obiter* 398.

<sup>279</sup> Foster care in terms of legislation.

<sup>280</sup> Rwezaura and Wanitzek 1988 *JAL* 158.

in customary law" is preferred, the terms "social parentage in customary law" and "fostering in customary law" are used interchangeably.

Social parentage implies that the meaning of "parent" must be considered. More importantly, it is necessary to establish the meaning of "parent(s)" as those competent to provide consent for adoption.

### *1.3.7 Parent*

In common law the consent of both biological<sup>281</sup> parents is necessary before their child may be adopted. In common law, when one refers to a "parent" one is generally referring to a child's biological father or mother. The *Children's Act* describes a "parent"<sup>282</sup> as including the adoptive parent of a child but excluding:<sup>283</sup>

- (a) the biological father of a child conceived through the rape of or incest with the child's mother;
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated.

A person granted parental responsibilities and rights regarding a child is not explicitly identified as a parent.<sup>284</sup>

The *Customary Initiation Act*<sup>285</sup> describes a "customary guardian" as<sup>286</sup>

Any person other than a parent or legal guardian who, in terms of the customs of a particular community, accepts parental responsibility for a child, including the responsibilities referred to in section 18 of the *Children's Act*.<sup>287</sup>

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<sup>281</sup> Or "natural". Used interchangeably.

<sup>282</sup> In relation to a child. S 1 of the *Children's Act*.

<sup>283</sup> Section 1 of the *Children's Act*.

<sup>284</sup> However, section 1 of the *Children's Act* does interpret a "party, in relation to a matter before a children's court" to mean or include "a person who has parental responsibilities and rights in respect of the child". Other parties include the child involved in the matter, a parent, a prospective adoptive or foster parent of a child, the department or a designated child protection organisation, and any other person admitted or recognised as such by the court.

<sup>285</sup> *Customary Initiation Act* 2 of 2021 (the *Customary Initiation Act*).

<sup>286</sup> Section 1 of the *Customary Initiation Act*.

<sup>287</sup> Responsibilities referred to in s 18 of the *Children's Act* include caring for and maintaining contact with a child, acting as a guardian of a child, and contributing towards a child's maintenance. See s 18(2) of the *Children's Act*. S 18(3) of the *Children's Act* stipulates the responsibilities and rights of a guardian, including consenting to a child's adoption. See s 18(3)(c)(ii) of the *Children's Act*.

A "parent" or "legal guardian" is excluded from the description of "customary guardian", which points towards a "customary guardian" being a *de facto* guardian as opposed to a legal one.<sup>288</sup> On the other hand, the "customs of a particular community" suggest "customary law" and therefore that a "customary guardian" is in fact a legal guardian. Furthermore, for the purposes of initiation the "customary guardian" has the same responsibilities and rights as a "parent" or "legal guardian".<sup>289</sup> In its turn, section 18 of the *Children's Act* allows a child's guardian to give or refuse consent to adoption. Consequently, distinguishing between "legal guardians" and "customary guardians" undermines customary law's equal status and creates confusion.<sup>290</sup>

For now, the term "parent" will be assigned the meaning per the *Children's Act* - therefore, the biological and adoptive parents of a child.

### 1.3.8 Child

For child adoption purposes, the meaning of the term "child" is significant. The *Constitution* defines a child as a person below the age of eighteen years,<sup>291</sup> and the *Children's Act* contains a definition similar to that of the *Constitution*.<sup>292</sup>

Therefore, the statutory age of signifying the end of childhood might seem uncontested, but Bekker explains that in customary law childhood and adulthood are not viewed in chronological terms.<sup>293</sup> Instead, adulthood is often marked by circumcision (in respect of boys) and puberty (in respect of girls).<sup>294</sup> For Zulu boys, adulthood is a "gradual evolutionary process" rather than the occasion of being

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<sup>288</sup> Therefore, not a biological or legal parent or guardian.

<sup>289</sup> For example, "the parents or, where applicable, the legal or customary guardian" must decide, "together with the child concerned", whether the child must attend initiation school. See s 22(1) of the *Customary Initiation Act*.

<sup>290</sup> Jeffreys 1951 *African Studies* 181 also refers to a "cultural" parent in customary law: "...though normally the payer of the *ilobolo* is also the penile father of the child, he may at times be only the cultural father... - a position that also arises in cases of adoption." Also see the discussion of the African family in chapter 2 below.

<sup>291</sup> Section 28(3) of the *Constitution*. Previous adoption legislation has described a "child" as a person under the age of 19. See 2.3.4.2.

<sup>292</sup> Section 1 of the *Children's Act*.

<sup>293</sup> Bekker 2008 *Obiter* 398.

<sup>294</sup> Bekker 2008 *Obiter* 398.

circumcised.<sup>295</sup> Even though initiation ceremonies for boys and girls are widespread, there seem to be no general criteria for determining adulthood or majority status in customary law.<sup>296</sup>

In the *Motsepe* case the court indicated that in Sotho- and Nguni-speaking cultures, "a child most often refers to a person under the age of 14", before graduating to the next developmental stage.<sup>297</sup> Adulthood, as considered under customary law, might affect the requirements for a customary law adoption; for example, whether or not *oe gapa le namane* is "assumed".<sup>298</sup>

Bennett explains that in customary law children are "all persons who are not yet deemed independent heads of households". Property obtained by "a child" is either house or family property. Consequently, adulthood in customary law is relative, and the age is not specific. There is also evidence of adopting "adult" persons<sup>299</sup> under customary law. Monye states that "an adult man can be adopted into any family by giving a cow, a bull or an ox (*kgomo*)".<sup>300</sup> The age of an "adult man" is not stipulated by Monye and might differ between communities. Kimario describes customary law adoptions of adults in Tanzania to have an heir or adopt an outsider with special skills into the community.<sup>301</sup> In a Ugandan context, adopting adults includes:<sup>302</sup>

[T]he adoption of war captives (*abazaana*), adoption for marriage when one has not bridewealth (*akutendera*), and self-obligation (*okwehonga*) adoption where a man renounces his clan and begs to be adopted into another to avoid punishment for crimes (death) committed in his clan.

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<sup>295</sup> See Bekker 2008 *Obiter* 398 and the authority cited.

<sup>296</sup> Bekker 2008 *Obiter* 398.

<sup>297</sup> The *Motsepe* case para 13. Also see 1.2.3, 1.3.8.

<sup>298</sup> See discussion under 1.2.3 above.

<sup>299</sup> In modern terms at least, an adult person is a person eighteen years and older.

<sup>300</sup> Monye 2017 *Journal of Law, Society and Development* 2.

<sup>301</sup> "[I]t soon becomes apparent that many and sometimes the majority of the members do not trace actual descent from the founders but are descendants of men adopted into the group". Rwezaura and Wanitzek 1988 *JAL* 155 and the authority cited. Also see Kimario *Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element In the Best Interest of the Child?* 81 and the authority cited; Rwezaura and Wanitzek 1988 *JAL* 154. Another example is a brother-in-law from "a distant clan who came initially as a guest to help on a farm eventually accepting land and being "incorporated into" the community. Rwezaura and Wanitzek 1988 *JAL* 154.

<sup>302</sup> Kimario *Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element In the Best Interest of the Child?* 81 and the authority cited.

Another example of the adoption of adults is found amongst the Yakö people of Nigeria.<sup>303</sup>

Nevertheless, whilst being mindful of the relativity of adulthood in customary law and that adopting adult persons may be possible for several reasons,<sup>304</sup> in this thesis a "child" to be adopted will be thought to be a person under the age of eighteen years. Eighteen years corresponds with the definition in the *Constitution*. This study deals with "child" adoption only.

### 1.3.9 Status

The status<sup>305</sup> of customary law adoptions in the South African constitutional legal dispensation must be distinguished from the adopted child's status.<sup>306</sup>

#### 1.3.9.1 Status of the adopted child

"Status" refers to the adopted child's standing in the legal system and indicates the child's role or function in the eyes of the law.<sup>307</sup> "Status" can be defined as "the sum total of a legal subject's capacities."<sup>308</sup> Here, then, the sum total of the adopted child's capacities. "Capacities" include the legal capacity, the capacity to act, and the capacity

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<sup>303</sup> Children returning to maternal homes with their divorcee mothers remain in the community until they obtain adulthood. On attaining adulthood and by accepting "offers of land and of wives" these children are adopted into the maternal family. Rwezaura and Wanitzek 1988 *JAL* 154.

<sup>304</sup> Also see Kimario *Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element In the Best Interest of the Child?* 81.

<sup>305</sup> Derived from the Latin word *stare* ("to stand").

<sup>306</sup> A legal subject refers to an entity that has "legal subjectivity". Legal subjectivity may be described as "the characteristic that an entity needs to have in order to participate in legal intercourse as a subject and not an object." In South African law, all natural persons ("and some social entities that comply with certain legal requirements (legal persons)") are considered legal subjects. Consequently, a deceased person is not regarded as a legal person. In customary law, though, the question arises whether a widow, who maintains the status of a married woman (as customary marriage is not necessarily dissolved by death) to bear more children for her deceased's husband's house, may be regarded as a legal subject with legal subjectivity. Robinson, Horsten and Human *Introduction to the South African Law of Persons* 3, 6, 7. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 113.

<sup>307</sup> Boezaart *Law of Persons* 8 and the authority cited.

<sup>308</sup> Boezaart *Law of Persons* 7.

to act as a litigant. The existence and extent of these capacities determine an individual's legal status.<sup>309</sup> Put differently:<sup>310</sup>

The extent to which it is possible for a legal subject<sup>311</sup> to participate in legal intercourse is his or her status.

Adoption affects a person's status because the adopted person acquires legal capacities in a new family. An adopted child's capacities in his or her former family are terminated.<sup>312</sup>

#### 1.3.9.2 Status of customary law adoptions

The status of customary law adoptions refers to the legal standing of customary law adoptions in the South African legal system; therefore the "position or rank"<sup>313</sup> of customary law adoptions as against common law adoptions in South African law.

Though it is necessary to refer to the adopted child's status occasionally, this thesis focuses on the status of customary law adoptions - in particular, the "actual"<sup>314</sup> status of customary law adoptions.

### **1.4 Area of focus**

Under colonialism and during the apartheid era, legislation determined the limited circumstances in which customary law could be applied. It was considered inferior to common law and was generally applied only when the parties were African, and subject to a repugnancy clause. Under the *Constitution* customary law has the same status as common law, and courts must apply customary law when that law is applicable.

This chapter illustrates that challenges arise when adoption is applied differently in common and customary law. In the law of succession, a *de facto* adopted child cannot

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<sup>309</sup> Boezaart *Law of Persons* 2.

<sup>310</sup> Robinson, Horsten and Human *Introduction to the South African Law of Persons* 4.

<sup>311</sup> Therefore, a "carrier of juridical competencies, subjective rights and capacities". Robinson, Horsten and Human *Introduction to the South African Law of Persons* 5.

<sup>312</sup> An exception is cases of step-parent adoptions where the children stay in the same families but are adopted by step-parents. Still, where children would have previously not been intestate heirs of the step-parent, they will qualify as intestate heirs after adoption. See 1.3.5.

<sup>313</sup> Merriam-Webster 2019 <https://www.merriam-webster.com/dictionary/status>.

<sup>314</sup> As explained in 1.2.4.

inherit intestate from her or his *de facto* adoptive parent in the common law. On the other hand, the *Reform Act* seems to allow a *de facto* adopted child to inherit from his or her *de facto* adoptive parent in customary law. In the law of maintenance, the courts have been wary of attaching all of the consequences of common law adoptions to customary law adoptions. Case law shows that it is primarily maintenance and loss of support claims which have been allowed.<sup>315</sup> Customary law adoptions seem to be interpreted as *de facto*, too. Whether customary law adoptions are on the same legal footing as *de facto* adoptions in the common law must be determined; differentiating between customary and common law adoptions might undermine the status of customary law adoption.

Furthermore, as shown in the following chapters, cross-racial and cross-cultural marriages were prohibited by apartheid legislation, and segregation policies made such adoptions unlikely. After the *Constitution*, cross-racial and cross-cultural marriages and adoptions are more likely to occur, leading to conflict of laws disputes.<sup>316</sup> To illustrate: if a white male, for example, marries an African woman under common law but adopts her child through a customary law agreement, a dispute may arise regarding the applicable legal system. If the court finds itself bound to apply customary law to adoption, its legal implications must be clear, including those pertaining to succession and maintenance in particular. If not, customary law may be undermined.<sup>317</sup>

The legal implications of common law adoptions have been regulated since 1923, whereas customary law adoptions have not received much scholarly attention. Before the regulations for customary law adoptions are considered, the requirements and content of customary law adoptions must be analysed against the value systems (family and otherwise) within which customary law adoptions operate. Otherwise, regulation will result in paper law only.

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<sup>315</sup> Though in *Modisane v The Road Accident Fund* (71221/2011) [2013] ZAGPPHC 145 (30 May 2013) para 17, the court stated that "[t]his fatherhood (of the adopted father) *amongst others* attracts the duty to maintain each other", the court did not specify other duties of the adopted father. A maintenance claim against the Road Accident Fund was allowed. Emphasis added.

<sup>316</sup> See chapter 2.

<sup>317</sup> See chapter 3, specifically the evaluation of the status of the customary law of adoptions in 3.7.

An analysis of the *Children's Act* will further shed light on the legal implications of customary law adoptions. Though it does not explicitly say so, the *Children's Act* caters for common law adoptions only, despite being drafted under the *Constitution*. For legal certainty and equality before the law the regulation of customary law adoptions in the *Children's Act* has to be considered.

Determining the legal implications of customary law adoptions is the first step towards testing customary law adoptions against more specific constitutional principles such as the child's best interests. The *Constitution* determines that a child's best interests are paramount in all matters concerning the child.<sup>318</sup> However, apart from what the *Constitution* and the *Children's Act*<sup>319</sup> determine, this thesis does not scrutinise the standard of the best interests of the child. Instead, the legal implications of customary law adoptions must first be established. A study of the child's best interests is believed to be a study on its own.<sup>320</sup>

Therefore, the central research question in this study is: "What are the legal implications of customary law adoptions in South Africa?" The general objective is to investigate from a doctrinal perspective the legal implications of customary law adoptions in South Africa. To this end the following more specific objectives are pursued:

- a) Reviewing and contextualising the history and development of adoptions in South Africa;<sup>321</sup>
- b) Analysing the requirements and content of customary law adoptions in South Africa;<sup>322</sup>
- c) Determining whether customary law adoptions and common law adoptions enjoy equal status in South African law;<sup>323</sup> and

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<sup>318</sup> Section 28(2) of the *Constitution*.

<sup>319</sup> See chapter 4.

<sup>320</sup> See, for example, the doctoral thesis by Kimario titled "Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element In the Best Interest of the Child?".

<sup>321</sup> Discussed in chapter 2.

<sup>322</sup> Discussed in chapter 3.

<sup>323</sup> Through comparison with the *Children's Act*. Discussed in chapter 4.

- d) Analysing the *Children's Act* as the most appropriate to provide for customary law adoptions.

#### *1.4.1 Hypothesis and assumptions*

The regulation of customary law adoptions would help to fulfil the collective duty of advancing the spirit and purpose of the *Constitution*, specifically concerning the status of customary law in the South African legal system and the right to equal treatment under the law.

In this study, the following assumptions are made:

- a) customary law (its living and official versions) is recognised as a part of South African law, on a par with the common law;
- b) the *Constitution* recognises customary law as a legal system to be applied by the South African courts;
- c) common law adoptions are regulated by the *Children's Act* 38 of 2005; and
- d) the *Children's Act* 38 of 2005 does not regulate adoptions under customary law.

The Constitutional Court has warned against viewing customary law through a common law lens instead of a constitutional one.<sup>324</sup> Every effort will be made not to fall into this trap.

### **1.5 Research methodology**

This study is a desktop review of both primary and secondary sources. The former include relevant legislation and case law, while the latter involve scholarly works such as textbooks, journal articles, reports and electronic material relevant to the topic. As per the title, the focus is on South African law. Some references to customary law adoptions in other African countries are necessary.

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<sup>324</sup> The *Alexkor* case para 51.

A historical, descriptive analysis of common law adoptions is conducted, followed by a critical analysis of customary law adoptions in context. An analysis of the *Children's Act* further clarifies the legal implications of customary law adoptions.

### **1.6 Limitations of the study**

Customary law is essentially an uncodified and non-unified living legal system. Therefore, not conducting qualitative empirical research could be a limitation of this study. However, relevant, authoritative published studies for which qualitative empirical research was performed and published studies from an anthropological perspective are also used. Furthermore, an empirical research method would have restricted the study to a particular community or geographic area. In contrast, this study makes general observations on the legal implications of customary law in South Africa.

A further limitation that could be identified is the research method's not being explicitly comparative. Though relevant, authoritative published studies on customary law adoptions in other African countries such as Tanzania are considered in this thesis. The South African constitutional dispensation is already formally dualistic due to the *Constitution's* recognition of the equal status of common and customary law.<sup>325</sup>

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<sup>325</sup> State recognition of customary law is still lacking in many countries. Cuskelly states that though the "highest level of recognition of customary law is found in African constitutions", of the fifty-two African constitutions she analysed in her research, thirty-three make reference to customary law merely "in some form". Many constitutions provide for the "recognition of traditional and customary institutions", as with Ghana's "national house of chiefs and regional houses of chiefs" with its "specific duties in relation to customary law", and Namibia's council of traditional leaders", which advises the country's president on "communal land" in particular. The Swazi constitution refers to "Swazi law and custom" specifically for administering traditional government. Other examples of African constitutions providing for traditional institutions include Botswana's "house of chiefs" and Madagascar's "customary dispute resolution body". In Kenya "traditional dispute resolution mechanisms" by "courts and tribunals" are promoted along with the "representation of and participation by marginalized communities" in government institutions. In Somalia the "involvement of traditional leaders when appointing members of parliament" is promoted. Angola, too, provides that "local government" must include "traditional authorities". In the Democratic Republic of the Congo, courts "shall apply customary law not contrary to public order"; and, in several other African countries, including Namibia, "a clear preference for statutory law" is detected. In Sudan "custom shall be the source of nationally enacted legislation." Furthermore, "customary law jurisdiction is sometimes expressly limited to civil cases and excluded from operation in criminal cases." In Nigeria, though, justices of the supreme court and court of appeal must study customary law, while in Swaziland some customary law matters are removed from high court jurisdictions. Swaziland

Therefore, comparisons with common law are already fairly unavoidable. Comparisons with common law adoptions – as provided for in the *Children's Act* – are necessary to this thesis, especially since the Act was drafted to afford children their constitutional rights in various legal fields including adoption. Furthermore, due to the pluralistic nature of customary law itself, considering specific cultures, different customs, albeit to a limited extent, is also – and rightly so – unavoidable.

### **1.7 Outline of the study**

In determining the legal implications of customary law adoptions, the rest of this thesis is structured as follows:

**Chapter 2: Contextual background: Adoption in South Africa** – It becomes apparent that an understanding of both common and customary law adoption is needed. Consequently chapter 2 traces the history and development of common law adoption, mainly through legislation. The chapter then turns to African values and the workings of the African family, which must be understood before conceptualising customary law adoption.

**Chapter 3: Conceptualising customary law adoption** – The chapter delineates the purpose, requirements and forms of customary law adoption. The status of customary law adoption is also determined. A critical analysis of judicial interpretation

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also provides for customary law to be interpreted according to the constitution and provides for "a special procedure for adopting legislation that would affect them (customary laws)". In Malawi "due regard" must be given to the constitution when applying and developing customary law. On the other hand, states Cuskelly, the "weakest level of recognition" is to be found in, amongst others, Chad and Ethiopia, where customary law is recognised in family or personal law scenarios only. Chad's "constitution provides that customary rules are applicable only in the communities they are recognised in until they are codified". Cameroon "simply recognizes rights of indigenous populations, cultural rights and fundamental rights as recognised by customs." Cuskelly also lists the South African *Bill of Rights* as a restriction to developing customary law, not being cognisant that in South Africa the *Constitution* is a product of years of negotiations between various political parties. She does state, though, that "South Africa gives concurrent jurisdiction to both national and provincial legislatures over customary law." She lists s 211(3) of the *Constitution* in a table which provides sections and articles contained in various countries' constitutions, but does not explain that s 211(3) elevated the status of customary law to the same as that enjoyed by common law – with both having to adhere to the *Constitution*. See Cuskelly *Customs and Constitutions: State Recognition of Customary Law Around the World* 6-11 along with the table included as annex A. The table includes various regions, naming their constitutions along with the "scope" of some of their provisions. Africa is covered from pp 31-47.

is done, identifying specific legal implications of customary law adoptions. The discussion in the chapter makes it evident that there is a need for the regulation of customary law adoption. This leads to an analysis of the *Children's Act* in chapter 4.

**Chapter 4: The *Children's Act*: An analysis** – The chapter analyses relevant sections of the *Children's Act*, showing that it is the appropriate legislation to regulate customary law adoptions, and reveals more legal implications of customary law adoptions.

**Chapter 5: Conclusion and Recommendations** – A conclusion and recommendations are provided on the basis of the theory, conceptualisation and critical analysis provided in the previous chapters.

## Chapter 2 Contextual background: Adoption in South Africa

### 2.1 Introduction

Whether done formally or informally, adoption is an age-old practice.<sup>1</sup> Early examples are found in the writings of the Greeks, Egyptians and Romans.<sup>2</sup> Roman mythology includes the legend of Romulus and Remus, in which a she-wolf found the twins in a basket on the banks of the Tiber River.<sup>3</sup> They were suckled by the she-wolf, fed by a woodpecker, and finally fostered by a shepherd and his wife.<sup>4</sup>

As pointed out in chapter 1, because adoption practices in customary law initially resembled *adoptio* from early Roman law, some authors argue that "adoption cannot be considered an established practice of customary law".<sup>5</sup> Nevertheless, adoption in customary law is a reality and takes various forms.<sup>6</sup>

This chapter contextualises the current legal position regarding adoption in South Africa by investigating the theoretical foundations of adoption under Roman, South African common, and customary law. Roman law is discussed first, followed by the history of South African common law adoption - specifically legislation promulgated in this regard. Lastly, customary law adoption is contextualised by referring to certain African values and the African family. Introducing the reader to the latter is crucial to ensure a proper understanding of customary law adoption and ultimately the legal implications of customary law adoption. As Spiller said:<sup>7</sup>

We will ... consider persons, for it is pointless to know the law if those for whom it was established are not known.

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<sup>1</sup> See, for instance, Ferreira 2007 *Fundamina* 1; Van der Walt 2014 *Obiter* 421; Rwezaura and Wanitzek 1988 *JAL* 153.

<sup>2</sup> Van der Walt 2014 *Obiter* 421.

<sup>3</sup> Van der Walt 2014 *Obiter* 424.

<sup>4</sup> Van der Walt 2014 *Obiter* 424.

<sup>5</sup> See 1.2.1 above. The history and "principles" of Roman law have been compared to those of customary law. See, for example, Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 46-47 and the authorities cited.

<sup>6</sup> See 1.2.1 above.

<sup>7</sup> Spiller *A Manual of Roman Law* 47.

## **2.2 Roman law adoption**

### *2.2.1 Introduction*

A discussion of Roman law adoption is relevant for both South African common law and customary law. Roman law seems to be one of the systems<sup>8</sup> considered in formulating the New Zealand adoption legislation, on which the initial South African legislation was modelled,<sup>9</sup> and customary law adoption has been compared to Roman law *adoptio*. Consequently, a discussion of Roman law adoption would be pertinent.<sup>10</sup>

### *2.2.2 The Roman family*

To understand adoption and the law governing it (whether Roman, common or customary law), one must first establish the particular family dynamics within which the practice originated.

Early Roman law regarded a man as a member of a particular group, not as an individual.<sup>11</sup> The family group consisted of persons tied together through agnatic<sup>12</sup> relations, including collateral relatives of each *paterfamilias* and their descendants.<sup>13</sup> The smallest recognised group was the family or *familia*.<sup>14</sup> Similar to customary marriage in the African extended family, the "source and the centre" of the Roman *familia* was marriage, which was aimed at procreating and maintaining the family.<sup>15</sup>

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<sup>8</sup> American, German and French legislation might also have been considered. See Ferreira 2007 *Fundamina* 9 for a brief discussion.

<sup>9</sup> See Ferreira 2007 *Fundamina* 9.

<sup>10</sup> Adoption practices in customary law initially resembled early Roman law adoption. See 1.2.1 above.

<sup>11</sup> Van der Walt 2014 *Obiter* 423. Being regarded as a member of a group in Roman law may be compared to the similar situation in customary law, where the focus is also more on the group than the individual per se. See 2.4.3.3 and chapter 3.2.

<sup>12</sup> Or "*agnatid*", which has been described as "(a) 'blood relations' (*cognati*), traced solely through males, excluding such cognates as had left the family by emancipation or otherwise, and (b) such persons, unrelated by blood, as had been brought artificially into the family". Prichard *Leage's Roman Private Law founded on the Institutes of Gaius and Justinian* 96-97. Also see Van der Walt 2014 *Obiter* 423 for an explanation.

<sup>13</sup> Van der Walt 2014 *Obiter* 423.

<sup>14</sup> Van der Walt 2014 *Obiter* 423.

<sup>15</sup> Spiller *A Manual of Roman Law* 60. Some similarities may be drawn between Roman marriage in early Roman law and customary marriages, such as the non-involvement of state officials, the fact that registration of the marriage is not a requirement and that "no prescribed form" is required,

In the classical period<sup>16</sup> and beyond, a son under paternal control (*patria potestas*) had to agree to a betrothal before marriage.<sup>17</sup> A daughter could go against her father's will in certain circumstances only.<sup>18</sup> In addition, prenuptial negotiations usually took place to arrive at a dowry (*dos*) agreement.<sup>19</sup> Although providing a *dos* was not a validity requirement for a marriage, it served as important evidence that a marriage had occurred.<sup>20</sup> The bride gave the *dos* to the groom as a contribution to household expenses or maintenance.<sup>21</sup> The *dos* as governed by strict social and moral obligations and was made available to the bride by her father or another paternal ascendant.<sup>22</sup> By law, the *dos* became part of the husband's estate. However, later<sup>23</sup> the husband's dealings with the *dos* were legally restricted<sup>24</sup> in the light of the increase in divorce and remarriage. The *dos* also had to be restored on the termination of a marriage.<sup>25</sup> In customary law, instead of negotiations about a *dos*, *ilobolo* negotiations also start before a customary marriage, later serving as proof of the marriage. At divorce, a return thereof might be required. In opposition to Roman law, *ilobolo* is provided by a man or his family to the bride's father.<sup>26</sup> *ilobolo*, amongst other things, transfers procreation rights to the husband's family, and as shown below, is particularly important for certain forms of customary law adoption.<sup>27</sup>

In Rome a party had the general legal capacity to marry if (s)he was a Roman citizen and of age.<sup>28</sup> At the time, any person of or above puberty was deemed to have attained

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etc., though differences are also detected, such as that a Roman marriage was monogamous only. See Madlingozi and Field (eds) *Introduction to Law and Legal Skills in South Africa* 64 and the discussion later in this paragraph; See Van der Walt 2014 *Obiter* 424.

<sup>16</sup> 27 BCE – 284 CE. See Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 78.

<sup>17</sup> Spiller *A Manual of Roman Law* 60.

<sup>18</sup> Such as where the person selected by the father was "unworthy on account of his habits" or "of infamous character". Spiller *A Manual of Roman Law* 61.

<sup>19</sup> Spiller *A Manual of Roman Law* 61.

<sup>20</sup> As opposed to an informal liaison or a concubinary relationship. Spiller *A Manual of Roman Law* 61.

<sup>21</sup> Spiller *A Manual of Roman Law* 61-62.

<sup>22</sup> Subject to certain conditions, the dowry could also come from another source. Spiller *A Manual of Roman Law* 62.

<sup>23</sup> Especially towards the end of the Republican era. Spiller *A Manual of Roman Law* 62.

<sup>24</sup> Spiller *A Manual of Roman Law* 62.

<sup>25</sup> Spiller *A Manual of Roman Law* 62.

<sup>26</sup> Instead of the other way around.

<sup>27</sup> See, for example, 2.4.3.1; 3.4.1.

<sup>28</sup> Spiller *A Manual of Roman Law* 63.

majority.<sup>29</sup> Various circumstances prevented parties from intermarrying,<sup>30</sup> and marriage between an adoptive parent and an adopted descendant was prohibited.<sup>31</sup> Adulthood in customary law is also gradually attained through puberty. Customary law determines the "prohibition of a customary marriage between persons on account of their relationship."<sup>32</sup> Marriage between an adoptive parent and an adopted child is also prohibited in customary law. Van Heerden, Skelton and Du Toit (eds) note that a "general rule" of customary law is that:<sup>33</sup>

[P]eople with the same ancestral surname or clan are not permitted to marry each other even if they are not biologically related to each other.

A *familia* constituted a religious entity that worshipped the deities of the particular household.<sup>34</sup> It was crucial to continue the family name and unit and preserve the cult of the domestic deities.<sup>35</sup> In customary law one belongs in a particular family. Consequently, before another family adopts a child, certain rituals might be necessary to avoid angering the ancestors.<sup>36</sup>

The *familia* comprised the *paterfamilias* as the family head and all those under his control,<sup>37</sup> who included his wife (in a marriage with *manus*, or *cum manu*),<sup>38</sup> (unemancipated) children, bondsmen and enslaved people,<sup>39</sup> as well as grandchildren and further descendants from the marriages of sons under paternal control.<sup>40</sup> In traditional customary law the husband represents his household and is obliged to

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<sup>29</sup> Initially, puberty was determined by physical examination. Later the age was fixed at twelve for girls and fourteen for boys. Spiller *A Manual of Roman Law* 63. In this regard, also see the *Motsepe* case, discussed in 3.4.1, where a distinction is made between adoptions of children younger and those older than fourteen years. Also see 1.3.8.

<sup>30</sup> Spiller *A Manual of Roman Law* 63.

<sup>31</sup> Spiller *A Manual of Roman Law* 65.

<sup>32</sup> By "blood or affinity". S 3(6) of the *RoCMA*.

<sup>33</sup> Van Heerden, Skelton and Du Toit (eds) *Family Law in South Africa* 212. Also see the discussion of the importance of naming a child in customary law later in this chapter in 2.4.3.3.

<sup>34</sup> Van der Walt 2014 *Obiter* 423.

<sup>35</sup> Van der Walt 2014 *Obiter* 423.

<sup>36</sup> Depending on the community. Also see 2.4.3.3.

<sup>37</sup> Van der Walt 2014 *Obiter* 423.

<sup>38</sup> The power of the husband or the head of the family over the wife. See Thomas *Introduction to Roman Law* 143. The wife assumed a status comparable to that of a daughter of her husband. The wife, for instance, had the same rights of succession as her daughter in respect of the husband. See Prichard *Leage's Roman Private Law founded on the Institutes of Gaius and Justinian* 101.

<sup>39</sup> Van der Walt 2014 *Obiter* 423.

<sup>40</sup> Thomas *Introduction to Roman Law* 137.

maintain members in his household. Females have limited, if any, input in important family matters such as marriages and adoptions and do not have a right to inherit. The consent of mothers, along with unmarried fathers, to the adoption of their children is scrutinised later in this thesis.<sup>41</sup>

In Rome so-called "illegitimate" children were considered *sui iuris* (independent)<sup>42</sup> at birth,<sup>43</sup> meaning that they did not fall under paternal control. However, a person could be brought *in potestate* in certain ways, including through adoption.<sup>44</sup> Adopted children were deemed part of the *familia*.<sup>45</sup> In customary law a child born out of wedlock belongs to the maternal side. In this regard, "*umlanjwane yingane kaninalume*" is discussed later.<sup>46</sup> A child can become part of her or his father's family through adoption by the unmarried father.<sup>47</sup>

It might seem that the Roman family setup corresponded with the modern-day nuclear family (a husband, wife and their unmarried children "living together as a single conjugal group").<sup>48</sup> However, from a legal perspective the Roman *familia* differed from the nuclear family in several respects.<sup>49</sup> For example, the wife became a legal part of the *familia* only in the case of a marriage with *manus*.<sup>50</sup> Legally, she remained part of her own family in the event of a marriage without *manus* (*sine manu*).<sup>51</sup> Moreover, the *paterfamilias* retained authority over his descendants until he or his offspring died.<sup>52</sup> The roots of this system of lifelong authority may be found in the days when the Romans lived in extended families of several conjugal groups,<sup>53</sup> each under a common head.<sup>54</sup> The Roman family setup can therefore rather be said to correspond with the African family setup in many respects, as I have already started to show. Remember

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<sup>41</sup> See 3.3.1.1.

<sup>42</sup> Thomas *Introduction to Roman Law* 136.

<sup>43</sup> Thomas *Introduction to Roman Law* 137.

<sup>44</sup> Thomas *Introduction to Roman Law* 139.

<sup>45</sup> Thomas *Introduction to Roman Law* 137.

<sup>46</sup> See 3.4.2

<sup>47</sup> See, for example, 1.2.1, 3.4.

<sup>48</sup> Spiller *A Manual of Roman Law* 59.

<sup>49</sup> Spiller *A Manual of Roman Law* 59.

<sup>50</sup> Spiller *A Manual of Roman Law* 60.

<sup>51</sup> Spiller *A Manual of Roman Law* 60.

<sup>52</sup> Spiller *A Manual of Roman Law* 60.

<sup>53</sup> Spiller *A Manual of Roman Law* 60.

<sup>54</sup> Spiller *A Manual of Roman Law* 60.

that various historical events and legal developments have influenced and altered customary law. African communities also adapt their laws to adjust to modern needs. The African family is discussed extensively later in this chapter but Roman law adoption is discussed before this is done, as customary law adoption practices have been said to correspond with Roman law *adoptio*.

### 2.2.3 Roman law adoption: *Adrogatio* and *adoptio*

Roman law adoption was "the voluntary acquisition of *potestas* over persons not part of a family".<sup>55</sup> Its purpose was to continue the *familia*, its name and the cult of its ancestors.<sup>56</sup> Therefore, adoption was used to prevent a *familia* from becoming extinct<sup>57</sup> and was common practice for noble families facing extinction due to infertility.<sup>58</sup> As such, dynastic adoption was "aimed at serving the needs of the adoptive parent and family",<sup>59</sup> while it also presented any father with a "spare son" to potentially link his family to a noble house.<sup>60</sup> It has been said that in customary law the original purpose of adoption was to provide a son to a family that would otherwise become extinct – focussing on the interests of the family unit more than on the individual child's interests *per se*.<sup>61</sup>

Two forms of adoption were used in Roman law: *adrogatio* and *adoptio*.<sup>62</sup> *Adrogatio* refers to the adoption of a *sui iuris* (independent) person.<sup>63</sup> *Adoptio*, in turn, developed later<sup>64</sup> and entailed adopting an *alieni iuris* person (a person under the legal authority of another).<sup>65</sup> Therefore, the term "adoption" was used broadly to refer to two different practices.<sup>66</sup>

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<sup>55</sup> Spiller *A Manual of Roman Law* 75.

<sup>56</sup> Thomas *Introduction to Roman Law* 139.

<sup>57</sup> Thomas *Introduction to Roman Law* 139.

<sup>58</sup> Spiller *A Manual of Roman Law* 75.

<sup>59</sup> Ferreira 2007 *Fundamina* 2 and the authority cited.

<sup>60</sup> Spiller *A Manual of Roman Law* 75.

<sup>61</sup> See the discussion in 3.2.

<sup>62</sup> Thomas *Introduction to Roman Law* 139.

<sup>63</sup> Thomas *Introduction to Roman Law* 139.

<sup>64</sup> Ferreira 2007 *Fundamina* 2.

<sup>65</sup> See Thomas *Introduction to Roman Law* 136, 139.

<sup>66</sup> Spiller *A Manual of Roman Law* 75.

The purpose of *adrogatio* (derived from *arrogatio*, which means "to claim what is not one's own") was to save a family line from going extinct.<sup>67</sup> It was performed through a ceremony before thirty officials and the pontiffs.<sup>68</sup> During the ceremony the "adrogator" and "adrogated" were interrogated to ensure that they consented to the adoption.<sup>69</sup> Thus, consent from both parties was required. Women and children below puberty could not be adopted this way.<sup>70</sup> With *adrogatio*, the adrogated was fully included in the adrogator's family.<sup>71</sup> Adoption affected the adrogated person, everyone under his control and his property.<sup>72</sup> Emperor Diocletian later abolished this form of adoption and declared that it could be carried out only by imperial rescript. Adoptions were to be granted by the emperor and no longer had to take place in the presence of the people.<sup>73</sup>

*Adoptio* (derived from *adopto*, which means "to choose or select"),<sup>74</sup> on the other hand, was aimed at replacing one father and his authority with another.<sup>75</sup> At first, *adoptio* was considered impossible, but it was later "made feasible by reason of a construction put by the jurists."<sup>76</sup> The *adoptio* procedure consisted of selling the to-be-adopted child to a third party.<sup>77</sup> Boys and girls were treated differently in this regard.<sup>78</sup> A son had to be sold three times to break the initial father's *potestas*, while a daughter<sup>79</sup> needed to be sold only once.<sup>80</sup> The procedure stemmed from a principle

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<sup>67</sup> Spiller *A Manual of Roman Law* 76. Therefore, "the purpose of *adrogatio* was to keep alive a family which was in danger of failing through the lack of heirs". This further meant that only the childless and those unlikely to have children (for example, due to age) could make use of this practice. Prichard *Leage's Roman Private Law founded on the Institutes of Gaius and Justinian* 118.

<sup>68</sup> A "priestly patrician body". Patricians were aristocracy (as opposed to the "unprivileged plebeians"). See Prichard *Leage's Roman Private Law founded on the Institutes of Gaius and Justinian* 3.

<sup>69</sup> Spiller *A Manual of Roman Law* 78.

<sup>70</sup> Ferreira 2007 *Fundamina* 2.

<sup>71</sup> Spiller *A Manual of Roman Law* 78.

<sup>72</sup> The practice placed the adrogated person, along with any children un his control, under the adrogator's *potestas*. Spiller *A Manual of Roman Law* 78.

<sup>73</sup> Spiller *A Manual of Roman Law* 78.

<sup>74</sup> Spiller *A Manual of Roman Law* 75.

<sup>75</sup> Spiller *A Manual of Roman Law* 75.

<sup>76</sup> Prichard *Leage's Roman Private Law founded on the Institutes of Gaius and Justinian* 114.

<sup>77</sup> Spiller *A Manual of Roman Law* 76. This preliminary sale of a child was known as *mancipatio*. See Ferreira 2007 *Fundamina* 2.

<sup>78</sup> Spiller *A Manual of Roman Law* 76.

<sup>79</sup> Or grandchild. See Spiller *A Manual of Roman Law* 76.

<sup>80</sup> Spiller *A Manual of Roman Law* 76.

in the Twelve Tables aimed at punishing "callous" fathers.<sup>81</sup> Initially<sup>82</sup> only men were allowed to adopt.<sup>83</sup> Both parties (i.e. the two "fathers") needed to consent – expressly or implicitly.<sup>84</sup> After that, a ceremony was held and a magistrate ceded the child to the adopter.<sup>85</sup> However, eastern Roman emperor Justinian merely required the father, child and adopter to appear before the magistrate and to have the *adoptio* entered on the court roll,<sup>86</sup> thereby dispensing with the preliminary selling of children.<sup>87</sup>

In classical law, *adoptio* in effect transferred the adopted child from the *potestas* of one person to that of another (the adopter), with the child assuming the position of the adopter's natural agnatic child. Unlike *adrogatio*, *adoptio* affected only the adopted person (the adoptee).<sup>88</sup> Justinian later introduced a change in this regard, declaring that the adoptee would be fully included in the adoptive family<sup>89</sup> only where the adopter was a natural ascendant of the adoptee.<sup>90</sup> If not, the adoptee was not fully included in the adoptive family (did not come under the *potestas* of the adoptive father) and retained his rights of succession in his family of origin.<sup>91</sup> Under Justinian the adoptee in the latter case could acquire a right of succession in the new family only on intestacy.<sup>92</sup> Justinian was concerned for children who might "lightly be turned out of their adoptive family" and would thus be left without rights.<sup>93</sup> Adoptees' interests

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<sup>81</sup> Prichard *Leage's Roman Private Law founded on the Institutes of Gaius and Justinian* 114. Also see Ferreira 2007 *Fundamina* 2.

<sup>82</sup> In classical law. See Spiller *A Manual of Roman Law* 75.

<sup>83</sup> Justinian later introduced an exception to this rule. See Spiller *A Manual of Roman Law* 75.

<sup>84</sup> In the absence of objections. Spiller *A Manual of Roman Law* 76.

<sup>85</sup> Spiller *A Manual of Roman Law* 76.

<sup>86</sup> Spiller *A Manual of Roman Law* 76; Van der Walt 2014 *Obiter* 428.

<sup>87</sup> Spiller *A Manual of Roman Law* 76. In common law the selling of children is prohibited by adoption legislation. See for example the discussion of pre-*Children's Act* adoption legislation in 2.3.4. The *Children's Act* is discussed in chapter 4. In a customary law context, also see the discussion in 3.4.1 regarding *ilobolo* being viewed as payment for a child.

<sup>88</sup> Any children of the adopted person born or conceived prior to *adoptio* remained in the family of origin. Spiller *A Manual of Roman Law* 76.

<sup>89</sup> This was known as *adoptio plena*. Spiller *A Manual of Roman Law* 76.

<sup>90</sup> Such as a father wanting to adopt his emancipated son. Spiller *A Manual of Roman Law* 76.

<sup>91</sup> Spiller *A Manual of Roman Law* 76.

<sup>92</sup> This was known as *adoptio minus plena*. Spiller *A Manual of Roman Law* 76-77.

<sup>93</sup> Spiller *A Manual of Roman Law* 77.

appear to have been considered by providing for children's inheritance rights in their families of origin.<sup>94</sup>

In brief, *adrogatio* applied to *sui iuris* people, who in turn could have had *potestas* over others. *Adrogatio* implies that the adrogated person was not necessarily a child.<sup>95</sup> *Adoptio*, on the other hand, applied to *alieni iuris* people, which may have included children. Furthermore, *adoptio* affected only the adoptee and no one else in the adoptee's previous family, while this was not necessarily the case with *adrogatio*.

Indeed, some aspects of Roman law adoption are reminiscent of adoptions under customary law: there being more than one "form" of adoption; requiring only the fathers' consent for an adoption; highlighting the superior position of men in the family; the purpose of adoptions being to save a family line from becoming extinct; the performance of an adoption ceremony; and the acceptance or knowledge of the adoption by the community. However, as with the Roman family, the African family and customary law adoptions underwent changes and developments over the years.<sup>96</sup> Where *adoptio* was initially focussed on the group alone, the process later changed to be more accommodating of the child.<sup>97</sup> The African family is discussed in the second part of this chapter, and customary law adoption in particular is discussed in chapter 3.<sup>98</sup>

#### 2.2.4 Conclusion

The aim of the discussion of Roman law here was not to view customary law through a Westernised lens. Though there are similarities to be drawn between the African family and the Roman family, as well as between customary law adoption and Roman law adoption,<sup>99</sup> there are distinctive traits. Roman marriages were monogamous; therefore, adoption could not occur in a polygynous marriage setup, as is sometimes

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<sup>94</sup> Also see Ferreira 2007 *Fundamina* 2-3. For a discussion of *adoptio*, also see Prichard *Leage's Roman Private Law founded on the Institutes of Gaius and Justinian* 114-117.

<sup>95</sup> Another aspect which agrees with customary law. In customary law, too, adult persons could be adopted into new families. See 1.3.8.

<sup>96</sup> Discussed in chapter 3.

<sup>97</sup> See the earlier discussion in this para pertaining to emperor Justinian's concerns.

<sup>98</sup> Chapter 3 focuses on customary law adoptions specifically.

<sup>99</sup> Some similarities are drawn in the preceding paras.

found in customary law. Also, as opposed to Roman law adoption, customary law adoption is practised in South Africa. Consequently, customary law adoptions have been influenced by events such as colonisation, as it occurred in South Africa. Since the *Constitution* commenced customary laws have been reformed in many respects.<sup>100</sup>

Instead, the discussion above was necessary, as Roman law adoption has been used to argue against the existence of customary law adoptions.<sup>101</sup> Furthermore, Roman law could have influenced the development of South African common law adoption legislation too.<sup>102</sup> Common law adoption is discussed next.

## **2.3 South African common law adoption**

### *2.3.1 Introduction*

The focus now shifts to an overview of the status of adoption in Roman-Dutch and English law, which make up the South African common law. However, since formal adoption was non-existent in Roman-Dutch law<sup>103</sup> and English law did not influence the South African adoption law,<sup>104</sup> this will be a brief synopsis only.

The first adoption legislation was promulgated in South Africa in 1923.<sup>105</sup> For this reason the discussion of the common law position on adoption is divided into positions before and post-1923.

### *2.3.2 Roman-Dutch and English law*

Roman law was adopted in different measures in different parts of the Netherlands. Roman-Dutch law thrived during the 17<sup>th</sup> century and was transferred to the Cape of

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<sup>100</sup> The African family and African values and how they have developed under the *Constitution* are discussed later in this chapter. See 2.4.

<sup>101</sup> Customary law adoption is discussed in chapter 3. Also see 2.2.

<sup>102</sup> See 2.2.1.

<sup>103</sup> *Robb v Mealey's Executor* 1899 16 (SC) paras 135-136. Also see Ruppel and Shipila "Adoption: Statutory and Customary Law Aspects from a Namibian Perspective" 190.

<sup>104</sup> Van der Walt 2014 *Obiter* 422. Initial South African adoption legislation was modelled on adoption legislation in New Zealand. See 2.2.1. In fact, adoption was "unknown to the English Common Law". Ibraheem 2013 *Journal of Law, Policy and Globalization* 7. Ibraheem also states that "in most legal systems of the world, adoption is a statutory creation". Ibraheem 2013 *Journal of Law, Policy and Globalization* 7

<sup>105</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 19.

Good Hope in 1652.<sup>106</sup> The legal system of the Netherlands was later codified.<sup>107</sup> As explained earlier,<sup>108</sup> South African common law is a mix of Roman-Dutch law, which applied during the 17<sup>th</sup> century in the former province of Holland, and English law.

Roman law did not affect adoption in Holland, and formal adoption was unfamiliar.<sup>109</sup> Children were "adopted" informally but were not recognised as their adoptive parents' children for inheritance upon intestacy, nor as "children" in status or wills.<sup>110</sup> Therefore, in a legal sense adoption did not exist in Holland.

Roman law was not fully received in England and was utilised only when the unwritten English common law was found wanting.<sup>111</sup> During the Middle Ages England's "Lord Chancellor" dealt with petitions raised by people who "felt" that a law was unjust.<sup>112</sup> He had the authority to amend such law based on "equity" derived from canon and natural law.<sup>113</sup> The Lord Chancellor had been trained in canon law, which in turn was based on Roman law.<sup>114</sup> Ultimately, this means that Roman law was indeed applied, albeit indirectly.<sup>115</sup>

The first adoption legislation in England was issued after South Africa's first adoption legislation was promulgated. Therefore, South Africa's adoption legislation is not historically grounded in English law.<sup>116</sup>

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<sup>106</sup> Europeans arrived at the Cape in 1652. Van Riebeeck's "primary task" was to establish a refreshment station for the ships of the *Vereenigde Oost-Indische Compagnie* ("United East India Company"), also referred to as the "VOC". The relevant authority at the time was the states-general, which was responsible for looking after provinces in the Netherlands as well as overseas territories of the Netherlands. The VOC was responsible for the administration of such territories, including the Cape. The VOC was headed by seventeen directors, the "Here 17". Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 97-98, 101-102 and the authorities cited.

<sup>107</sup> In the *Burgerlijk Wetboek* of 1838. Roman law was also included in the codification. Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 98.

<sup>108</sup> See 1.3.3.

<sup>109</sup> Ferreira 2007 *Fundamina* 4.

<sup>110</sup> Ferreira 2007 *Fundamina* 4.

<sup>111</sup> Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 94.

<sup>112</sup> Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 95.

<sup>113</sup> Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 95.

<sup>114</sup> Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 95.

<sup>115</sup> Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 95. For a brief discussion of the development of English law from the 1500s onwards, see Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 94-97 and the authorities cited.

<sup>116</sup> Ferreira 2007 *Fundamina* 4-5.

### 2.3.3 South African law before 1923

Adoption was not recognised in Cape law, probably because it was not acknowledged in Roman-Dutch law.<sup>117</sup> The non-recognition of adoption was confirmed in *Robb v Mealey's Executor* (the *Robb* case)<sup>118</sup> in 1899. The court held that "there is no machinery for adoption ... in Cape law" because "the law of this Colony does not recognise adoption as a means of creating the legal relationship of parent and child."<sup>119</sup>

However, informal adoptions did occur.<sup>120</sup> An informal adoption might have entailed an agreement between the natural and adoptive parents, although the courts did not regard the agreement as binding.<sup>121</sup> Natural parents' rights remained unaffected by the informal adoption, and adoptive parents gained no rights to the children.<sup>122</sup> The non-recognition of adoption rendered the position of adoptive parents precarious and insecure.<sup>123</sup>

The precarious position of children in informal adoption situations became the subject of legal reform in the 20<sup>th</sup> century.<sup>124</sup> It culminated in promulgating the first adoption legislation enacted in South Africa in 1923.<sup>125</sup>

### 2.3.4 South African law adoptions post 1923

The enactment of the *Adoption of Children Act 25* of 1923 introduced a new era. Legislation enacted after the 1923 Act especially was broader in scope than adoption alone, and only the most relevant provisions are discussed here. These provisions pertain to persons qualifying as children, consent (including that of the to-be-adopted

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<sup>117</sup> Ferreira 2007 *Fundamina* 4.

<sup>118</sup> *Robb v Mealey's Executor* 1899 16 (SC) 133.

<sup>119</sup> The *Robb* case paras 135-136. Also see Ferreira 2007 *Fundamina* 4; Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 19.

<sup>120</sup> Ferreira 2007 *Fundamina* 5; Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 19.

<sup>121</sup> Ferreira 2007 *Fundamina* 5. Also see *Fibinger v Botha* 1905-1910 10 HCG 97; *Edwards v Fleming* 1909 TH 232; Louw 2017 *Obiter* 460-462.

<sup>122</sup> Ferreira 2007 *Fundamina* 5.

<sup>123</sup> Ferreira 2007 *Fundamina* 5-6.

<sup>124</sup> See 2.3.4.

<sup>125</sup> See Ferreira 2007 *Fundamina* 5-6

child), deserted children, illegitimate children,<sup>126</sup> the notion of the best interests of a child, payment concerning an adoption, the effect of an adoption order, and the role of race in the parent-child relationship.<sup>127</sup>

The next section provides an account of the *Adoption of Children Act*,<sup>128</sup> considering that it laid the foundation for the regulation of common law adoption in South Africa.

#### 2.3.4.1 *Adoption of Children Act 25 of 1923 (the Adoption of Children Act)*

Modelled on New Zealand's *Infants Act*,<sup>129</sup> the *Adoption of Children Act* took effect on 1 January 1924<sup>130</sup> to "provide for the adoption of children". Although "adoption" *per se* was not defined in the South African Act, an "adopted child" was described as "a child concerning whom an order of adoption has been made".<sup>131</sup> A "child", in turn, was described as a boy or girl below sixteen years of age, while adoptive parents could mean both a husband and wife through a joint application.<sup>132</sup> Subject to certain

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<sup>126</sup> An "illegitimate" child refers to a child whose parents cannot legally marry, or a child whose parents can legally marry but do not do so. Also see *Motan v Joosub* 1930 (AD) 61 (the *Motan* case). In the *Motan* case the plaintiff claimed maintenance from her children's parental grandfather (the defendant). The plaintiff and the defendant's son had been married by Mohammedan rites. The union was not recognised as a marriage under South African law, so the children were regarded as "illegitimate". A paternal grandfather had no common law duty to pay maintenance for "illegitimate" grandchildren. Consequently, the claim was dismissed. However, today a paternal grandfather would be liable. See *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 1 All SA 117 (C) (the *Petersen* case), where the differentiation between children "born in wedlock" and "extra-marital" children was found to violate the constitutional rights of children born out of wedlock. The court proceeded in developing the common law in this regard. See the *Petersen* case paras 21, 27. The meaning of an "illegitimate" child has also been considered by the SALC (as it was previously known). In 1985 the SALC's report on the investigation into the legal position of illegitimate children explained the generally accepted definition of a "legitimate child" as "a child whose parents were legally married to each other at the time of the child's conception, or birth, or at any time in between." It then continues to explain that certain other categories of children also have legitimate status from birth, such as children born from putative marriages and from voidable marriages that are annulled. Consequently, children who are not covered by the definition of a legitimate child are regarded as "illegitimate". See *SALC Report on the investigation into the legal position of illegitimate children* 6-13 for a discussion in this regard. The term "illegitimate" is sometimes used in this thesis – as it is also the term used in certain legislation and other sources. However, it is submitted that the term is derogatory. Consequently, "born out of wedlock" is preferred. Also see the discussion in 3.2.

<sup>127</sup> See 2.3.4.1- 2.3.4.2 and 4.2.3.

<sup>128</sup> 25 of 1923.

<sup>129</sup> 86 of 1908. Ferreira 2007 *Fundamina* 5. See Ferreira 2007 *Fundamina* 7-9 for a comparison between the South African and New Zealand acts.

<sup>130</sup> Ferreira 2007 *Fundamina* 6.

<sup>131</sup> Section 1 of the *Adoption of Children Act*.

<sup>132</sup> Section 1 of the *Adoption of Children Act*.

conditions, men and women were allowed to adopt on their own, although a distinction was made between those allowed to adopt a male child and those permitted to adopt a female child.<sup>133</sup>

Before making an adoption order a magistrate had to be satisfied that the person proposing to adopt was of good repute; that (s)he was a fit and proper person to have care and custody of the child; and was sufficiently able to bring up, maintain and educate the child.<sup>134</sup> The *Adoption of Children Act* further provided that the magistrate had to be satisfied that the child's welfare and interests would be promoted.<sup>135</sup>

Apart from the parent or guardian's consent, consent was also required from adoptees themselves if over ten years of age.<sup>136</sup>

Where one parent had deserted a child, only the other parent's consent was required.<sup>137</sup> If both parents had deserted a child, a guardian was appointed. The guardian had to consent to such a child's adoption.<sup>138</sup> Section 1 of the *Adoption of Children Act* provided that a deserted child included any illegitimate child<sup>139</sup> deserted by the mother.<sup>140</sup>

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<sup>133</sup> Sections 2 and 3 of the *Adoption of Children Act* stated that where a female child was to be adopted, a married woman looking to adopt on her own had to be over 25 years of age, and either separated from her husband or the husband had to have been declared insane. A widow or unmarried woman looking to adopt a female child had to be over 25 years of age, while a widower or unmarried man looking to adopt a female child had to be at least 25 years older than the child. For the adoption of a male child, a married man looking to adopt on his own had to be over 25 years of age, and either separated from his wife or the wife had to have been declared insane. A widower or unmarried man looking to adopt a male child had to be over 25 years of age, while a widow or unmarried woman looking to adopt a male child had to be at least 25 years older than the child.

<sup>134</sup> Section 4(1)(c) of the *Adoption of Children Act*.

<sup>135</sup> Section 4(1)(c) of the *Adoption of Children Act*.

<sup>136</sup> Section 4(1)(d)-(e) of the *Adoption of Children Act*.

<sup>137</sup> Section 4(1)(e) of the *Adoption of Children Act*.

<sup>138</sup> Section 4(1)(f) of the *Adoption of Children Act*.

<sup>139</sup> The Act did not define an illegitimate child. For an explanation, see as explained earlier in this chapter.

<sup>140</sup> The Act described a deserted child as any child who had been deserted and had ceased to be cared for or maintained by its parents, or by such one of them as was living, or by the guardians of such a child, or if the child was illegitimate, by the mother of such a child.

The *Adoption of Children Act* also allowed for provisional orders.<sup>141</sup> When the consent required by section 4 of the Act had been duly obtained,<sup>142</sup> the magistrate could make a provisional order instead of immediately deciding to grant or refuse an adoption order. A provisional order committed the child to the care of the applicant(s) for up to two years.<sup>143</sup>

In addition, the *Adoption of Children Act* stipulated that it was unlawful for a person adopting a child to give or receive<sup>144</sup> a premium or other consideration regarding the adoption, except with the magistrate's consent.<sup>145</sup> However, any person<sup>146</sup> could make a settlement for the child's benefit or leave an inheritance or bequest to the adoptive parent through a will.<sup>147</sup>

Regarding the status of the adopted child and the adoptive parent, the *Adoption of Children Act* provided for the adoptive parent's surname to be conferred on the adopted child, who would then by law be deemed the child born in lawful wedlock of such parent.<sup>148</sup> However, unless any instrument indicated an intention to the contrary,<sup>149</sup> the adopted child could not acquire any right, title or interest in any property devolving on any child of the adoptive parent by any instrument executed before the date of the adoption order.<sup>150</sup> The adopted child could further not acquire any right, title or interest in any property burdened with a *fideicommissum*<sup>151</sup> in favour of the descendants of the adoptive parent.<sup>152</sup> The adopted child could also not acquire

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<sup>141</sup> Section 5 of the *Adoption of Children Act*.

<sup>142</sup> Or in the absence of such consent, the magistrate was satisfied that the consent should be dispensed with. S 9 dealt with a parent or legal guardian who was unfit to have custody or control of a child.

<sup>143</sup> Section 5(1) of the *Adoption of Children Act*.

<sup>144</sup> Except with the magistrate's consent. See s 7(1) of the *Adoption of Children Act*.

<sup>145</sup> Section 7(1) of the *Adoption of Children Act*.

<sup>146</sup> Including the person giving the child up for adoption.

<sup>147</sup> Section 7(2) of the *Adoption of Children Act*.

<sup>148</sup> Section 8(1) of the *Adoption of Children Act*.

<sup>149</sup> Whether such an instrument took effect *inter vivos* or *mortis causa*. See s 8(1) of the *Adoption of Children Act*.

<sup>150</sup> Section 8(1)(a)(i) of the *Adoption of Children Act*.

<sup>151</sup> "*Fideicommissum*" refers to a "legal institution in terms of which a person transfers a benefit to a particular beneficiary subject to a provision that, after a certain time has elapsed or a certain condition has been fulfilled, the benefit goes over to a further beneficiary." A *fideicommissum* may be created "between living persons or by means of a will". See De Waal and Schoeman-Malan *Law of Succession* 147-148.

<sup>152</sup> Section 8(1)(a)(ii) of the *Adoption of Children Act*.

any right, title or interest in any property devolving on the heirs' *ab intestato*<sup>153</sup> of any child born in lawful wedlock of the adoptive parent.<sup>154</sup> The adoption did not entitle an adopted child to succeed<sup>155</sup> the adoptive parent *jure representationis*.<sup>156</sup> The adoptive parent was deemed the lawful parent of the adopted child for all purposes. Therefore, it was deemed that the child had been born to the adoptive parent in lawful wedlock.<sup>157</sup> The adoption order terminated the rights and legal responsibilities between the child and the natural parents, except the child's right to take property as an heir or next-of-kin.<sup>158</sup> Thus, the adopted child did, in fact, not lose all rights concerning the former family.

The *Adoption of Children Act* neither specifically allowed for nor prohibited intercultural or interracial adoptions.<sup>159</sup> Some authors<sup>160</sup> contend that, due to the racist views of the time, such adoptions would have in any event been contrary to the accepted social norms, so no legislative intervention was considered necessary to guard against such an eventuality.<sup>161</sup> It was unthinkable that anyone would consider adopting a child from a race or culture<sup>162</sup> different from his or her own.<sup>163</sup>

In summary, regarding status, the *Adoption of Children Act* provided adoptive parents with a more "secure" position than in the case of informal adoptions before 1923. In addition, it determined that the child's welfare and interests had to be promoted.<sup>164</sup> The various stipulations in the Act also confirmed this notion of promoting the child's

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<sup>153</sup> "*Ab intestato*" or "by intestacy". Hiemstra and Gonin *Trilingual Legal Dictionary* 147.

<sup>154</sup> Section 8(1)(a)(iii) of the *Adoption of Children Act*.

<sup>155</sup> Whether by will or *ab intestato*. See s 8(1)(b) of the *Adoption of Children Act*.

<sup>156</sup> "*Jure representationis*" or by right of representation. Also see section 8(1)(b) of the *Adoption of Children Act*.

<sup>157</sup> Section 8(2) of the *Adoption of Children Act*.

<sup>158</sup> Provided that neither the adoptive parent nor his next-of-kin could by reason of the adoption acquire, on the death intestate of the adopted child while still a minor, any right in immovable property that had become vested in joint ownership in such a child and any blood relation of such a child. In the event of such a death, such a right accrued to the person who would have been entitled thereto if no order of adoption had been made. See s 8(2).

<sup>159</sup> Also see Van der Walt 2014 *Obiter* 432.

<sup>160</sup> See Van der Walt 2014 *Obiter* 432 and the authorities cited.

<sup>161</sup> Van der Walt 2014 *Obiter* 432.

<sup>162</sup> See the discussion of the concepts of "race" and "culture" under 1.3.2 above.

<sup>163</sup> Van der Walt 2014 *Obiter* 432. Also see Joubert 1993 *SALJ* 726, where it is stated that even though the Act "had no special sections forbidding interracial adoption", "no such adoptions are known".

<sup>164</sup> Section 4(1)(c) of the *Adoption of Children Act*. Also see Ferreira 2007 *Fundamina* 8.

welfare and interests to protect the child. These included a stipulation that the adoptive parent(s) needed to be "fit and proper"; that the child, if of age, had to consent to the adoption, as well as the possible prevention of child trafficking by prohibiting the giving or receiving of any premium or other consideration in respect of a to-be-adopted child.<sup>165</sup> The provision allowing the adopted children to retain rights of succession concerning their natural parents<sup>166</sup> also calls to mind Justinian's amendment of *adoptio* under Roman law. Justinian ensured that the adoptee (if not a natural descendant of the adopter) retained his or her succession rights in the family of origin.<sup>167</sup>

#### 2.3.4.2 *Children's Act* 31 of 1937 (the 1937 *Children's Act*)

The 1937 *Children's Act* took effect on 18 May 1937.<sup>168</sup> The Act repealed the *Adoption of Children Act* and had a much broader scope than its predecessor,<sup>169</sup> dealing in addition with various other matters relating to children.<sup>170</sup> Adoption was provided for in chapter VII.

Similar to the *Adoption of Children Act*, the 1937 *Children's Act* did not contain a definition of "adoption". "Adopted child" was defined as "a child adopted under chapter VII" of the Act "or under the *Adoption of Children Act, 1923*". "Adoptive parent" was defined as "a person who adopts or has adopted a child under chapter VII" of the Act "or under the *Adoption of Children Act, 1923*". The definition of "child" referred

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<sup>165</sup> Section 7(1) of the *Adoption of Children Act*. Also see Ferreira 2007 *Fundamina* 8-9.

<sup>166</sup> Section 8(2) of the *Adoption of Children Act* which stipulated that: "Where such order of adoption has been made the adopting parent shall for all purposes whatsoever, be deemed in law to be the parent of such adopted child, as if such child had been born to such adopting parent in lawful wedlock; and such order of adoption shall thereby terminate all the rights and legal responsibilities existing between the child and his natural parents, except the right of the child to take property as heir or next-of-kin: Provided that neither the adopting parent nor his next-of-kin shall by reason of the adoption acquire on the death intestate of the adopted child while still a minor, any right in immovable property which has become vested in joint ownership in such child and any blood relation of such child but such right shall in the event of such death accrue to the person who would have been entitled thereto if no order of adoption had been made." Also see the discussion earlier in this paragraph.

<sup>167</sup> See 2.2.2.1.2 above.

<sup>168</sup> Van der Walt 2014 *Obiter* 432.

<sup>169</sup> Also see Van der Walt 2014 *Obiter* 432-433.

<sup>170</sup> See the long title of the 1937 *Children's Act*.

amongst other things to "a person under the age of nineteen years" and included an "infant".<sup>171</sup>

Therefore, under the 1937 *Children's Act* a child could be adopted until s/he was nineteen years old.<sup>172</sup> Consent had to be given by the parents or guardians of the child.<sup>173</sup> Any child over ten years old<sup>174</sup> still needed to consent to the adoption.<sup>175</sup> The relevant minister had the authority to appoint a guardian for a child deserted by the parents.<sup>176</sup>

In relation to an illegitimate child,<sup>177</sup> the 1937 *Children's Act* regarded the mother of a child as the "parent".<sup>178</sup> It furthermore stipulated that a husband and wife could jointly adopt an illegitimate child of one of the spouses.<sup>179</sup> Only an illegitimate child's mother needed to consent to someone adopting her child.<sup>180</sup>

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<sup>171</sup> Section 1 of the 1937 *Children's Act*. The definition of "child" also catered for persons over the age of nineteen years for establishing and maintaining "places of detention of children awaiting trial or sentence", for example, in terms of chapter V of the Act. Chapter V dealt with "places of safety, places of detention, industrial schools, reformatories, certified institutions, certified hostels, approved agencies and placing of children in foster homes". See the heading of chapter V. The Act described an "infant" as a person below the age of ten years.

<sup>172</sup> See s 1 of the 1937 *Children's Act*; Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 27. Where the child was sixteen years old or older, the adoptive parent(s) had to be at least 25 years older than the child (except in the case of an illegitimate child). See s 68(2) of the 1937 *Children's Act*.

<sup>173</sup> For example, where the parents were deceased. If only one parent was deceased, the surviving parent and any guardian of the child who may have been appointed by the deceased parent had to consent to the adoption. See s 69(2)(d)(ii)-(iii) of the 1937 *Children's Act*.

<sup>174</sup> Section 1 of the 1937 *Children's Act* defines an infant as a person below the age of ten.

<sup>175</sup> Section 69(2)(e) of the 1937 *Children's Act*.

<sup>176</sup> Section 70(1)(b) of the 1937 *Children's Act*. The Act did not define a deserted child. It stated that if only one parent had deserted the child, the other parent could consent to the adoption. For the purposes of chapter VII, a father was presumed (subject to rebuttal, however) to have deserted his child if he lived apart from the child and did not provide or contribute to the provision of lodging, food and clothing for the child. See ss 69(2)(d)(iv) and 70(5) of the 1937 *Children's Act*.

<sup>177</sup> This Act also did not define an illegitimate child. See 2.3.4.1.

<sup>178</sup> Section 1 of the 1937 *Children's Act*. If the mother was deceased, the child's guardian had to consent to the adoption. See s 69(2)(d)(ii) of the 1937 *Children's Act*. Roman-Dutch law stipulated that an illegitimate child or "bastard" had "no lawful father" and therefore no rights of succession in relation to the biological father, though for "*eene moeder maakt geen bastaard*" (a mother does not make an illegitimate child) an illegitimate child was able to succeed in the mother's family (as per the opinion of the Roman-Dutch writer "Grotius"). Therefore, a child born out of wedlock was in "the power of the mother". See Lee *An Introduction to Roman-Dutch Law* 34, 41. Also see Joubert 1958 *THRHR* 185-186.

<sup>179</sup> Section 68(2) of the 1937 *Children's Act*.

<sup>180</sup> Section 69(2)(d)(i) of the 1937 *Children's Act*. In the event of a deceased mother, consent had to be given by the child's guardian. Section 69(2)(d)(ii) of the 1937 *Children's Act*.

The 1937 *Children's Act* provided for establishing children's courts, which had jurisdiction to determine matters of adoption in the district where the adopted child resided.<sup>181</sup> As in the case of the *Adoption of Children Act*, a children's court had to be satisfied, before granting an application for an order of adoption, that the applicant(s)<sup>182</sup> was/were of good repute, fit and proper to be entrusted with the custody of the child, and had adequate means to maintain and educate the child.<sup>183</sup> The Act also stipulated that the children's court had to be satisfied that the proposed adoption would serve the interests of the child and be conducive to the child's welfare. As such, the Act adopted the same basic policy of permitting adoption where it was in the child's interest.<sup>184</sup> Retained in the 1937 *Children's Act* was the prohibition on giving<sup>185</sup> or receiving<sup>186</sup> any consideration for a child, except with the court's consent.<sup>187</sup> Moreover, the effect of an adoption order on the status of an adopted child remained unchanged, as the 1937 *Children's Act* provided for an adopted child to inherit *ab intestato* from his natural parents.<sup>188</sup>

Like its predecessor, the 1937 *Children's Act* remained silent on intercultural or interracial adoptions. Except for stating that "race" had to be considered when considering a place of detention for a possible child offender under chapter VIII,<sup>189</sup> the Act contained no reference to race or culture,<sup>190</sup> but for several reasons such as racism and segregation<sup>191</sup> it is unlikely that interracial or intercultural adoption officially occurred under the 1937 *Children's Act*. Due to a belief in their strong cultural ties,

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<sup>181</sup> See chapter VII of the 1937 *Children's Act*, specifically section 69(1) of the 1937 *Children's Act*.

<sup>182</sup> Apart from a husband and wife jointly, adoptions by single persons were also allowed. In terms of s 68(1)(b)-(d) of the 1937 *Children's Act*, single people who could adopt were a widower or widow, an unmarried or a divorced person, a married person whose spouse was, at the time of the adoption, and had been for a continuous period of at least seven years immediately before that time, "mentally disordered or defective", and a married person who was separated from his or her spouse by "judicial decree".

<sup>183</sup> Section 69(2)(b) of the 1937 *Children's Act*.

<sup>184</sup> Joubert 1993 *SALJ* 727.

<sup>185</sup> Or undertaking to give. See s 77 of the 1937 *Children's Act*.

<sup>186</sup> Or contracting to receive. See s 77 of the 1937 *Children's Act*.

<sup>187</sup> Section 77 of the 1937 *Children's Act*.

<sup>188</sup> Section 71(3) of the 1937 *Children's Act*.

<sup>189</sup> See s 89 of the 1937 *Children's Act*.

<sup>190</sup> See Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 27-28.

<sup>191</sup> For example, the *Population Registration Act* 30 of 1950, which took effect on 7 July 1950, provided for the "compilation of a register" of the South African population, classing people as "black", "coloured" or "white". See s 1 of the Act.

African communities might also not necessarily have been in favour of interracial or intercultural adoption.<sup>192</sup>

#### 2.3.4.3 *Children's Act* 33 of 1960 (the 1960 *Children's Act*)

The 1960 *Children's Act* took effect on 14 April 1960.<sup>193</sup> The Act repealed the 1937 *Children's Act* and, like its predecessor, dealt with various matters relating to children.<sup>194</sup> Chapter VII provided for adoption.

Like its predecessors again, the 1960 *Children's Act* did not contain a definition of "adoption". "Adopted child" was defined as "a child adopted under the provisions of chapter VII" of the Act.<sup>195</sup> "Child" included "any person, whether an infant or not, who is under the age of eighteen years."<sup>196</sup> An "adoptive parent" was defined as "a person who adopts ... a child under the provisions of chapter VII" of the Act.<sup>197</sup>

Therefore, under the 1960 *Children's Act* a child could be adopted up until the age of eighteen years,<sup>198</sup> although consent to adoption<sup>199</sup> still had to be obtained from any child over ten.<sup>200</sup> Generally the parents or guardian also had to consent.<sup>201</sup>

If one parent had deserted a child<sup>202</sup> the other parent's consent was required for their child's adoption.<sup>203</sup> If one parent was deceased and the surviving parent had deserted

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<sup>192</sup> Also see 2.4.2.2 below.

<sup>193</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 28.

<sup>194</sup> Also see Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 28.

<sup>195</sup> Or under the 1937 *Children's Act* or the *Adoption of Children Act* (of 1923).

<sup>196</sup> Amongst other things. See s 1 of the 1960 *Children's Act*. The definition of "child" also catered for older children (up to the age of twenty-one years) when, for example, establishing and maintaining "places of detention for the reception and detention of children awaiting trial or sentence" in terms of chapter V of the Act. Chapter V dealt with "places of safety, places of detention, schools of industries, reform schools, children's homes, places of care, observation centers and placing of children". See the heading of chapter V. The Act described an infant as a person below the age of seven years.

<sup>197</sup> Or who has adopted a child under the 1937 *Children's Act* or the *Adoption of Children Act* (1923).

<sup>198</sup> See s 1 of the 1960 *Children's Act*. Where the child was sixteen years old or older, the adoptive parent(s) had to be at least 25 years older than the child. See s 70(2) of the 1960 *Children's Act* for exceptions in this regard.

<sup>199</sup> See s 71(2)(e) of the 1960 *Children's Act*.

<sup>200</sup> Despite s 1 defining an infant as a person below the age of seven, and no longer the age of ten as per the 1937 *Children's Act*.

<sup>201</sup> Except if, for example, the child was illegitimate.

<sup>202</sup> Once again, no definition of a deserted child was supplied.

<sup>203</sup> Section 71(2)(d)(iv) of the 1960 *Children's Act*.

the child,<sup>204</sup> the child's guardian had to consent to the adoption.<sup>205</sup> If the parents<sup>206</sup> place of residence or address was known, they were allowed to oppose the application.<sup>207</sup> A probation officer had to provide a report where a parent was deemed to have deserted the child.<sup>208</sup> The court had to be satisfied that there was no likelihood that the child would be returned to the parent's custody soon if no order for the child's adoption was made.

The 1960 *Children's Act* similarly indicated the mother as the "parent" of an illegitimate child.<sup>209</sup> Although the Act did not specifically state that a husband and wife could jointly adopt an "illegitimate" child of one of the spouses, it did make provision for a husband and wife to jointly adopt "any child born of one of the spouses".<sup>210</sup> Still requiring only the mother's consent in the event of the adoption of an illegitimate child,<sup>211</sup> the Act also specifically stated that the mother's consent was needed irrespective of minority, marital status or assistance by her parent, guardian or husband.<sup>212</sup>

Like the 1937 *Children's Act*, the 1960 *Children's Act* provided that matters of adoption had to be determined by the children's court of the district where the adopted child resided.<sup>213</sup> Similarly, before granting an application for an order of adoption the children's court had to be satisfied that the applicant(s)<sup>214</sup> was/were of good repute, fit and proper to be entrusted with the custody of the child, and had adequate means to maintain and educate the child.<sup>215</sup> The court also had to be satisfied that the

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<sup>204</sup> Or was incompetent to give consent due to a mental disorder or defect, or due to having been declared a habitual criminal. Section 71(2)(d)(vi) of the 1960 *Children's Act*.

<sup>205</sup> Section 71(2)(d)(vi) of the 1960 *Children's Act*. The Act stipulated circumstances under which consent may have been dispensed with, for example in the case of a deserted child for whom no guardian had been appointed. See s 72(1) of the 1960 *Children's Act*.

<sup>206</sup> The parent who deserted a child.

<sup>207</sup> The Act afforded such parents a reasonable opportunity to oppose an adoption application. Section 72(2)(a) of the 1960 *Children's Act*.

<sup>208</sup> Or an authorised officer. See s 72(2)(b) of the 1960 *Children's Act*. Section 73 of the 1960 *Children's Act* listed the circumstances in which a parent would be deemed to have deserted a child, such as a parent's having been convicted of mistreating or neglecting the child. See s 73(1)(a) of the 1960 *Children's Act*.

<sup>209</sup> Section 1(xxix) of the 1960 *Children's Act*.

<sup>210</sup> Section 70(2) of the 1960 *Children's Act*.

<sup>211</sup> Or guardian (in the event of a deceased mother). Section 71(2)(d)(ii) of the 1960 *Children's Act*.

<sup>212</sup> Section 71(2)(d)(i) of the 1960 *Children's Act*.

<sup>213</sup> Section 71(1)(a) of the 1960 *Children's Act*.

<sup>214</sup> Adoptions by single persons were allowed.

<sup>215</sup> Section 71(2)(b) of the 1960 *Children's Act*.

proposed adoption would serve the interests and promote the child's welfare.<sup>216</sup> Moreover, the 1960 *Children's Act* retained the prohibition of giving or receiving any consideration for adoption.<sup>217</sup> In terms of the effect of adoption, section 74 provided as follows:

- (1) An order of adoption shall, unless otherwise thereby provided, confer the surname of the adoptive parent on the adopted child.
- (2) Subject to the provisions of section *eighty-two*,<sup>218</sup> an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent: Provided that an adopted child shall not by virtue of the adoption –
  - (a) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect *inter vivos* or *mortis causa*), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child;
  - (b) inherit any property *ab intestato* from any relative of his adoptive parent.
- (3) An order of adoption shall terminate all the rights and legal responsibilities existing between the child and his natural parents and their relatives, except the right of the child to inherit from them *ab intestato*.

Thus, sections 74(1) to (3) of the 1960 *Children's Act* provided an effect of adoption similar to that of section 71 of the 1937 *Children's Act*. Subsection (4) provided for the lapsing of an order made under section 31, which dealt with orders in relation to children in need of care, as well as the lapsing of orders made in terms of the *Criminal Procedure Act*,<sup>219</sup> which governed the placing of convicted juveniles under the supervision or in the custody or control of a suitable person or institution.

At the time,<sup>220</sup> various laws in South Africa were aimed at racial segregation.<sup>221</sup> Although chapter VII of the 1960 *Children's Act* did not explicitly prohibit intercultural

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<sup>216</sup> Section 71(2)(c) of the 1960 *Children's Act*.

<sup>217</sup> Section 79 of the 1960 *Children's Act*.

<sup>218</sup> Section 82 of the 1960 *Children's Act* was similar to section 79 of the 1937 *Children's Act* and dealt with the effect of adoption on marriage. Section 82 of the 1960 *Children's Act* stipulated that an adoption did not have the effect of prohibiting any marriage or carnal intercourse (other than marriage or carnal intercourse between the adoptive parent and the adopted child) that, had it not been for the adoption, would have been permitted.

<sup>219</sup> 56 of 1955.

<sup>220</sup> Within which the 1960 *Children's Act* operated.

<sup>221</sup> Such as the *Immorality Act* 5 of 1927, the *Immorality Amendment Act* 21 of 1950, the *Immorality Act* 23 of 1957, which was later renamed the *Sexual Offences Act* 23 of 1957; the *Prohibition of Mixed Marriages Act* 55 of 1949, and the *Population Registration Act* 30 of 1950. Also see Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 28.

or interracial adoption, section 35(2)<sup>222</sup> provided that "regard shall be had to the religious and cultural background and ethnological grouping" of a child.<sup>223</sup> The phrase "regard shall be had" was subsequently considered in the 1964 matter of *Joffin v Commissioner of Child Welfare, Springs* (the *Joffin* case).<sup>224</sup> The court found that the phrase was not mandatory but meant to "bear in mind" or "not overlook", thereby affording the court a measure of discretion.<sup>225</sup> Although this finding could have been interpreted to mean that interracial adoptions were now possible, it would still have been unlikely.<sup>226</sup> The potential variation in interpretation was eliminated a little over a year after the judgment in the *Joffin* case. Section 4 of the 1965 *Children's Amendment Act*<sup>227</sup> provided for the amendment of section 35(2) of the 1960 *Children's Act* by inserting subsection (c), which stipulated that a child was not to be placed in the custody of any person whose classification in terms of the *Population Registration Act*<sup>228</sup> differed from that of the child.<sup>229</sup> Therefore, it was abundantly clear that a child could not be placed in the foster care of prospective adoptive parents with a different

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<sup>222</sup> Read with s 71(1)(b).

<sup>223</sup> When an adoption application was determined by a court.

<sup>224</sup> 1964 2 SA 506 (T).

<sup>225</sup> The *Joffin* case para 508; Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 29-30.

<sup>226</sup> Also see Joubert 1993 *SALJ* 727, where it is stated that even though this Act did not prohibit interracial adoption, "such adoptions do not seem to have taken place."

<sup>227</sup> 50 of 1965.

<sup>228</sup> 30 of 1950.

<sup>229</sup> Except where such a person was the parent or guardian of the child. Also see Joubert 1993 *SALJ* 727. Section 1 of the *Population Registration Act* 30 of 1950 defined "black" as "a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa." (The definition of "black" was replaced by s 1(a) of the *Population Registration Amendment Act* 106 of 1969. Section 1(a) of the latter Act referred to "bantú" instead of "black", although the definition remained unchanged.) The *Population Registration Act* further defined "coloured person" as "a person who is not a white person or a Black" and "white person" as a person who "in appearance obviously is a white person and who is not generally accepted as a coloured person; or is generally accepted as a white person and is not in appearance obviously not a white person." Yet it did not include any person who, for the purposes of his classification under the Act, freely and voluntarily admitted that he was by descent a Black or a coloured person, unless it was proved that the admission was not based on fact. (The definition of "white person" was replaced by s 1(a)-(b) of the *Population Registration Amendment Act* 61 of 1962. Section 1(a)-(b) defined a "white person" to mean "a person who in appearance obviously is a white person and who is not generally accepted as a coloured person; or is generally accepted as a white person and is not in appearance obviously not a white person, but does not include any person who for the purposes of his classification under this Act, freely and voluntarily admits that he is by descent a native or a coloured person unless it is proved that the admission is not based on fact.")

racial classification.<sup>230</sup> Of course, the practical implications<sup>231</sup> of the then *Group Areas Act*<sup>232</sup> further narrowed the chance of such adoptions being permitted by the state.<sup>233</sup>

One should also remember that the *Joffin* case dealt with adoption by a couple who had a different religion from that of the mother of the illegitimate child in question and not with race. In the 1979 matter of *Ex parte Kommissaris van Kindersorg: In Re NL*,<sup>234</sup> the court found that section 71(1)(b) of the 1960 *Children's Act* implied that section 35(2)(c) could not be seen as a ban on interracial adoptions. The court found that the child's welfare was of the utmost importance.<sup>235</sup> Yet, although this case was about race, the circumstances were rather unusual. The child, whose parents were coloured, had been given up for adoption to a coloured male and his black wife.

In *Ex parte Kommissaris van Kindersorg: In Re NL*, the wife was deemed part of the "coloured group".<sup>236</sup> However, when her husband died she reverted to African status, even though she regarded herself as "coloured" and was allowed to stay on in the so-called coloured community.<sup>237</sup> The court confirmed the adoption order, but according to some authors this did not mean that interracial placements suddenly became acceptable in the South African context.<sup>238</sup> Ultimately, in this instance the adoptive parent committed "cultural suicide" and remained in a community with the same population group (coloured) as the child.<sup>239</sup>

Further confirmation of the intolerance towards interracial adoptions in South African history is found in a July 2018 article published on the South African news portal

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<sup>230</sup> Joubert 1993 *SALJ* 727.

<sup>231</sup> Such as that the child would not have been able to attend school in the adoptive parents' residential area. See Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 33 and the authority cited.

<sup>232</sup> 36 of 1966.

<sup>233</sup> See Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 33 and the authority cited for criticism of the opinion that interracial adoptions were indeed possible.

<sup>234</sup> 1979 2 SA 432 (T).

<sup>235</sup> *Ex parte Kommissaris van Kindersorg: In Re NL* 1979 2 SA 432 (T) 435.

<sup>236</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 31. Also see s 12(1)(c)(ii) of the *Group Areas Act* 36 of 1966.

<sup>237</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 32.

<sup>238</sup> See Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 32-33 and the authorities cited.

<sup>239</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 32-33 and the authorities cited.

Netwerk24. It tells the story of a white couple<sup>240</sup> who adopted a baby girl shortly after her birth on the so-called *Republiekdag* (Republic Day, 31 May) in 1979. However, when the little girl's skin turned darker and her hair curlier ("*velletjie word al hoe donkerder en die haartjies krul al hoe meer*") the couple came under pressure to exchange her for another (presumably "white") child. The article paints a picture of intolerance and prejudice, both from social workers and so-called friends and family of the couple, stating: "*Die polisie dreig. Dis immers teen die wet.*" ("The police threaten. It is, after all, against the law.") Despite this opposition, the couple decided to keep their little girl and moved to another country.<sup>241</sup>

In another case a "black" child<sup>242</sup> grew up with a "white" family and was raised by the family as if he (the child) was their own.<sup>243</sup> Although the child was legally not allowed<sup>244</sup> to attend school or church with his white family, he grew up in the home of his biological father's white employer, where he had his own room. His white family paid the school fees of the school he was "allowed" to attend, and he also attended a church where black people were "permitted". However, it is unclear from the article whether the white family would have formally adopted the black child had the law allowed interracial adoption.<sup>245</sup>

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<sup>240</sup> The man was what the article calls an "Afrikaner", while the woman was German. Although the man was born in the former South-West Africa (today's "Namibia"), his family later moved to South Africa, where he met his future wife, who was visiting the country as a tourist. See Louw 2018 <https://www.netwerk24.com/netwerk24/Stemme/Aktueel/ek-moes-kies-tussen-my-land-en-my-kind-20180702>.

<sup>241</sup> Louw 2018 <https://www.netwerk24.com/netwerk24/Stemme/Aktueel/ek-moes-kies-tussen-my-land-en-my-kind-20180702>.

<sup>242</sup> From the article, it seems that the child was born around 1951. This means that he grew up under both the 1937 and 1960 *Children's Acts*.

<sup>243</sup> ... "soos 'n eie kind deur wit gesin grootgemaak". See Author unknown *Die Wêreld* 17.

<sup>244</sup> "*Hy kon net nie saam met hulle skool en kerk toe gaan nie. So het die wet destyds gesê.*" ("He could not go to school and church with them [the white family]. That was the law at the time.") See Author unknown *Die Wêreld* 17.

<sup>245</sup> Author unknown *Die Wêreld* 17. For example, Curtis states: "Although incorporated to varying degrees into the intimate spaces of the white family, these participants are still regarded first and foremost as children of their biological domestic worker parents / grandparents." Curtis *Identity Narratives of Black Domestic Workers' Adult Children partially reared by their Parents' White Employers* 10.

Reference to race could also be found in section 11 of the 1965 *Children's Amendment Act*,<sup>246</sup> which allowed for the insertion of the following section at the end of chapter VII:

82*bis*. In the application of the provisions of this chapter in respect of a person who is a Bantu<sup>247</sup> ..., any customary union as so defined shall be deemed to be a marriage between the parties concerned, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly.

According to Joubert, Africans living in a customary union were allowed to adopt as if legally married.<sup>248</sup> However, "race-matching" remained the order of the day, even after the *Ex parte Kommissaris van Kindersorg: In Re NL* ruling.<sup>249</sup> Later, the 1973 *Children's Amendment Act*<sup>250</sup> defined "Bantu", namely:<sup>251</sup>

A person who is or is to be classified as a Bantu under the Population Registration Act ..., and includes a native within the meaning of section 25 of the Native Administration Proclamation, 1928.

A definition of a "Bantu children's court" was also provided.<sup>252</sup> Therefore, the 1960 *Children's Act* marked the first introduction of "race" as a factor to be considered in the parent-child relationship in adoption cases.<sup>253</sup>

#### 2.3.4.4 *Child Care Act* 74 of 1983 (the *Child Care Act*)

The *Child Care Act* replaced the 1960 *Children's Act* and took effect on 1 February 1987.<sup>254</sup> Chapter 4<sup>255</sup> of the Act dealt with adoptions.

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<sup>246</sup> 50 of 1965.

<sup>247</sup> The term used by lawmakers to refer to a black or African person. See Joubert 1993 *SALJ* 727.

<sup>248</sup> Joubert 1993 *SALJ* 727.

<sup>249</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 33 and the authority cited.

<sup>250</sup> 74 of 1973.

<sup>251</sup> In s 1(d). "Bantu" was later changed to "black". See Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 28.

<sup>252</sup> Section 1(f) of the *Children's Amendment Act* 74 of 1973. Also see Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 28.

<sup>253</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 28.

<sup>254</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 34.

<sup>255</sup> Up to that stage the legislator had used Roman numerals to indicate chapters in the relevant adoption legislation.

The *Child Care Act* defined a child as any person under eighteen.<sup>256</sup> Any child over ten still had to consent to adoption, with the added requirement that the child needed to understand "the nature and import" of such consent.<sup>257</sup> The parents' consent was also still required.<sup>258</sup>

The *Child Care Act* contained only one reference to a "deserted child", which it failed to define. Section 19 stipulated that no consent for adoption was required from any parent who had deserted the child whose whereabouts were unknown.<sup>259</sup>

The *Child Care Act* required only the mother of an illegitimate child to consent to the child's adoption, whether or not the mother was a minor, married or assisted by her parent, guardian or husband.<sup>260</sup> The *Children's Status Act*,<sup>261</sup> which commenced on 14 October 1987, went one step further, stipulating that where the mother of an illegitimate child was unmarried and a minor, the guardianship of the child vested in the mother's guardian and the custody of the child in the mother.<sup>262</sup>

The *Child Care Act* retained the requirement that a children's court had to be satisfied that the applicants: had adequate means to maintain and educate the child; were of good repute; were fit and proper to look after the child; and that the adoption would serve the interests of and be conducive to the welfare of the child.<sup>263</sup>

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<sup>256</sup> Section 1(v) of the *Child Care Act*.

<sup>257</sup> Section 18(4)(e) of the *Child Care Act*.

<sup>258</sup> Section 18(4)(d) of the *Child Care Act*.

<sup>259</sup> Section 19(b)(ii) of the *Child Care Act*.

<sup>260</sup> Section 18(4)(d) of the *Child Care Act*. Like its predecessors, the Act did not define an illegitimate child.

<sup>261</sup> 82 of 1987.

<sup>262</sup> In s 3(1)(a)-(b). It seems safe to conclude that s 3 of the *Children's Status Act* had the effect that the mother or father (or "guardian") of a single mother who was still a minor (the grandmother or grandfather of an illegitimate child born from a minor) could give consent for such a child to be adopted. Neither the *Child Care Act* nor the *Children's Status Act* defined a "guardian". However, when reading the *Child Care Act*, one notices that the concept "guardian" appears next to "parent" throughout. Indeed, before the *Children's Act* "guardianship" included amongst other things consenting to a child's "marriage, adoption, departure from South Africa, application for a passport, or alienation or encumbrance of any immovable property". Emphasis added. "Custody" referred to the caretaking of a child, such as providing a child with a suitable place to live. See Clark 2002 *CILSA* 218.

<sup>263</sup> When considering an adoption application. S 18(4)(a)-(c) of the *Child Care Act*.

Like its predecessors the *Child Care Act* prohibited the giving or receiving of or contracting to receive any consideration in cash or kind for an adoption.<sup>264</sup> Therefore, a person who contravened this provision was still guilty of an offence.<sup>265</sup>

Section 20 of the *Child Care Act* governed the effect of adoption. An adoption order still<sup>266</sup> conferred the adoptive parents' surname on the adopted child.<sup>267</sup> The Act also stipulated that an adoption order did not have the effect of permitting or prohibiting any marriage or carnal intercourse<sup>268</sup> that, had it not been for the adoption, would have been prohibited or permitted.<sup>269</sup> Thus, both the freedoms and limitations that existed before the adoption continued to apply following the adoption. For instance, an adoption order did not prevent an adopted child from concluding a marriage with another member of the adoptive family (with the exclusion of the adoptive parent) if, had it not been for the adoption, such a marriage would have been allowed.<sup>270</sup> Section 20(1) of the *Child Care Act* stated that an adoption order terminated all existing rights and obligations between the child and any person previously serving as the child's parent.<sup>271</sup> Importantly, section 20(2) stipulated:<sup>272</sup>

An adopted child shall for *all* purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage.

As a result, the *Child Care Act* did not stipulate that the child would retain a right to inherit from the family of origin upon intestacy. For the first time, "the complete

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<sup>264</sup> Except with the consent of the relevant minister at the time. See s 24(1) of the *Child Care Act*.

<sup>265</sup> Section 24(2) of the *Child Care Act*.

<sup>266</sup> Unless the order determined otherwise. See s 20(3) of the *Child Care Act*.

<sup>267</sup> Section 20(3) of the *Child Care Act*.

<sup>268</sup> Other than a marriage or carnal intercourse between the adoptive parent and the adopted child.

<sup>269</sup> Section 20(4) of the *Child Care Act*.

<sup>270</sup> The Afrikaans version of the Act put it as follows: "'n Aannemingsbevel het nie die uitwerking dat 'n huwelik of vleeslike gemeenskap (behalwe 'n huwelik of vleeslike gemeenskap tussen die aannemende ouer en die aangenome kind) wat by ontstentenis van die aanneming verbode of veroorloof sou gewees het, veroorloof of verbode word nie." See s 20(4) of the *Wet op Kindersorg* 74 of 1983.

<sup>271</sup> Except, of course, a married person of whose spouse the child was born, as contemplated in s 17(c). See s 20(1) of the *Child Care Act*.

<sup>272</sup> Emphasis added.

severance of all ties<sup>273</sup> between the adopted child and their natural family" was introduced by law.<sup>274</sup>

Similar to section 74(4) of the 1960 *Children's Act*, section 20(5) of the *Child Care Act* also provided for the lapsing of certain other orders.

Regarding interracial adoption, section 40(b) of the *Child Care Act* provided that a child was not to be placed in or transferred to the custody of any person whose classification in terms of the *Population Registration Act* differed from that of the child.<sup>275</sup> The Act also required the child's religious and cultural background and biological parents to be considered against that of the proposed adoptive parent(s).<sup>276</sup> Therefore, even though the *Child Care Act* did not copy the explicit reference to "ethnological grouping" found in the 1960 *Children's Act*,<sup>277</sup> the phrasing of section 35(2)(c) of the 1960 Act was indeed repeated in section 40(b) of the *Child Care Act*.<sup>278</sup> Interestingly, although section 40(b) was repealed in 1991,<sup>279</sup> the provision stating that religious and cultural background had to be considered was retained. As intercultural adoption was closely intertwined with interracial adoption, this position caused uncertainty as to whether interracial adoption was accepted or desired<sup>280</sup> at that point.<sup>281</sup> Section 27 of the *Child Care Act* also specifically referred to "blacks" and stipulated that, in applying the provisions of chapter 4 in respect of a black person, any customary union was to be deemed marriage between such persons.<sup>282</sup> Consequently, Joubert argues that the Act

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<sup>273</sup> "Except for purposes of marriage and sexual intercourse." See Louw 2017 *Obiter* 467.

<sup>274</sup> Louw 2017 *Obiter* 467.

<sup>275</sup> Except where such a person was the parent or guardian of the child. See s 40(b).

<sup>276</sup> Section 40(a) of the *Child Care Act*.

<sup>277</sup> See 3.2.4.3 above.

<sup>278</sup> Also see Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 34-35.

<sup>279</sup> By means of s 14 of the *Child Care Amendment Act* 86 of 1991. See Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 35.

<sup>280</sup> See, for example, Joubert 1993 *SALJ* 728-729 on research conducted in 1967 regarding the desirability of interracial adoption. According to Tanga and Nyasha 2017 *Res Soc Work Pract* 232, "CRA (cross-racial adoption) became legal in 1991".

<sup>281</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 35.

<sup>282</sup> And any reference to a husband, wife, widower, widow, divorced person, married person or spouse was to be construed accordingly.

specifically provided for black people who had concluded a customary union to adopt jointly.<sup>283</sup>

Even if Joubert's contention is correct, it is unlikely that a black couple would have been able to adopt a child of another race legally. Though the *Population Registration Act* was repealed in 1991,<sup>284</sup> its legacy of categorising people according to race endured. The story of a boy called Happy Sindane comes to mind. In 2003 Happy alleged that he was kidnapped by an African family when he was young and indicated that he wanted to reunite with his white family.

When the alleged "kidnappers" were contacted the version of the story changed. According to the father of the deceased African woman (Ms Sindane) who raised Happy, his daughter "informally adopted" Happy after his mother abandoned him. Years earlier, a woman called "Rina" had approached his daughter, Ms Sindane, requesting that she keep an eye on Happy whilst she went to a liquor store. Ms Sindane agreed to watch Happy, but Rina never returned. She had reported the incident to the police, but the matter had not been followed up and she had continued to raise Happy as one of her own. After Ms Sindane's death Happy<sup>285</sup> had become lonely, going to the police to report his kidnapping.

Awareness of race is clear from the story of Happy Sindane.<sup>286</sup> As Happy was initially presumed to be "white", the story about the lost white boy became an overnight sensation. However, DNA results proved that he could not have been the son of two white couples alleging to be his biological parents. A Xhosa woman alleged that Happy was her cousin's child with a white Zimbabwean man and that Happy was of "mixed race" or "coloured", though DNA results to this effect were inconclusive. People from the township he grew up in called Happy "ungrateful", stating that black people should

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<sup>283</sup> Joubert 1993 *SALJ* 727-728.

<sup>284</sup> See the *Population Registration Act Repeal Act* 114 of 1991.

<sup>285</sup> At that stage believed to be sixteen years old.

<sup>286</sup> For the story of Happy Sindane, see Polgreen 2003 [nytimes.com/2003/06/19/world/lost-boy-shines-light-on-race-in-south-africa.html](http://nytimes.com/2003/06/19/world/lost-boy-shines-light-on-race-in-south-africa.html).

not be expected to raise rich white people's kids, but according to Ms Sindane's father, he felt sorry for Happy and treated Happy as his own, "even if he was a white".<sup>287</sup>

In summary, therefore, regarding interracial adoption, the *Child Care Act* did not introduce any noteworthy change.<sup>288</sup> Also, due to South African society's "bizarre obsession"<sup>289</sup> with race, interracial adoptions remained unlikely.

The *Child Care Amendment Act*<sup>290</sup> of 1996 introduced a definition of "child born out of wedlock" to be inserted after the definition of "child" in section 1 of the *Child Care Act*. Such a child was defined as "a child born outside a marriage".<sup>291</sup> "Marriage" was defined as any marriage recognised in South African law or customary law or concluded under a system of religious law.<sup>292</sup> Any reference to a husband, wife, widower, widow, divorced person, married person or spouse had to be construed accordingly.<sup>293</sup>

The 1960 *Children's Act*, the *Child Care Act* and the *Children's Status Act* have all since been repealed by the current *Children's Act* 38 of 2005. Chapter 15 of this Act deals with adoptions. A discussion of relevant sections of the *Children's Act* follows later in this thesis.<sup>294</sup>

Chapter 3 of this thesis points to the requirements for customary law adoptions and those under the legislation. As South African adoption legislation was enacted to address the need for formalising adoptions under common law, the difference in requirements should be seen against the backdrop of the different values underpinning adoption under the two legal systems. These different value systems become apparent from the discussion of African values and the African family below, which serves as a backdrop to the discussion of customary law adoption in chapter 3.

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<sup>287</sup> See Polgreen 2003 [nytimes.com/2003/06/19/world/lost-boy-shines-light-on-race-in-south-africa.html](http://nytimes.com/2003/06/19/world/lost-boy-shines-light-on-race-in-south-africa.html).

<sup>288</sup> Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 34.

<sup>289</sup> As stated by the then executive director of the Center for the Study of Violence and Reconciliation, Graeme Simpson. See Polgreen 2003 [nytimes.com/2003/06/19/world/lost-boy-shines-light-on-race-in-south-africa.html](http://nytimes.com/2003/06/19/world/lost-boy-shines-light-on-race-in-south-africa.html).

<sup>290</sup> 96 of 1996.

<sup>291</sup> Section 1(c) of the *Child Care Amendment Act* 96 of 1996.

<sup>292</sup> Subject to specified procedures.

<sup>293</sup> Section 1(d) of the *Child Care Amendment Act* 96 of 1996.

<sup>294</sup> See chapter 3.

## **2.4 Customary law adoption: A certain set of values and the importance of family**

### *2.4.1 Introduction*

As adoption under common law evolved through the passing of legislation, tracing its development over time is a fairly simple historical exercise. On the other hand, customary law adoption was essentially ignored by legal commentators<sup>295</sup> for the first two centuries of colonial rule, when Roman-Dutch law was regarded as the "basic law of the land".<sup>296</sup> Moreover, customary law requires a different perspective.<sup>297</sup> It needs to be understood in the context of certain African values and, more particularly, the idea of the African extended family<sup>298</sup> (both of which were previously undermined):<sup>299</sup>

Colonial powers regarded the indigenous populations of conquered territories as uncivilised 'savages' and viewed indigenous law as a set of primitive rules which 'was irrational, inseparably linked with religion, lacked a distinction between civil and criminal law, thought in terms of groups and not individuals as legal units, and was generally on a lower evolutionary plateau'. ... The most prominent victim of the repugnancy principle<sup>300</sup> has been the potentially polygamous customary marriage, which was regarded as particularly offensive to the 'principles of civilisation' and has accordingly been denied legal recognition until very recently.

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<sup>295</sup> Even though customary law was afforded limited recognition in some instances, Pieterse states that the "recognition and application of customary law were intricately linked to the regulation of South Africa's 'native' population." See Pieterse 2001 *SAJHR* 368; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 39 and the authorities cited.

<sup>296</sup> See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 39 and the authority cited.

<sup>297</sup> "The common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection." See Elias *The Nature of African Customary Law* 28 and the authorities cited.

<sup>298</sup> The "importance of the extended family in African social systems" was also referred to in *Centre for Child Law v NN* (32053/2014) [2017] ZAGPPHC 682 (25 October 2017) para 35.

<sup>299</sup> Pieterse 2001 *SAJHR* 368 and the authorities cited; Bennett 2011 *PELJ* 30/351.

<sup>300</sup> Where customary law was "tolerated" if it was not in conflict with public policy and natural justice, or rather, with the European perception of public policy, morality and natural justice. See, for example, Pieterse 2001 *SAJHR* 368 and the authorities cited; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 39.

Accordingly, despite customary law showing resilience over the years,<sup>301</sup> Monye states that viewing customary law through a common law lens has resulted in "a lack of development and standardisation of *customary law adoptions* in South Africa".<sup>302</sup>

The following introductory discussion of the development of customary law adoption starts by briefly contextualising relevant African "values". It then explores the African extended family (including a brief look at customary marriage, *ilobolo* and the handing over of the bride) and the position of children in such an extended family. Therefore, the foundation for unpacking customary law adoption in chapter 3 is laid.

## 2.4.2 African values

### 2.4.2.1 The meaning of values

According to the *Collins English Dictionary*, the term "values", among other listed meanings,<sup>303</sup> refers to the "moral principles and *beliefs* or accepted standards of a person or *social group*".<sup>304</sup> Consequently, it has been stated that "values are a fundamental part of the human condition".<sup>305</sup> Values include an "emotional element" and, despite forming part of one's "individual identity", can also be shared by groups.<sup>306</sup> Typically, values are developed during childhood, are resistant to change, and enable one to distinguish between right and wrong.<sup>307</sup> Also, values "cannot be proved correct or incorrect, valid or invalid, right or wrong":<sup>308</sup>

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<sup>301</sup> "State regulation, which often resulted in distortion, could not suppress the natural development of customary law and its institutions." Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 14.

<sup>302</sup> Emphasis added. Monye 2017 *Journal of Law, Society and Development* 6 and the authority cited.

<sup>303</sup> Which are not relevant for the purposes of this study.

<sup>304</sup> "Value". Emphasis added.

<sup>305</sup> Bryan, Mason-Whitehead and McIntosh *et al* (eds) 2008 <https://epdf.pub/key-concepts-in-nursing-sage-key-concepts-series.html>.

<sup>306</sup> Groups are made up of either different or similar individuals. See Bryan, Mason-Whitehead and McIntosh *et al* (eds) 2008 <https://epdf.pub/key-concepts-in-nursing-sage-key-concepts-series.html>. Although explained in the context of the nursing profession in the source cited, the information is equally relevant to the context of this study.

<sup>307</sup> Bryan, Mason-Whitehead and McIntosh *et al* (eds) 2008 <https://epdf.pub/key-concepts-in-nursing-sage-key-concepts-series.html>.

<sup>308</sup> Bryan, Mason-Whitehead and McIntosh *et al* (eds) 2008 <https://epdf.pub/key-concepts-in-nursing-sage-key-concepts-series.html>.

If a statement can be proven true or false, then it cannot be a value. Values tell what we should believe, regardless of any evidence or lack of evidence.

From the above, it appears that the definition of "values" leaves enough scope to include cultural and religious beliefs. Therefore, this discussion starts with a brief overview of the importance of African beliefs, particularly regarding ancestry, in customary law, followed by a discussion of the value<sup>309</sup> of *ubuntu*, considering that:<sup>310</sup>

[a]ny discussion about African values in South Africa without reference to *ubuntu* will be incomplete.

*uBuntu* is also linked to ancestor veneration and African beliefs:<sup>311</sup>

*uBuntu* lies at the root of ancestor veneration and provides the ethical standard for traditional systems of African belief. It runs counter to the modern Western view of social atomism, which emphasises individuals as the centre of things. In the African view, 'I participate therefore I am'. In this way, the individual's existence is defined in relation to a whole, although this is not to say that an individual is merely a part of a whole, but rather as a whole in him or herself.

From the outset it should be made clear that the overview below does not purport to be an exhaustive account of African beliefs. African beliefs also differ from one community to the next.<sup>312</sup> Amoah and Bennett warn against overgeneralising and reducing indigenous beliefs to "animism and ancestor worship" only.<sup>313</sup> Instead, the following discussion of African beliefs is a "general" discussion with a particular focus on the importance of the ancestors. However, the discussion is deemed important to create some understanding, albeit in a general sense, of adoption under customary law. Likewise, the discussion of *ubuntu* is presented only from the perspective of customary law adoptions in South Africa.

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<sup>309</sup> *uBuntu* was referred to as a "value" in *S v Makwanyane* 1995 3 SA 391 (CC) para 307 and *Koyabe v Minister for Home Affairs* 2010 4 SA 327 (CC) 349-350 and elsewhere.

<sup>310</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 28.

<sup>311</sup> Bennett *Traditional African Religions in South African Law* xxx.

<sup>312</sup> Also see Amoah and Bennett 2008 *AHRLJ* 360.

<sup>313</sup> Amoah and Bennett 2008 *AHRLJ* 360.

#### 2.4.2.2 The importance of African beliefs

African beliefs have been key in the development of customary law. The beliefs of a community support its legal system.<sup>314</sup> The ancestors "guard the rules of conduct of their descendants".<sup>315</sup> A breach thereof may affect the community as a whole (and not merely the individual alone) negatively; consequently, the relevant rules of conduct are usually abided by:<sup>316</sup>

Primarily the law is obeyed, just because it is accepted. Its acceptance and its position as an integral part of the social organisation are its own sanction. It is obeyed because only by obedience to the law will society function, and it is in everybody's interest to subscribe to its regulations.

Certain beliefs play an important role in customary law.<sup>317</sup> For instance, it has been stated that the practice of *ilobolo*<sup>318</sup> should not be seen in an economic or commercial light only; it has "a *religious*, magic, a social and a legal aspect".<sup>319</sup>

The role of African religion or traditional beliefs in customary law has also been explained with reference to a "Supreme Being":<sup>320</sup>

Some African communities recognised a Supreme Being,<sup>321</sup> ancestors, witchdoctors and witchcraft. They considered, and still consider, the Supreme Being as the creator and provider of all that is good on Earth. He was also the highest authority, the keeper of law and order, morals and behavioural codes. The traditional leader or king had to

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<sup>314</sup> Such as the Pedi. See Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 18 and the authorities cited.

<sup>315</sup> The descendants of the ancestors are viewed to have inherited the traditions of their forefathers. See Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 18 and the authorities cited.

<sup>316</sup> See Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 18 and the authorities cited. See Elias *The Nature of African Customary Law* 64 and the authorities cited.

<sup>317</sup> "Underlying everything is the *religious* sanction which is based on 'the theory that the clan is a continuous entity comprising both the living and the dead. The ancestors are just as much concerned as the living in the due observance of the law'." Elias *The Nature of African Customary Law* 64 and the authorities cited. Also see Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 111; Du Plessis 1992 *De Jure* 298-300; Bennett *Traditional African Religions in South African Law* xi, xiv, xviii, xxx, xxxi.

<sup>318</sup> Discussed in more detail below. See 2.4.3.1.

<sup>319</sup> Emphasis added. Olivier *et al Inheemse Reg* 38 and the authority cited.

<sup>320</sup> Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 111. Also see Du Plessis 1992 *De Jure* 298-300; Bennett *Traditional African Religions in South African Law* xi, xiv, xviii, xxx, xxxi.

<sup>321</sup> Regarded as male, with "all the characteristics associated with a man of high rank and status". Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 17. Also see Elias *The Nature of African Customary Law* 14-15.

apply laws and justice as the Supreme Being would have, but the leaders and kings were nevertheless subject to the rules of the community and could not regard themselves as being above the law. The Supreme Being acted through the ancestors. The ancestors were the departed and the unborn, and a deceased person had to be remembered to remain an ancestor. It was therefore important to keep in contact with the ancestral land where the ancestor was buried and people feared that once the bond was broken, some misfortune would happen.

Traditionally, when someone in a community angers the ancestors, misfortune occurs. The Supreme Being and the ancestors punish the offender for preventing even more misfortune. Offences include defamation, robbery, murder and the abuse of women. Therefore, communities created rules to prevent angering their ancestors. They developed unique ways to restore peace, for example, by paying cattle, whipping, or providing labour to another person. Instead of having a "winner" and a "loser" after an offence is committed, the aim of punishment is reconciliation.<sup>322</sup>

Denson and Nxumalo once again confirm the importance of the ancestors:<sup>323</sup>

Belief in the influence of ancestral spirits and their veneration is an element central to the religions of all black peoples of South Africa. It is based on the belief that the living and the dead influence each other. If the ancestral spirits are offended or neglected, they may withhold good fortune from their descendants on earth and may bring misfortune upon them. This belief results in certain acts of veneration being observed to ensure the continued goodwill of the ancestral spirits or to restore good relations with them.

Ancestors keep their former social status and individual characteristics after death.<sup>324</sup>

They act as "guardians of the living":<sup>325</sup>

Evil and sickness cannot touch a person unless the ancestral spirits are negligent or have decided to abandon their living descendants.

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<sup>322</sup> See Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 111; Du Plessis 1992 *De Jure* 298-300; Bennett *Traditional African Religions in South African Law* xi, xiv, xviii, xxx, xxxi.

<sup>323</sup> Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 17. Ancestral spirits are referred to in the plural. In Xhosa, for instance, they are known as *amathongo*, in Zulu as *amadlozi*, in siSwati as *madloti*, in Sotho and Tswana as *badimo*, in Tsonga as *swikwembu*, and in Venda as *mezimu*. Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 18.

<sup>324</sup> Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 18. Bennett states that "the spirit of a socially important person may remain indefinitely attached to its family and continue to take an interest in the family's well-being". Bennett *Customary Law in South Africa* 295.

<sup>325</sup> Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 18.

For this reason, "rituals for the ancestors persist, even amongst members of Christian congregations".<sup>326</sup> Children's ties with their families of origin are important.<sup>327</sup> Children are believed to be "spiritually linked to rituals peculiar to ... [their] ancestry".<sup>328</sup>

As a result, when a child's bloodline is "different<sup>329</sup> and unknown",<sup>330</sup> "cross-pollination of rituals will anger the child's ancestors", exposing the child to "misfortunes".<sup>331</sup> Certain consequences of adoption, such as changing the child's name and moving the child to another geographic area, also go against African "ancestral belief systems".<sup>332</sup> The firm belief in connection with one's ancestors might lead to an unwillingness to adopt.<sup>333</sup>

In the case of *Centre for Child Law v NN* (the *NN* case)<sup>334</sup> the court had to determine whether a baby girl and boy who had erroneously been switched in the hospital at birth should be returned to their biological families. Interestingly, expert witness Nhlapo<sup>335</sup> testified that "it is still possible to perform the necessary ceremonies and

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<sup>326</sup> At least in a Sotho-Tswana context. See Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 37 and the authority cited; Bennett *Traditional African Religions in South African Law* xvi. Some African people are said to have been practising Christianity for "more than 200 years". In this regard, see Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 17.

<sup>327</sup> Boezaart *Child Law in South Africa* 195.

<sup>328</sup> See Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf) and the authority cited.

<sup>329</sup> From a family looking to adopt, for instance.

<sup>330</sup> Such as in the case of an abandoned child. See Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf).

<sup>331</sup> Such as "sickness and disease". See Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf), and the reference to a 2012 article in *The Times*.

<sup>332</sup> Boezaart *Child Law in South Africa* 195.

<sup>333</sup> Also see Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf).

<sup>334</sup> *Centre for Child Law v NN* (32053/2014) [2017] ZAGPPHC 682 (25 October 2017).

<sup>335</sup> At the time of the judgment, Prof Nhlapo was an emeritus professor at the University of Cape Town, specialising in cultural traditions. See the *NN* case para 34.

rituals on the children"<sup>336</sup> – although "different" bloodlines were involved, and that, by the time of the hearing, a couple of years had already lapsed.<sup>337</sup> Nhlapo also added:<sup>338</sup>

[T]he interests of children is best served in the communal value system by making sure that a child "belongs" and consequently mechanisms for ensuring that every child has a home are considered sacrosanct.

Nhlapo referred to each of the two children in the *MV* case as "the social child of their psychological parents",<sup>339</sup> a concept "deeply entrenched in African culture" and which "does not impinge on customary law or traditions".<sup>340</sup>

Although this was "not necessarily a clear-cut adoption case",<sup>341</sup> Nhlapo's testimony in the *MV* case suggests that, subject to acceptance by the extended family and performance of the necessary ceremonies and rituals, ancestral beliefs do not necessarily pose a barrier for adoption between African families. However, were the two families involved African and white South African the situation might have been perceived differently. In a fairly recent qualitative study<sup>342</sup> some of the African participants said the following:<sup>343</sup>

The practice of CRA [cross-racial adoption] needs to be avoided at all costs, even if its avoidance result in the children having to remain in institutional care until a 'perfect' racial match can be found.

Therefore, the researchers conclude:<sup>344</sup>

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<sup>336</sup> If the court were to find that the children should stay with their "psychological" parents. The *MV* case para 37.

<sup>337</sup> The children were born in 2010. In 2013 it transpired that they had been switched at birth. The matter was first heard in 2015. Reasons for the judgment were given in 2017. See the *MV* case paras 1-4.

<sup>338</sup> The *MV* case para 35.

<sup>339</sup> Both children had been accepted by their respective "psychological" extended families. The *MV* case para 36.

<sup>340</sup> The *MV* case para 36.

<sup>341</sup> Although the court stated that it was not necessary to "forge *de facto* adoption into a specific legal classification", it indeed recognised *de facto* adoption in the best interests of the children. The *MV* case para 63.

<sup>342</sup> Conducted in East London. See Tanga and Nyasha 2017 *Res Soc Work Pract* 231.

<sup>343</sup> Tanga and Nyasha 2017 *Res Soc Work Pract* 234.

<sup>344</sup> Tanga and Nyasha 2017 *Res Soc Work Pract* 234. Some participants believed that "children adopted across racial lines will face a dilemma regarding whether to follow their own culture or to adopt the new culture."

The findings of the study indicate that a great many black people may perceive the practice of CRA to be bad and not only not in the best interests of the cross-racial adopted child but also not in the best interests of society as a whole.

However, in the case of Happy Sindane discussed earlier an African family had no objection to raising a white child as their own.<sup>345</sup> In this qualitative study, though, the "white, Indian, and coloured participants"<sup>346</sup> supported so-called "cross-cultural adoption" as opposed to the African participants. Some of the white, Indian and coloured participants suggested the following:<sup>347</sup>

It is good for a black child to have a family, even when that means being raised by white parents in a "white" culture, rather than that child having no family at all, simply because of the belief of some people that the child needs to be raised in his or her "black" culture.

Those opposed to cross-cultural adoption saw it as "a weapon which is being used to destroy the African cultural ties of black people" and "a form of cultural genocide".<sup>348</sup> The reason for this, the researchers concluded, could be "black" participants' "greater exposure and adherence to black culture".<sup>349</sup> Nevertheless, if nothing else the research has highlighted the importance of African children growing up in their "culture", which is grounded in the value of *ubuntu*.

#### 2.4.2.3 *uBuntu*<sup>350</sup>

The fact that "Africans live and think in the context of a community"<sup>351</sup> points to the existence of a group psyche closely linked to *ubuntu*.<sup>352</sup> This distinctively African value has significantly impacted on the development of South African law in general and customary law in particular.<sup>353</sup>

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<sup>345</sup> See 2.3.4.4.

<sup>346</sup> As well as one African ("black") participant. Tanga and Nyasha 2017 *Res Soc Work Pract* 234.

<sup>347</sup> Tanga and Nyasha 2017 *Res Soc Work Pract* 236.

<sup>348</sup> Tanga and Nyasha 2017 *Res Soc Work Pract* 235-236.

<sup>349</sup> Tanga and Nyasha 2017 *Res Soc Work Pract* 236.

<sup>350</sup> As it functions as a loanword in English, "*ubuntu*" is written in italics throughout this thesis. Also see Bennett 2011 *PELJ* 31/351.

<sup>351</sup> Mwamwenda *Educational Psychology An African Perspective* 322.

<sup>352</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 27 and the authorities cited; the *Bhe* case para 45. Also see 1.3.8 above for a brief discussion of the meaning of *ubuntu*.

<sup>353</sup> Also see Mwamwenda *Educational Psychology An African Perspective* 322; *S v Makwanyane* 1995 3 SA 391 (CC) 423.

While *ubuntu* was mentioned in the *Interim Constitution*,<sup>354</sup> no reference to it appears in the *Constitution*, yet *ubuntu* continues to be referred to and to influence court decisions occasionally.<sup>355</sup> In *S v Makwanyane* (the *Makwanyane* case),<sup>356</sup> which was decided under the *Interim Constitution*, *ubuntu* was explained as follows:<sup>357</sup>

An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own.

The court in the *Makwanyane* case conceded that even though the notion of *ubuntu* had been used in various texts, it was largely "without explanation of the concept".<sup>358</sup> Nevertheless, the court said *ubuntu* had<sup>359</sup>

always been mentioned in the context of it being something to be desired, a commendable attribute which the nation should strive for.

It was further explained that *ubuntu* "carries in it the ideas of humaneness, social justice and fairness".<sup>360</sup> Ultimately or generally,<sup>361</sup>

*ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*,<sup>362</sup> describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.

To Bennett, *ubuntu* means "sharing and co-responsibility and the mutual enjoyment of rights by all".<sup>363</sup> In the context of family law *ubuntu* has been described as a "godly

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<sup>354</sup> The post-amble of the *Interim Constitution* stated that "... there is a need for understanding but not vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not victimisation". Also see *S v Makwanyane* 1995 3 SA 391 (CC) para 237.

<sup>355</sup> See Bennett 2011 *PELJ* 43/351 for a discussion of family law matters featuring *ubuntu*. *uBuntu* has also been referred to in various other fields of the law. See, amongst other things, Bennett 2011 *PELJ* 31/351-46/351 for a discussion of some of these cases.

<sup>356</sup> 1995 3 SA 391 (CC).

<sup>357</sup> The *Makwanyane* case para 225.

<sup>358</sup> The *Makwanyane* case para 227.

<sup>359</sup> The *Makwanyane* case para 227.

<sup>360</sup> The *Makwanyane* case para 237.

<sup>361</sup> The *Makwanyane* case para 308.

<sup>362</sup> "A person is a person by or through other people." See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 29.

<sup>363</sup> Bennett 2011 *PELJ* 52/351.

value with which all human beings are ordained" and a "healthy communitarian tradition".<sup>364</sup>

Some consider *ubuntu* an obstacle to adoption because a child from a "different and unknown bloodline" might anger the ancestors,<sup>365</sup> resulting in misfortunes such as illness and disease befalling the adopted child.<sup>366</sup> Cultural concerns regarding adoption emanated from a 2019 online newspaper article, where the following was stated:<sup>367</sup>

It was at this point that I realised that there were some deep cultural concerns around the formal process of adoption, as outlined in the Children's Act (2005). I kept on being told by community members that "adoption is not ubuntu". I found this very confusing as informal adoption takes place every day in South Africa, when parents are lost or unable to take care of their children, and extended family or caring community members then absorb the child into their family.

These informal arrangements, however, are often not formalised through the courts, and it is this process of formalisation, where a court removes the parental rights of the biological parent from a child and then places those rights into another family, with different familial ancestors that were cause for concern. The challenge for the child protection community is that due to these beliefs, the majority of vulnerable children are not placed formally into the child protection system, but are rather abandoned into care, making the process of reunifying children with their biological family almost impossible.

Adoption by a husband and his wives<sup>368</sup> has been regarded as "a practical application of the spirit of *ubuntu*".<sup>369</sup>

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<sup>364</sup> See Bennett 2011 *PELJ* 43/351 and the authority cited; the *Bhe* case para 45; *MM v MN* 2013 4 SA 415 (CC) 423.

<sup>365</sup> See Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf).

<sup>366</sup> See Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf).

<sup>367</sup> Blackie 2019 <https://dailymaverick.co.za/opinionista/2019-01-17-why-adoption-is-a-problem-in-south-africa/>. The article refers to Blackie as a "child protection researcher and community worker in Johannesburg".

<sup>368</sup> Therefore, in a polygynous customary marriage. Regarding the term "polygyny": It is submitted that even though the word "polygamy" is often used, African communities in South Africa tend to observe "polygyny" instead. Among African communities in South Africa, only a man is allowed to have more than one wife, and not the other way around as well. See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 90 for an explanation. Accordingly, in this thesis, the term "polygyny" will be used.

<sup>369</sup> By the SALC. See Boezaart *Child Law in South Africa* 170.

### 2.4.3 The African extended family

The importance of a sense of community in African life not only transpires from certain beliefs and the meaning of *ubuntu* but is also specifically illustrated through the phenomenon of the extended family. However, explaining the nature and structure of African families is "extraordinarily complex".<sup>370</sup> Bennett states two reasons for this:<sup>371</sup>

In the first place, although the modern African family is constantly being defined in relation to its precolonial forebear, we have very little evidence of pre-nineteenth-century family structures. In the second place, the concept of family itself has no settled meaning.

The key point of contention is whether "family" is meant to be interpreted (or treated) as a "group of people" or, rather, as an "abstract constellation of obligations and emotional attachments".<sup>372</sup> Both interpretations pose certain challenges. For example, interpreting the family unit as a group of people mostly entails defining the family with reference to bloodline or co-residence.<sup>373</sup> However, these physical criteria fail to measure a subjective state of mind.<sup>374</sup> Ultimately, the fact that two people share a bloodline is no guarantee that they would be fond of each other or have a good relationship.<sup>375</sup> Also, the degree of acceptance may vary when introducing strangers into a household.<sup>376</sup> On the other hand, finding criteria to measure subjective emotional sentiments presents problems, challenging the view that a family should be treated as a constellation of obligations and emotional attachments.<sup>377</sup> According to a recent *Revised White Paper of Families in South Africa*:<sup>378</sup>

South Africa celebrates a diversity of family forms. People's ideas of the family differ based on who they identify to be their family. Family therefore goes beyond ties of

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<sup>370</sup> Bennett *Customary Law in South Africa* 178.

<sup>371</sup> Bennett *Customary Law in South Africa* 178.

<sup>372</sup> Or "a constellation of intangible sentiments of duty and attachment". See Bennett *Customary Law in South Africa* 178-178.

<sup>373</sup> Bennett *Customary Law in South Africa* 178.

<sup>374</sup> Bennett *Customary Law in South Africa* 179.

<sup>375</sup> Bennett *Customary Law in South Africa* 178.

<sup>376</sup> Bennett *Customary Law in South Africa* 178.

<sup>377</sup> Bennett *Customary Law in South Africa* 179. For a more detailed discussion of the difficulties associated with the concept "family", see Bennett *Customary Law in South Africa* 178-179 and the authorities cited. For a description of family in different disciplines, see clause 2.1. in GN 540 in GG 44724 of 18 June 2021 and the authorities cited, where it is also stated that a standard definition of "family" is therefore "not possible".

<sup>378</sup> Clause 1.1.3. in GN 540 in GG 44724 of 18 June 2021.

blood, marriage, kinship, and legal arrangement, but originates from the social connections and identity ties. While marriage rates in South Africa are amongst the lowest globally, many people choose to cohabit and engage in long-term committed relationships. South Africa has legalised same-sex marriage and celebrates families formed on the basis of same-sex marriages and long-term relationships. Nuclear families are amongst the least common family forms in South Africa. Many families are headed by single parents – both men and women, although we do have high rates of female-headed households. Polygynous marriages are also recognised in South Africa and form the basis of many families.<sup>379</sup> Many families include multiple generations and extended kinship networks. Skip-generation households in which children are cared for by grandparents are also prevalent in South Africa.

For the purposes of the White Paper, "family" is then defined as<sup>380</sup>

a societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation, and go beyond a particular physical residence.

According to Monye, "kinship is created through cattle" in the African family.<sup>381</sup>

"Kinship" (in the context of the African family) has been explained as follows:<sup>382</sup>

Kinship is the state of being related by blood. Kinship has an influence on the structural organisation of communities. It forms the basis of social life. It is not merely a system of classifying persons as parents, children and relatives, it dictates the behaviour of the members amongst each other. They are not only related by blood, but conscious of being related in character, origin and have the same value system. Africans emphasise patrilineal descent, which is calculated by reference to paternal lineage. ... Kinship also applies to name giving and forbidden or preferred marriages. The latter is quite complicated, but boils down to the fact that marriages within some degrees of relationship are preferred whereas others are prohibited.

In modern times, despite the emphasis on individualisation introduced by the *Constitution*<sup>383</sup> and the emergence of new family formations, many Africans,<sup>384</sup> particularly African children, still form part of "extended families".<sup>385</sup> As Bennett and Peart explain, in anthropological terms "extended" refers to an augmentation of the

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<sup>379</sup> Although another source states that "households are nowadays seldom based upon a polygynous family". Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 15.

<sup>380</sup> Clause 2.1. in GN 540 in GG 44724 of 18 June 2021.

<sup>381</sup> "Ngwana o tswalwa ke kgomo", or "Cattle, not men, begat children". Monye 2017 *Journal of Law, Society and Development* 2.

<sup>382</sup> Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 15 and the authorities cited.

<sup>383</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 27. "Individualism" implies considering one's personal interests instead of the interests of the wider group of kin. See Bennett *Customary Law in South Africa* 182.

<sup>384</sup> As also stated above.

<sup>385</sup> Bekker 2008 *Obiter* 396; Mokotong 2015 *THRHR* 349. Also see 1.2.4 above.

nuclear (or conjugal)<sup>386</sup> family by vertical and/or horizontal extension.<sup>387</sup> While the nuclear family consists of only a husband, wife and their dependent children,<sup>388</sup> the extended family may include members from the ascending and descending generations (vertical extension) and from a series of conjugal units or polygynous marriages (horizontal extension).<sup>389</sup> It is not certain how far the range of relatives extended in the past.<sup>390</sup>

However, according to Bennett, the vertical extension of the nuclear family in the form of eponymous, patrilineal clans remains prevalent.<sup>391</sup> A "clan" refers to a "group of people who believe themselves to be related to a common ancestor".<sup>392</sup> Clans segment into lineages (or more manageable units) generally four to six generations deep.<sup>393</sup> The lineage, which is said to have provided "the model of the African family",<sup>394</sup> consists of or "breaks down into" households,<sup>395</sup> which are the centre of normal day-to-day domestic activities.<sup>396</sup> The term "household" should refer to people who live together<sup>397</sup> at a homestead<sup>398</sup> and not denote the entire network of relatives.<sup>399</sup> A traditional household was a conjugal unit extended horizontally through polygynous

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<sup>386</sup> See Bennett *Customary Law in South Africa* 180.

<sup>387</sup> Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 146.

<sup>388</sup> Or couples living together. Generally, children include adoptive children. See GN 540 in GG 44724 of 18 June 2021. Also see Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 146.

<sup>389</sup> See Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 146.

<sup>390</sup> Bennett *Customary Law in South Africa* 180.

<sup>391</sup> Bennett *Customary Law in South Africa* 180.

<sup>392</sup> Even though their exact genealogical links may no longer be traceable. Bennett *Customary Law in South Africa* 180. "Clans" may also be described as "community wards": "A number of family groups, living together in the same village, make up a ward. The unit may be defined as a collection of households living together in their own hamlet and forming a distinct social and political unit under the leadership and authority of one hereditary headman." See Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 15 and the authority cited.

<sup>393</sup> Bennett *Customary Law in South Africa* 180-181.

<sup>394</sup> Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 147.

<sup>395</sup> Bennett *Customary Law in South Africa* 181.

<sup>396</sup> Bennett *Customary Law in South Africa* 181.

<sup>397</sup> And "share a common food supply". Bennett *Customary Law in South Africa* 181.

<sup>398</sup> Being "the physical unit occupied by a household". Bennett *Customary Law in South Africa* 181.

<sup>399</sup> Bennett notes that the concepts "household" and "family" are sometimes used interchangeably. However, as the latter refers to a network of kin, a distinction should be drawn between the two terms. See Bennett *Customary Law in South Africa* 181.

marriage.<sup>400</sup> It included a husband<sup>401</sup> with several wives, their children, grandchildren, siblings, and others allowed into the household.<sup>402</sup>

In addition, each wife's "house" was more than a physical shelter.<sup>403</sup> It served as an economic hub where production, distribution and consumption took place and offered a supernatural element, ensuring continuity beyond the life of the particular wife.<sup>404</sup> The latter occurred either through her own or adopted children.<sup>405</sup>

In his 2020 publication<sup>406</sup> Mseleku discusses polygamy in Africa and highlights the importance of children in such families. He indicates that having many children is one of the "benefits" of a polygamous family.<sup>407</sup> Such children "*belong to all wives* irrespective of biological patterns".<sup>408</sup> Through "uniting" the children in this way, there will be no "fissure that makes it difficult to run it [the family]".<sup>409</sup> All of the particular husband's wives are to be "equally respected" by the children.<sup>410</sup>

The father of children should ensure that his wives are equally respected by the children. If a wife is barren, this is overcome by those who have children in the family in that she has the right to use any child *since the children belong to her husband and her sisters-in-law*. That family cannot diminish just because she had no child; all the other children of this family will take care of that. She can still contribute to the growing of the family irrespective of her having a child or not. The primary goal for

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<sup>400</sup> Bennett *Customary Law in South Africa* 181.

<sup>401</sup> Or "patriarch". Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 147.

<sup>402</sup> Bennett *Customary Law in South Africa* 181; Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 147. Strangers might also form part of a particular family. Such persons are allowed into the community, provided that they have the consent of the traditional authority and the community concerned, or as a result of long-term residency. Olivier *et al Inheemse Reg* 3. S 68(2) of the *KwaZulu-Natal Codes* refers to "houses of non-relatives on sufferance" forming part of the "family home".

<sup>403</sup> Rwezaura and Wanitzek 1988 *JAL* 153.

<sup>404</sup> Rwezaura and Wanitzek 1988 *JAL* 153.

<sup>405</sup> Further explained in chapter 3. Rwezaura and Wanitzek 1988 *JAL* 153. However, the authors do not use the past tense with reference to this meaning of a house in African societies, and refer to "certain" African societies.

<sup>406</sup> Self-published.

<sup>407</sup> Mseleku *Life and Polygamy* 146.

<sup>408</sup> Emphasis added. Mseleku *Life and Polygamy* 146.

<sup>409</sup> Mseleku *Life and Polygamy* 146.

<sup>410</sup> Emphasis added. Mseleku *Life and Polygamy* 146. For more on the consent and the role of the first wife in particular - as per Mseleku - refer to Mseleku *Life and Polygamy* 143 – 145. According to the author, if a first wife does not agree to a further marriage ("does not want anything that has to do with polygamy") she loses respect and the husband will, in any event, continue to do what he wants without her assent.

polygamy is to expand the family. The wife without children should know that she is equally important in the family.

As it seems that "sisters-in-law" here refers to the other wives of the husband,<sup>411</sup> it is unclear why it is first stated that children belong to "all" of the wives but later, when referring to a wife without children, that they belong to the husband and his other wives.<sup>412</sup> The contradiction is problematic, especially for determining whether adoption occurs automatically in a polygamous family. Determining the position is important when considering the legal implications for these "adopted" children in South African law.

Every extended family member had a role in ensuring the family's communal good and welfare.<sup>413</sup> However, as Bennett explains, households were "profoundly affected by colonization and the various forces" associated with it, such as segregation policies and apartheid.<sup>414</sup> One example is the forced removals that took place from the 1960s up to the late 1980s, which disrupted social networks and contributed to poverty in rural areas.<sup>415</sup> Poverty has had a devastating effect on the extended family:<sup>416</sup>

Poverty inevitably erodes the material base of an extended family. When breadwinners can no longer afford to share an income, it is concentrated in their households, and ties with more remote kinfolk must be sacrificed. Ultimately, even children must be dispersed in order to secure the survival of core wage earners. ... [This has] so destabilised the extended family that the structure now clearly survives as a traditional ideal, not a reality. This proposition is borne out by various studies which indicate that nuclear families are ubiquitous, and that they are giving way to single-parent units, often headed by women.

The Covid-19 pandemic has also recently "placed families under significant strain with loss of caregivers and economic providers".<sup>417</sup>

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<sup>411</sup> Rwezaura and Wanitzek 1988 *JAL* 153 rather speak of "co-wives".

<sup>412</sup> Although the wife without children may "use" such children, presumably to run errands. See Mseleku *Life and Polygamy* 146.

<sup>413</sup> The *Bhe* case para 75.

<sup>414</sup> Other "forces" include missionaries, urbanisation and wage labour. Bennett *Customary Law in South Africa* 181.

<sup>415</sup> Bennett *Customary Law in South Africa* 185.

<sup>416</sup> Bennett *Customary Law in South Africa* 186 and the authorities cited.

<sup>417</sup> Other stressors faced by South African families include "a lack of economic opportunities, poor infrastructure and service delivery, substance abuse, crime, and violence". See clauses 1.1.1.-1.1.2. in GN 540 in GG 44724 of 18 June 2021 and the authorities cited.

According to a 2018 survey,<sup>418</sup> the "overwhelming majority of households in South Africa" today may be described as "composed of families".<sup>419</sup> Households comprising more than six members are more common in provinces with vast rural areas, such as KwaZulu-Natal and Mpumalanga. Single households in North-West are linked to migrant labour sustaining the mining industry. According to the survey, 34,2% of households may be classified as "extended households", which means that they consist of a "nuclear core" (couples living together, or one or more parent(s) with their children) combined with other family members, such as parents or siblings. The survey detected a decline in nuclear families.<sup>420</sup> "Extended households", the survey found, are mostly found in the Eastern Cape, Limpopo and KwaZulu-Natal. The (estimated) percentages of "adoptive and blended families" were small, and no significant differences were indicated between 2001 and 2011.<sup>421</sup>

The emergence of new family forms in the African context has not necessarily meant the end of traditions.<sup>422</sup> Therefore, Bennett asserts that in defining a family unit one should rather keep in mind "the reason for defining a unit" as well as the "person with control over the definitional process".<sup>423</sup> Therefore, to create a further context for understanding customary law adoption, the following paragraphs explore the African family with specific reference to family structure, customary marriage (and the dissolution thereof), *ilobolo* and the so-called "handing over of the bride". Some customary law adoptions occur when parties become married (and the child is transferred to the husband's family) or when a relative within the extended family adopts a child.<sup>424</sup> Therefore, explaining concepts relating to the African family is important.

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<sup>418</sup> The 2018 Household Survey. See clause 2.2.1. in GN 540 in GG 44724 of 18 June 2021.

<sup>419</sup> As opposed to being composed of non-family members. See clause 2.2.1. in GN 540 in GG 44724 of 18 June 2021.

<sup>420</sup> These families are more prevalent in the Western Cape and Gauteng. See clause 2.2.1. in GN 540 in GG 44724 of 18 June 2021.

<sup>421</sup> Clause 2.2.1. in GN 540 in GG 44724 of 18 June 2021.

<sup>422</sup> Bennett *Customary Law in South Africa* 186.

<sup>423</sup> Bennett *Customary Law in South Africa* 186.

<sup>424</sup> Further elaborated on in chapter 3.

#### 2.4.3.1 Family structure, customary marriage, *ilobolo* and the "handing over of the bride"

Traditionally, African family members are ranked by "sex, age and generation".<sup>425</sup> These criteria may be combined "to yield a patriarchal family structure" where senior males enjoy power and authority, while women and junior men are deemed subordinate.<sup>426</sup> A male (the husband or father) heads the family.<sup>427</sup> As the family's representative<sup>428</sup> he must protect, maintain and support his family members.<sup>429</sup> As such, the family head enters into contracts and acquires property on the family's behalf and incurs liability for delicts committed by family home members.<sup>430</sup> Traditionally women have no contractual capacity or *locus standi*. Therefore, regarding the latter, women have no "right to be heard" in a court or in the adoption process. In other words, they are viewed as having no direct interest in the matters up for consideration, including the adoption of their children.

Instead, women are assisted by male guardians.<sup>431</sup> Family heads are responsible for their wives and children and are held accountable for their conduct.<sup>432</sup> Wives fall under the guardianship of their husbands.<sup>433</sup> A mother, for instance, does not have the contractual capacity to consent to her daughter's getting married;<sup>434</sup> she is not at liberty to negotiate marriage and may not receive the agreed *ilobolo*.<sup>435</sup> However, in

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<sup>425</sup> Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 147.

<sup>426</sup> Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 147; The *Bhe* case para 78.

<sup>427</sup> See *Ramuhovhi v President of the Republic of South Africa* 2018 2 BCLR 217 (CC) para 62; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 103.

<sup>428</sup> Regarded as a legal entity. Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 27.

<sup>429</sup> The *Bhe* case para 76. The "duty of care owed to family members by the family head" has been described as one of the "foundational values of indigenous laws". Diala and Kangwa 2019 *De Jure Law Journal* 205.

<sup>430</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 27.

<sup>431</sup> Olivier et al *Indigenous Law* 5; Olivier et al *Inheemse Reg* 5.

<sup>432</sup> Bekker 2008 *Obiter* 402. Also see Olivier et al *Indigenous Law* 6, where it is explained that the husband is liable for delicts committed by his wife.

<sup>433</sup> Traditionally, in most communities women are regarded as perpetual minors and remain under the guardianship of males. If a woman is married, this would be her husband; if unmarried or a widow or a divorcee, it would be her father or his successor. See Olivier et al *Indigenous Law* 6; Olivier et al *Inheemse Reg* 5. However, law reform has taken place in this regard.

<sup>434</sup> Olivier et al *Inheemse Reg* 22.

<sup>435</sup> Except in special circumstances, although the mother's guardian or his successor retains the principal authority. Olivier et al *Inheemse Reg* 37.

*Mabena v Letsoalo* (the *Mabena* case)<sup>436</sup> the court rejected this traditional position, finding that a woman heading a family may negotiate and receive *ilobolo*.<sup>437</sup> In arriving at this decision the court relied on living (actually observed)<sup>438</sup> law and held that "it [allowing females such powers] would constitute a development in accordance with the spirit, purport and objects" of chapter 3 of the *Interim Constitution*.<sup>439</sup> Indeed, when the *RoCMA* was adopted two years later, wives' equal status and capacity in customary marriages were formalised.<sup>440</sup> These developments are, of course, in line with the equality clause in the *Constitution*.<sup>441</sup>

The *Traditional and Khoi-San Leadership Act*,<sup>442</sup> which took effect on 1 April 2021, was an example of legislation in terms of which women could be recognised as traditional leaders.<sup>443</sup> However, due to Parliament's lack of facilitating public participation before passing the Act, the Act was found unconstitutional in 2023.<sup>444</sup>

Since procreation is "central to African society" as a means to preserve family lines,<sup>445</sup> marriage is critically important in customary law. Customary marriage is seen as a union of families (as opposed to the common law contract between individuals).<sup>446</sup> In some communities a new family would briefly stay with the wife's family and then

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<sup>436</sup> 1998 2 SA 1068 (T).

<sup>437</sup> The *Mabena* case 1998 2 SA 1068 (T) 1069.

<sup>438</sup> As opposed to "the official version as documented by writers", since "customary law exists not only in the official version". The *Mabena* case 1998 2 SA 1068 (T) 1069, 1074.

<sup>439</sup> The *Mabena* case 1998 2 SA 1068 (T) 1069.

<sup>440</sup> See s 6 of the *RoCMA*; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 103; *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC) (the *Gumede* case). Also see *Ramuhovhi v President of the Republic of South Africa* 2018 2 BCLR 217 (CC) with respect to women's position in relation to the proprietary consequences of pre-*RoCMA* monogamous and polygynous customary marriages respectively.

<sup>441</sup> Also see the *Bhe* case paras 49-51 for a brief discussion of the importance of the right to equality.  
<sup>442</sup> 3 of 2019. The Act repeals the *Traditional Leadership and Governance Framework Act* 41 of 2003, the *Traditional Leadership and Governance Framework Amendment Act* 23 of 2009 and the *National House of Traditional Leaders Act* 22 of 2009.

<sup>443</sup> See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 225 for a brief discussion.

<sup>444</sup> See *Mogale v Speaker of the National Assembly* 2023 (ZACC) 14.

<sup>445</sup> Procreation remains very important, even though it does not necessarily create kinship. As explained under 2.4.3, "kinship is created through cattle". Monye 2017 *Journal of Law, Society and Development* 2.

<sup>446</sup> See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 26. In common law, marriage is between one man and one woman only. The common law definition of a marriage has been developed to include parties of the same sex, but still only between two people. This development took place in *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC).

relocate to the husband's father's house.<sup>447</sup> There they remain subject to the father's authority and gain autonomy and independence, partially or fully, only after setting up their own homes.<sup>448</sup>

A customary marriage is also potentially polygynous,<sup>449</sup> which entails the establishment of a separate proprietary entity for each wife and her children.<sup>450</sup> Each marriage signifies a new family unit and thus a new proprietary unit.<sup>451</sup> Even though it may not be as prevalent in modern times,<sup>452</sup> most African communities allow polygyny.<sup>453</sup> A wife's seniority depends on her position in the marriage sequence. The first wife, for instance, would be more senior than the second.<sup>454</sup>

Among the Nguni the first wife is known as the "great wife" and her house as the "great house".<sup>455</sup>

The *RoCMA* currently governs customary marriage and recognises both monogamous and polygynous<sup>456</sup> marriages entered into both before and after the commencement of the Act.<sup>457</sup> Requirements for a customary marriage entered into after 15 November 2000<sup>458</sup> are set out in section 3 of the Act.<sup>459</sup> First, both prospective spouses must be

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<sup>447</sup> Olivier et al *Inheemse Reg* 47.

<sup>448</sup> Olivier et al *Inheemse Reg* 47.

<sup>449</sup> See, amongst others, Bekker 2008 *Obiter* 396; Olivier et al *Inheemse Reg* 46-47.

<sup>450</sup> Olivier et al *Indigenous Law* 6.

<sup>451</sup> Olivier et al *Indigenous Law* 6.

<sup>452</sup> Polygamous marriages still form the basis of "many" families in South Africa. See para 2.4.3 above.

<sup>453</sup> Olivier et al *Inheemse Reg* 7, 47. However, also see Olivier et al *Inheemse Reg* 7 for an example where "polygamy" was, at one point, prohibited among the Ngwaketse in Botswana. As stated previously in this chapter: "It is submitted that even though the word 'polygamy' is often used, African communities in South Africa tend to observe 'polygyny' instead. Among African communities in South Africa, only a man is allowed to have more than one wife, and not the other way around as well." See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 90 for an explanation.

<sup>454</sup> Bekker "Children and Young Persons in Indigenous Law" 185. In some communities it might be that a later wife, and not the first wife, is regarded as the chief wife. In this case the chief wife's son replaces the first wife's son as heir. Bekker "Children and Young Persons in Indigenous Law" 186.

<sup>455</sup> See Henderson "Questions on Fostering: An Anthropologist's Perspective" 19.

<sup>456</sup> The *RoCMA* refers to a person who "is a spouse in more than one customary marriage", which implies "polygamy". However, as also stated earlier in this chapter, it is submitted that the practice observed in traditional communities in South Africa is "polygyny". Polyandry is deemed by traditional leaders not to be of African origin. Para 3.1 in GN 398 in GG 44529 of 4 May 2021.

<sup>457</sup> Section 2 of the *RoCMA*.

<sup>458</sup> Date of commencement of the *RoCMA*.

<sup>459</sup> See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 91-94 for a discussion of the requirements for marriages entered into prior to this date.

eighteen years or older.<sup>460</sup> Despite chronological age not being the determining factor for adulthood in customary law,<sup>461</sup> the age of majority is now eighteen years.<sup>462</sup> The second requirement is that both prospective spouses consent to the marriage under customary law.<sup>463</sup> Lastly, section 3 requires the marriage to "be negotiated and entered into or celebrated in accordance with customary law".<sup>464</sup> This third and final requirement may be "open to interpretation", but an extensive discussion would be superfluous.<sup>465</sup> It is worth mentioning that fulfilling this requirement normally requires proof that an *ilobolo* agreement was reached,<sup>466</sup> as well as the so-called "handing over" or "integration" of the bride into the groom's family.<sup>467</sup> The latter entails the bride's formally leaving her ancestral family home, which event is "usually accompanied by some symbolic ritual".<sup>468</sup> After that, she is "integrated" into her husband's family group, and again the event is accompanied by certain rituals.<sup>469</sup> After integration she is deemed to "belong" to the husband's family group:<sup>470</sup>

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<sup>460</sup> Section 3(1)(a)(i) of the *RoCMA*.

<sup>461</sup> Discussed under 2.4.3.2 below.

<sup>462</sup> Section 28(3) of the *Constitution*; s 17 of the *Children's Act*; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 94. S 3(3)-(4) of the *RoCMA* stipulate the procedure to be followed in respect of a prospective spouse who is a minor.

<sup>463</sup> Section 3(1)(a)(ii) of the *RoCMA*.

<sup>464</sup> Section 3(1)(b) of the *RoCMA*.

<sup>465</sup> See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 96-98 and the authorities cited for a discussion of this requirement.

<sup>466</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 99-101 and the authorities cited. As long as an agreement is in place, deliverance/payment of all of the agreed *ilobolo* is not a requirement. A customary marriage may be valid even if only part of the *ilobolo* has been delivered/paid. Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 101 and the authorities cited.

<sup>467</sup> For a brief discussion of the "handing over" and/or "integration" of the bride into the groom's family, see, amongst others, Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 92-93, 97-98 and the authorities cited.

<sup>468</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 97.

<sup>469</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 97.

<sup>470</sup> Emphasis added. Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 97 and the authority cited. The bond between a widow and her deceased husband's family is further elaborated on in 3.6. The "handing over of the bride" was subjected to scrutiny in the recent case of *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020). The facts of the case were briefly as follows: The deceased proposed to the respondent in Amsterdam in November 2015, and the respondent accepted. They agreed that they would conclude a customary marriage. Consequently, at a meeting between the families at the respondent's home in February 2016, an *ilobolo* agreement was reached, in terms of which a deposit of R30 000 was to be paid, and the balance of R15 000 in two instalments. At the conclusion of the *ilobolo* negotiations, the "deceased left the respondent's home for a short while", during which time the respondent's mother received a payment notification in the amount of R35 000 from the deceased. The deceased returned and was now wearing "formal

Once she is aggregated, she 'belongs' to her husband's group. Any *children born to her belong to the husband's group*, and even death does not dissolve the marriage.

The *ilobolo* agreement is another key concept to be considered in the context of customary law adoption. In the *Mabena* case, although it was decided before the commencement of the *RoCMA*, the *ilobolo* agreement was highlighted as one of the "distinct legal actions" for a customary marriage to occur.<sup>471</sup> The *RoCMA* defines *ilobolo* as follows:<sup>472</sup>

Property in cash or in kind, whether known as *lobolo*, *bogadi*, *bohali*, *xuma*, *lumalo*, *thaka*, *ikhazi*, *magadi*, *emabheka* or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage.

Opinions vary as to the meaning and function of *ilobolo*.<sup>473</sup> Some view it as payment for a bride;<sup>474</sup> others have described it as payment for a woman's children.<sup>475</sup> However,

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attire". His aunts led the respondent to a bedroom inside the house and informed her that she was to change into her "wedding dress". When she made her appearance, she was introduced to "all persons present" as the deceased's "wife" and was welcomed into his family. Celebrations following the *ilobolo* agreement were recorded on video. Later that day, the deceased and the respondent returned to what the respondent described as their "matrimonial home". The marriage was not registered. Yet the appellant, the deceased's biological father, insisted that no customary marriage was concluded and that the meeting of February 2016 was "confined to *lobola* negotiations". He asserted that the celebrations thereafter were rather a "celebration of the successful conclusion of the *lobola* negotiations", and that a date still had to be set for the handing over of the bride to take place. At the handing over of the bride, "a lamb or goat is slaughtered and the bile therefrom is used to cleanse the couple". He contended that the latter would have marked the "union of the couple and the joining of the two families". Consequently, according to the appellant, the handing over of the bride, which is the "most crucial part of a customary marriage", did not take place. See *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) paras 2, 3-6, 9-10. The high court of its own accord went so far as to declare the custom unconstitutional. As no constitutionality issue was argued, the Supreme Court of Appeal agreed with both counsels that there was no basis for the high court to have made this finding. The Supreme Court of Appeal did not agree with the high court's ruling that, based on the facts, the physical handing over of the bride was waived in favour of a symbolic handover. Accordingly the court found that a valid customary marriage had indeed been concluded. See *Tsambo v Sengadi* (244/19) [2020] ZASCA 46 (30 April 2020) paras 30-33. Also see the *Mbungela* case 2020 1 SA 41 (SCA) 41-42, where it was held that "the purpose of the ceremony of the handing-over of a bride was to mark the beginning of a couple's customary marriage and introduce the bride to the groom's family. It was an important but not necessarily a key determinant of a valid customary marriage". The court found that, based on the facts, the custom of "the 'bridal transfer' ritual" had been waived.

<sup>471</sup> The *Mabena* case 1068. With specific reference to Xhosa law, Olivier also states that there is no valid marriage without an *ilobolo* agreement. Olivier *et al Inheemse Reg* 38.

<sup>472</sup> Section 1 of the *RoCMA*.

<sup>473</sup> Olivier *et al Inheemse Reg* 37.

<sup>474</sup> Or "reinforcing the authority of the husband over his wife". See, amongst other things, Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 100 and the authority cited.

<sup>475</sup> Jeffreys 1951 *African Studies* 146 and the authorities cited.

the original purpose of *ilobolo* was not economic; instead, it was intended as a social and spiritual symbol of the bond created between two families.<sup>476</sup> Nevertheless, differences of opinion aside, the practice is so firmly embedded that many Africans would not accept that marriage exists without *ilobolo* – despite criticism, and although not expressly included as a validity requirement in the *RoCMA*.<sup>477</sup> Even with a civil marriage between Africans, traditional social values are upheld to a certain extent and might include an *ilobolo* agreement.<sup>478</sup>

#### 2.4.3.2 Dissolution of a customary marriage

Traditionally, divorce was an extrajudicial matter without state involvement.<sup>479</sup> The marriage would have been dissolved using an "agreement between the parties involved in the original marriage agreement."<sup>480</sup> However, the *RoCMA* states that the only

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<sup>476</sup> Olivier *et al Inheemse Reg* 37 and the authorities cited.

<sup>477</sup> See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 99-101 for a discussion in this regard.

<sup>478</sup> As explained earlier as well, although many Africans currently have the same social order as other population groups, it "did not lead to a whole-scale abandonment of traditional social values, and cultural perceptions of children in a family." See Bekker 2008 *Obiter* 397; para 1.2.4 above. Some argue that *ilobolo* is paid as a token of appreciation for the upbringing of the wife; that it serves as security to ensure that the wife is treated well by her husband, and to see to it that widows are looked after. See Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 112; Olivier *et al Inheemse Reg* 38. Others suggest that *ilobolo* is primarily meant to "transfer the reproductive power of a woman from her own family into that of her husband." For a discussion, see Olivier *et al Inheemse Reg* 38 and the authorities cited. Indeed, women are expected to bear children for their husbands' family lineages, and to enter such a family to "raise up the village". For a discussion, see Olivier *et al Inheemse Reg* 38 and the authorities cited.

<sup>478</sup> For a discussion of how the infertility of the wife and the impotence or sterility of the husband are dealt with under customary law, see Olivier *et al Inheemse Reg* 40-42.

<sup>479</sup> With the exception of KwaZulu-Natal, a customary marriage was dissolved by means of agreement between the relevant parties and not through a court order. Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 109.

<sup>480</sup> The woman's father or guardian and the groom. Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 111.

"ground"<sup>481</sup> for divorce is the "irretrievable breakdown of the customary marriage".<sup>482</sup> A customary marriage may "only be dissolved by a court by a decree of divorce".<sup>483</sup>

Traditionally, the father's right to custody and guardianship over children belonging to his family group was "absolute".<sup>484</sup> Now, when determining the interests of children at the dissolution of a customary marriage, the *RoCMA*<sup>485</sup> stipulates that the *Mediation in Certain Divorce Matters Act*<sup>486</sup> and section 6 of the *Divorce Act*<sup>487</sup> apply. In terms of the former, family advocates and family counsellors (assisting the advocates) may be appointed to advise regarding the custody and control of minor children.<sup>488</sup> Section 6 of the *Divorce Act*, in turn, deals with the "safeguarding of interests of dependent and minor children."<sup>489</sup> The court may "cause" any investigation deemed necessary for the court to be satisfied that the welfare of a minor or dependent child is looked after.<sup>490</sup> It may also make an order regarding guardianship, custody, access and maintenance regarding the children<sup>491</sup> and appoint a legal practitioner to represent them.<sup>492</sup> When one considers the applicability of these two laws in customary law divorce, the legislation seems to "equate the position of children born of customary marriages with those born of civil marriages".<sup>493</sup>

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<sup>481</sup> See Himonga and Nhlapo (eds) *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 149-150, where it is stated that pertaining to customary law, it is perhaps better to refer to "reasons or justifications" for divorce.

<sup>482</sup> Section 8(1). In determining whether a customary marriage has broken down "irretrievably", a high court, family court or divorce court may consider the traditional grounds which led to the dissolution of customary marriages in the past. Traditional grounds for divorce include adultery, accusations of witchcraft, desertion etc. For a discussion, see Himonga and Nhlapo (eds) *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 149-153; Rautenbach (ed) *Introduction to Customary Law in South Africa* 108-109.

<sup>483</sup> Section 8(1) of the *RoCMA*; Rautenbach (ed) *Introduction to Customary Law in South Africa* 109.

<sup>484</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 109.

<sup>485</sup> Section 8(3) of the *RoCMA*.

<sup>486</sup> 24 of 1987.

<sup>487</sup> 70 of 1979.

<sup>488</sup> See ss 2-4 of the *Mediation in Certain Divorce Matters Act* 24 of 1987; Rautenbach (ed) *Introduction to Customary Law in South Africa* 109.

<sup>489</sup> As per the heading of s 6 of the *Divorce Act* 70 of 1979.

<sup>490</sup> See s 6(1)-(2) of the *Divorce Act* 70 of 1979.

<sup>491</sup> See s 6(3) of the *Divorce Act* 70 of 1979; Rautenbach (ed) *Introduction to Customary Law in South Africa* 109.

<sup>492</sup> Section 6(4) of the *Divorce Act* 70 of 1979.

<sup>493</sup> Rautenbach (ed) *Introduction to Customary Law in South Africa* 109 and the authority cited.

In line with section 28(2) of the *Constitution*,<sup>494</sup> the court has the final say as the upper guardian of all minors.<sup>495</sup> In this respect, customary law has been "modified" even before the commencement of the *RoCMA*.<sup>496</sup> Nevertheless, when considering African values and beliefs<sup>497</sup> the best interests of a child born from a customary marriage might not necessarily be determined like those of a child born from a civil marriage.<sup>498</sup> In this regard, it is stated in Rautenbach (ed):<sup>499</sup>

In determining the best interest of the child, the court should take African cultural values and belief systems into account, for example the link with their ancestors. An award of custody to the mother is interpreted as breaking the child's link with the family group of the father (to which the child "belongs"). It is submitted that children's interests will be best served by granting joint custody to both parents, unless there are specific reasons for not doing so. The new Children's Act favours the idea of awarding joint custody.

Lastly, it should be noted that the *RoCMA* does not list the death of a spouse as the terminator of a customary marriage.<sup>500</sup> The bond between a widow and her deceased husband's family continues,<sup>501</sup> as further discussed in chapter 3.

#### 2.4.3.3 The position of the child in the extended family

The meaning of the term "child" in the context of customary law adoption differs from that in the *Children's Act*,<sup>502</sup> where "child" refers to a "person under the age of 18 years". As mentioned earlier,<sup>503</sup> despite the making of a distinction between children above and below fourteen years of age in the *Motsepe* case,<sup>504</sup> chronological age is not the determining factor of minority and adulthood under customary law.<sup>505</sup> An African male living in his father's family home under his father's control may still be

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<sup>494</sup> "A child's best interests are of paramount importance in every matter concerning the child." Section 28(2) of the *Constitution*.

<sup>495</sup> Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 109.

<sup>496</sup> See Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 109 and the authorities cited.

<sup>497</sup> Also see 2.4.2.2 and 2.4.2.3 above.

<sup>498</sup> Also see Moore and Himonga 2018 *South African Child Gauge* 62.

<sup>499</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 109-110 and the authorities cited.

<sup>500</sup> For a discussion, see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 113.

<sup>501</sup> Bekker "Children and Young Persons in Indigenous Law" 190. For a further discussion, see Himonga and Nhlapo (eds) *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 153-154.

<sup>502</sup> The *Children's Act* is discussed in chapter 4.

<sup>503</sup> Under 2.4.3.1 above.

<sup>504</sup> See the discussion in chapter 3.

<sup>505</sup> Bekker "Children and Young Persons in Indigenous Law" 191.

considered a minor, irrespective of age.<sup>506</sup> While initiation or circumcision<sup>507</sup> might mark the start of "manhood" in a social sense,<sup>508</sup> legally he remains a minor until he marries and establishes his own family home.<sup>509</sup> For females, puberty followed by a ceremony<sup>510</sup> might elevate a Xhosa girl's status to adulthood.<sup>511</sup> Marriage and parenthood may confer on her the privileges an adult enjoys, although full legal, political and religious status might be attained only later in life.<sup>512</sup> Obtaining adulthood, therefore, is a gradual process instead of something instant. Also, when sons and daughters are economically independent by modern standards,<sup>513</sup> the family unit and their membership of it remain vital. Children typically regard their earnings as their father's or their homestead's.<sup>514</sup>

Rather than being "under the guardianship" or "in the custody"<sup>515</sup> of one of their biological parents, African children "belong" to their mother's or father's family group, where rights and duties are shared.<sup>516</sup> Even if a child's biological parents pass away, the child is still cared for.<sup>517</sup> Other family members also "perform parenting

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<sup>506</sup> Bekker "Children and Young Persons in Indigenous Law" 191.

<sup>507</sup> Zulu boys are not circumcised. Their introduction to "manhood" is "marked by subtle changes indicating that they are growing up". Bekker 2008 *Obiter* 398 and the authority cited.

<sup>508</sup> Without being initiated, a male might not be accepted by the community as a "complete adult" at a later stage. Such a male would be barred from many political and legal activities and would probably not find a bride in his community. Bekker "Children and Young Persons in Indigenous Law" 191 and the authority cited.

<sup>509</sup> Bekker "Children and Young Persons in Indigenous Law" 191.

<sup>510</sup> Known as *intonjane*. Bekker 2008 *Obiter* 398.

<sup>511</sup> Bekker 2008 *Obiter* 398.

<sup>512</sup> Bekker "Children and Young Persons in Indigenous Law" 191 and the authority cited.

<sup>513</sup> Or reached the legal age of majority.

<sup>514</sup> In the family to which they belong. Bekker "Children and Young Persons in Indigenous Law" 191; Bekker 2008 *Obiter* 398-399. Osman and Himonga argue that, in contemporary society, there may be a need for certain customary law concepts to be "redefined" to keep pace with developments in traditional societies. For example, the present-day meaning of traditional categorisations of house, family and personal property requires clarification. Osman and Himonga 2017 *The Journal of Legal Pluralism and Unofficial Law* 178-179.

<sup>515</sup> Bekker suggests that "in customary law parlance the word 'custody' is hardly, if ever, used." Bekker 2008 *Obiter* 403.

<sup>516</sup> Bekker 2008 *Obiter* 396, 403. In the Western nuclear family the biological parents are the guardians and custodians of their children. See Bekker 2008 *Obiter* 396. Also see Bekker "Children and Young Persons in Indigenous Law" 190.

<sup>517</sup> Bekker 2008 *Obiter* 403.

functions",<sup>518</sup> which is why several family members may be called "mother" or "father".<sup>519</sup> Bennett and Peart explain:<sup>520</sup>

In Africa a classificatory system of terminology prevails. This means that a large number of relatives is included under the same term of identification, implying a common type of relationship. Thus, if A and B are related to one another, and X stands in a certain relationship to A, he/she is regarded as standing in the same relationship to B. Relatives are divided into a few broad categories, and so instead of one's father's brother being called 'uncle', he is called 'father', and once subsumed under the general category of father, he is treated as such.

Therefore, your father's brother is regarded as your other "father", and his children are your "brothers" and "sisters":<sup>521</sup>

[A] father's brothers or a mother's sisters would be classified as "senior" and "junior" fathers or as "senior" and "junior" mothers ...

According to Mokotong, membership in an extended group provides children with a profound sense of security:<sup>522</sup>

The customary law approach appears to be that the sentiments and support of a family exist, even though not all the members necessarily have a close biological link to each other. The child belongs to a family group and other people are significant when it comes to adopting and parenting a child. The person could be a neighbour, church member, or even a step-parent.

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<sup>518</sup> Mokotong 2015 *THRHR* 349.

<sup>519</sup> The status of a family member is evident from the way (s)he is addressed. Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 147.

<sup>520</sup> Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 147.

<sup>521</sup> Instead of your "uncle" or "cousins". See Henderson "Questions on Fostering: An Anthropologist's Perspective" 17, where Nelson Mandela is quoted as having said: "In African culture, the sons and daughters of one's aunts or uncles are considered brothers and sisters, not cousins. We do not make the same distinctions among relations practiced by whites. We have no half-brothers or half-sisters. My mother's sister is my mother; my uncle's son is my brother; my brother's child is my son, my daughter."; Martin and Mbambo 2011 <https://bettercarenetwork.org/sites/default/files/An%20exploratory%20study%20on%20the%20interplay%20between%20African%20%20customary%20law%20and%20practices%20%20and%20children%E2%80%99s%20protection%20rights%20in%20South%20Africa.pdf> and the authority cited.

<sup>522</sup> Mokotong 2015 *THRHR* 349. Also see Martin and Mbambo 2011 <https://bettercarenetwork.org/sites/default/files/An%20exploratory%20study%20on%20the%20interplay%20between%20African%20%20customary%20law%20and%20practices%20%20and%20children%E2%80%99s%20protection%20rights%20in%20South%20Africa.pdf>, where several benefits (and risks) for children growing up in an extended family context are discussed.

Even after divorce, the children continue to be supported and looked after through belonging to a certain family group. As a result of this "guarantee", maintenance in the common law sense is an unfamiliar concept:<sup>523</sup>

In customary law, divorce ends the connection between the families of the couple. The concept of making *maintenance* payments is therefore generally a *foreign* one. The rule is that *all children belonging to a family group are guaranteed support within the group and by all members acting jointly*: customary law is focussed on group rather than individual rights. As far as the children born outside of a customary union or a civil-law marriage are concerned, customary law does not concern itself with the problem of maintenance. Such obligations are imposed on a natural father only if he has acquired guardianship over the child. This lacuna in the customary law has led to an increased reliance on statutory enforcement ...

However, the extended family approach to a child should not be construed as absolving individual parents from the responsibility of maintaining and supporting their children. According to Bekker:<sup>524</sup>

[S]ome authors think that there is no substantive rule of customary law obliging a person to maintain another. This is a misconception which is partly based on the fact that the group, and not individuals, are legal subjects in customary law. The group therefore, and not individuals (not even parents), is liable to maintain the children.

Bekker proceeds to explain that ethnological research and anthropological work confirm that parents married under customary law have a legal duty to maintain their children.<sup>525</sup>

Therefore, on the one hand, due to a child's "belonging" to a family and always being taken care of, one might be able to argue that attempting to pinpoint the adoption process in customary law would be a redundant exercise. On the other hand, when an issue of customary law adoption arises,<sup>526</sup> research on the topic should be available to the courts and the legislator. For example, for determining who should provide valid consent for a customary law step-parent adoption, the person(s) within the family who is/are contributing to the child's maintenance is a possible factor to consider.

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<sup>523</sup> Emphasis added. SALC 2002  
[http://www.ci.uct.ac.za/sites/default/files/image\\_tool/images/367/childrens\\_act/salrc/24-dp103-ch21.pdf](http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/childrens_act/salrc/24-dp103-ch21.pdf) and the authorities cited.

<sup>524</sup> Bekker "Children and Young Persons in Indigenous Law" 193.

<sup>525</sup> Bekker "Children and Young Persons in Indigenous Law" 193.

<sup>526</sup> Such as demonstrated from case law discussed in chapter 1.

"Belonging" to a family also relates to whether a child is "legitimate" or not. "Legitimacy", interpreted per customary law, determines to which family (the mother's or the father's) a child belongs.<sup>527</sup> Children born of married parents are deemed "legitimate".<sup>528</sup> The rebuttable presumption is that the children of a married woman are her husband's children,<sup>529</sup> which in turn is founded on "the general rule that the children of a married woman belong to the man who paid *ilobolo* for her".<sup>530</sup> Bekker explains:<sup>531</sup>

It is immaterial whether that man is dead or whether his wife has been impregnated by another man, or whether a seed-bearer gives birth to the children. Thus, if a widow continues to live at her husband's family home, any children born to her belong to her deceased husband's family home.

In the Tswana community a man can lay "claim" to children, who will then be regarded as legitimately his, only if a *bogadi* agreement exists.<sup>532</sup> In some instances the actual transfer might first need to occur for the children to be regarded as his.<sup>533</sup> A child is deemed the "legal offspring" of the man who delivered *bogadi* for the mother, even if the man is not the child's biological father.<sup>534</sup> There also seem to be instances where should *bogadi* not be delivered the marriage might be dissolved, and the children would become part of their mother's family.<sup>535</sup> However, in most cases the status of the children would not change, and they would remain part of their father's family (even if temporarily under their mother's care), despite the dissolution of the father's marriage.<sup>536</sup> Where a woman's father has to return *ilobolo* cattle at the dissolution of her marriage, the number of children she gave birth to would sometimes be

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<sup>527</sup> Or is affiliated to. Bekker 2008 *Obiter* 403; Olivier *et al Indigenous Law* 6. Also see Olivier *et al Inheemse Reg* 7.

<sup>528</sup> Bekker "Children and Young Persons in Indigenous Law" 187.

<sup>529</sup> The presumption is rebuttable by submitting convincing evidence to the contrary. Bekker "Children and Young Persons in Indigenous Law" 188.

<sup>530</sup> Expressed in the saying "Cattle bring forth children – children belong where the cattle are not", which means that while the *ilobolo* cattle are with the wife's family, her children must be with her husband's family. Bekker "Children and Young Persons in Indigenous Law" 187. Also see Monye 2017 *Journal of Law, Society and Development* 2.

<sup>531</sup> Bekker "Children and Young Persons in Indigenous Law" 187.

<sup>532</sup> Olivier *et al Inheemse Reg* 38 and the authorities cited.

<sup>533</sup> *Bogadi* is the Tswana equivalent of *ilobolo*. Olivier *et al Inheemse Reg* 38 and the authorities cited.

<sup>534</sup> Olivier *et al Inheemse Reg* 38 and the authorities cited.

<sup>535</sup> Olivier *et al Inheemse Reg* 46.

<sup>536</sup> Olivier *et al Inheemse Reg* 46, 69.

considered.<sup>537</sup> In traditional African communities marriage dissolution occurs only in exceptional circumstances.<sup>538</sup>

Therefore, a child's status at birth is determined by the mother's marital status.<sup>539</sup> Children born due to adulterous intercourse by a married woman belong to the husband's family.<sup>540</sup> Children born to an unmarried woman belong to their mother's family (or the mother's guardian). In *Bhe* the court offered the following explanation for this approach:<sup>541</sup>

The mechanism of maternal-filiation provides an extramarital child with a father, with a male ritual and social sponsor, with a place in a conjugal unit, and it manufactures for the child a full lineal identity.

In customary law, children may gain legitimacy through the subsequent marriage of their parents. Sometimes the natural father can legitimise a child by paying a seduction fine and *isondlo*.<sup>542</sup> Then belonging to his father's family, such a child is regarded as

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<sup>537</sup> See Olivier *et al Inheemse Reg* 84 for a comprehensive discussion in this regard.

<sup>538</sup> Olivier *et al Inheemse Reg* 70. For a discussion of such exceptions, see Olivier *et al Inheemse Reg* 70-82.

<sup>539</sup> Bekker "Children and Young Persons in Indigenous Law" 185. In customary law, like "state law", survival at birth is also regarded as a "minimum condition" for a child to be regarded as a legal person. Moore and Himonga 2018 *South African Child Gauge* 62.

<sup>540</sup> Olivier *et al Indigenous Law* 6. The Tswana language, for example, does not have equivalents for "stepfather" and "stepchild". Monye 2017 *Journal of Law, Society and Development* 3, 8.

<sup>541</sup> The *Bhe* case paras 57-58 and the authorities cited.

<sup>542</sup> Olivier *et al Indigenous Law* 6. *Isondlo* (Zulu/Xhosa) or *kotlo* (Tswana) refers to "the payment of compensation to a person for the care of a child who is not a member of his group." Rautenbach (ed) *Introduction to Legal Pluralism* 167. "Children born from casual liaisons have neither rights nor duties in respect of their father's house, unless a penalty or *intlawulu* is paid. ... Such a penalty is sometimes called *isondlo*." *Nhlabathi v Fick* 2003 2 All SA 323 (LCC) 328. It has also been described as "payment of the compensatory *isondlo* beast in relation to women's work in providing care for children of the relationship. The practice of *isondlo* is ... recognised by section 8(4)(e) of the *Recognition of Customary Marriages Act*". Bonthuys 2018 *PER* 10. *Isondlo* is also sometimes referred to as "maintenance". For example, see *Hlengwa v Maphumulo* 1972 NAC (NE) 61; Broughton 2006 <https://www.iol.co.za/news/south-africa/huge-waste-of-isondlo-maintenance-payment-303619>; South African Government 2006 <https://www.gov.za/justice-and-constitutional-development-operation-isondlo>. "*Isondlo* is a Zulu word meaning 'support' or 'maintenance'." Author unknown date unknown <https://www.vukuzenzele.gov.za/book/export/html/142>. However, the latter (the practice of referring to *isondlo* as "maintenance") has been criticised by the SALC: "There is an institution in African customary law which resembles maintenance in common law and appears to be confused in our law with maintenance. This is the institution of *isondlo*, which enables any person who has raised a child, whether born in or out of wedlock, to claim payment from a parent if the parent demands custody of the child. *Isondlo* constitutes a token of the transfer of the parental rights to the parent tendering the *isondlo*; payment is limited to one beast. Despite some apparent resemblance between *isondlo* and maintenance, the two institutions cannot be equated: there is no duty resting on a parent to pay *isondlo*, nor does it signify any form of

the youngest family member, similar to his position in the mother's family. Therefore, he would succeed only if there were no other male heirs.<sup>543</sup> This would mean that a girl's father acquires *ilobolo* rights over her.<sup>544</sup> According to the *Children's Act*, "full parental responsibilities and rights" are to be acquired by a father who "pays damages in terms of customary law".<sup>545</sup>

As customary marriages were not previously recognised, children born from such marriages used to be registered as "illegitimate" under the *Births and Deaths Registration Act*.<sup>546</sup> Section 1 of the Act was later amended to include a "customary union concluded according to indigenous law or customs".<sup>547</sup> With these now officially recognised as marriages,<sup>548</sup> children born from parents married in terms of customary law are no longer seen as "illegitimate" in the eyes of "official" law. The *Births and Deaths Registration Act* has been amended accordingly.<sup>549</sup>

It is doubtful that being viewed as "illegitimate" by "official" law would have affected a child's belonging in a traditional community practising living customary law. The latter is (and always has been) a specific community's "official law".

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reimbursement for past maintenance." Emphasis added. The SALC goes even further, comparing the institution of *isondlo* to the "purchase and sale of a child". SALC 2002 [http://www.ci.uct.ac.za/sites/default/files/image\\_tool/images/367/childrens\\_act/salrc/24-dp103-ch21.pdf](http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/childrens_act/salrc/24-dp103-ch21.pdf). Bennett describes deeming *isondlo* as a form maintenance "a curious twist caused by a modern interpretation" as interpreting *isondlo* as maintenance means that *isondlo* is enforceable against someone other than a natural father. Bennett *A Sourcebook of African Customary Law for Southern Africa* 367. For the position of the *isondlo* institution in different communities, see Rautenbach (ed) *Introduction to Legal Pluralism* 167; Olivier *et al Indigenous Law* 6; Bekker "Children and Young Persons in Indigenous Law" 188-189.

<sup>543</sup> Bekker "Children and Young Persons in Indigenous Law" 188-189 and the authority cited.

<sup>544</sup> Bekker "Children and Young Persons in Indigenous Law" 189.

<sup>545</sup> Section 21(1)(b)(i) of the *Children's Act*.

<sup>546</sup> Births and Deaths Registration Act 51 of 1992 (the Births and Deaths Registration Act).

<sup>547</sup> Bekker "Children and Young Persons in Indigenous Law" 187-188.

<sup>548</sup> In terms of the *RoCMA*.

<sup>549</sup> A marriage concluded in terms of the *RoCMA* is included in the definition of "marriage". See s 1 of the *Births and Deaths Registration Act*.

Apart from legitimacy, naming a child is also significant to a child's "belonging" and establishing a connection with the family, community or "clan". Therefore, naming a child has a symbolic value which links directly to "belonging":<sup>550</sup>

Naming ceremonies are associated with welcoming, *acceptance and acknowledgment of the child in the broader group*, whether the family, community or clan, and are an essential step in *ensuring the child is well prepared for life*. The choice and source of the name often has symbolic value, symbolizing the child's connectedness to the family. Naming is seen as a *thread that connects children to families*, families to other families and to the broader community. For example, often a child will be given the name of a deceased relative *to reflect the history of the family and the continuation of the family lineage*. One such naming ceremony is *ukubikwa*, which is practiced amongst the *amaZulu*. An elder in the family presents a child to the ancestors, slaughters a goat and uses the bile of the goat mixed with ash in the fireplace to make a mark on the child's body as a sign that the child belongs and has roots in his or her family.

Traditionally, a child who belongs to the father's family enjoys the benefit and privilege of being recognised as the father's legitimate child; he has a right to be maintained and to inherit and succeed in the father's family.<sup>551</sup> Traditional customary law of inheritance and succession is generally intestate.<sup>552</sup> It does not concern itself with property inheritance only but with succeeding the deceased.<sup>553</sup> Therefore, strictly speaking, in customary law "inheritance" refers to the transfer of property rights, while "succession" refers to the transfer of rights, duties, powers and privileges.<sup>554</sup> In Rautenbach (ed), it is explained as follows:<sup>555</sup>

In the case of customary law of succession, the emphasis is, strictly speaking, not on the division of property but on the continuation of status positions. The successor steps into the place of the deceased and gains control over the property and people over which the deceased had control. Furthermore, the successor succeeds not only to the assets of the estate but also to its liabilities. Should the liabilities exceed the assets, the successor in customary law succeeds to these as well. *One of the main objects of the traditional customary marriage is the continuation of the family lineage*

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<sup>550</sup> Emphasis added. Martin and Mbambo 2011 <https://bettercarenetwork.org/sites/default/files/An%20exploratory%20study%20on%20the%20interplay%20between%20African%20%20%20customary%20law%20and%20practices%20%20%20and%20children%E2%80%99s%20protection%20rights%20in%20South%20Africa.pdf>.

<sup>551</sup> See Olivier *et al Inheemse Reg* 46.

<sup>552</sup> A family head may make certain allocations to houses and individuals and his deathbed wishes are to be respected. Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 193.

<sup>553</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 193.

<sup>554</sup> Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 193.

<sup>555</sup> Emphasis added. Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 193 and the authorities cited.

*of the husband as family head.* ... Originally (in customary law) the death of a family head had a significant effect on control of the member of the family group and its property. The family head was succeeded by a general successor but at the same time there was also succession to the position as head of his various houses. A distinction was thus made between a general successor and a successor in each house. The death of other members of the family had no effect on the control of the group and its property. There was thus no question of succession in status to their positions on their death.

The rule of male primogeniture is central to the traditional customary law of inheritance and succession. Its primary purpose is to preserve the family unit and ensure that someone takes over the responsibilities of the family head upon death.<sup>556</sup> Females (widows and daughters) and younger sons are precluded from inheriting and succeeding.<sup>557</sup> Children born out of wedlock are not entitled to succeed their fathers. Sons born out of wedlock<sup>558</sup> qualify for succession in their mother's family, but only after all other male children born in wedlock.<sup>559</sup> In a polygynous household the first-born son of the first wife ranks above all other children. Next in rank are "his own (blood) brothers", followed by the sons born in the second and further houses.<sup>560</sup> In a monogamous household the eldest son is the most senior, followed by his brothers in their birth order.<sup>561</sup> The family head must "*maintain* and support the minor *children* and other dependants of the deceased".<sup>562</sup> Therefore, based on the rule of primogeniture, gender is another traditional determinant of a child's status.<sup>563</sup> Consequently, should a son born out of wedlock becoming part of his father's family<sup>564</sup> be viewed as a customary law adoption, he does not necessarily stand to succeed and

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<sup>556</sup> The *Bhe* case paras 176, 180.

<sup>557</sup> The *Bhe* case para 88. For an example in terms of which a daughter, in exceptional circumstances, may succeed her father, see the *Bhe* case para 193. The legal interest vests in her only until she gives birth to a son. The *Bhe* case para 193. Another exception may be found amongst the Pondo, where the youngest son inherits. For more exceptions, see Olivier et al *Indigenous Law* 148.

<sup>558</sup> Based on the principle of primogeniture, in terms of which only a male relative of the deceased qualifies as an intestate heir. The *Bhe* case paras 77, 79.

<sup>559</sup> And other close male members of the family. The *Bhe* case para 58, 79.

<sup>560</sup> Bekker "Children and Young Persons in Indigenous Law" 185. Among the Nguni, the second wife's house is called the "right-hand house", and the third wife's house the "left-hand house". Children born from the second and third wife are accordingly known as "children of the right-hand house" and "children of the left-hand house" respectively. See Henderson "Questions on Fostering: An Anthropologist's Perspective" 19.

<sup>561</sup> Bekker "Children and Young Persons in Indigenous Law" 186.

<sup>562</sup> Emphasis added. The *Bhe* case para 229.

<sup>563</sup> Bekker "Children and Young Persons in Indigenous Law" 186.

<sup>564</sup> After the latter has paid damages.

inherit.<sup>565</sup> Due to the rule of male primogeniture, an adopted daughter will not stand to succeed.

The judgment in the *Bhe* case has radically changed the customary law of inheritance and succession, having found the customary rule of primogeniture unconstitutional. The court found that even though the rule might have "been justified by the traditional social, economic structure in which it developed", it has "outlived its usefulness".<sup>566</sup> The rule (and section 23 of the *Black Administration Act*)<sup>567</sup> were found to violate the rights of equality and human dignity and to discriminate against children's rights.<sup>568</sup> Accordingly, the rule of male primogeniture, as practised in the South African customary law context, was unconstitutional. As a result, the *Reform Act* commenced on 20 September 2010. The Act prescribes that the *Intestate Succession Act* applies to the intestate estates of people subject to customary law.<sup>569</sup> The *Reform Act* provides for people living under customary law to dispose of assets using a will.<sup>570</sup> To provide for situations peculiar to the customary law context, the Act redefines certain concepts. As also mentioned in chapter 1,<sup>571</sup> in terms of the *Reform Act*, a "descendant" means:<sup>572</sup>

[A] person who is a descendant in terms of the Intestate Succession Act, and includes-  
(a) a person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child; and (b) a woman referred to in section 2(2)(b) or (c).

Sections 2(2)(b) and (c) respectively provide that;<sup>573</sup>

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<sup>565</sup> As he will be regarded as the youngest of the children. Refer to the discussion earlier in 2.4.3.3.

<sup>566</sup> The *Bhe* case para 210. For an explanation of the rationale behind the rule of male primogeniture and the context within which it developed, see the *Bhe* case paras 162-174, 188.

<sup>567</sup> For a discussion of s 23 of the Black Administration Act, see Rautenbach Introduction of Legal Pluralism in South Africa 200-201.

<sup>568</sup> Sections 9, 10 and 28 of the *Constitution* respectively. See the *Bhe* case paras 92-94, 100. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 206.

<sup>569</sup> Section 2(1) of the *Reform Act*. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 208.

<sup>570</sup> Section 4(1) of the *Reform Act*. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 210. For a discussion of and/or comments on whether freedom of testation allows for the possible revival of the rule of male primogeniture, see Rautenbach 2014 *Acta Juridica* 132-159.

<sup>571</sup> See 1.2.2 above.

<sup>572</sup> Section 1 of the *Reform Act*.

<sup>573</sup> Emphasis added.

[A] woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased<sup>574</sup>

and that,

[I]f the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as *a descendant* of the deceased.<sup>575</sup>

The meaning of "descendant" is extended even further in section 4(2) of the Act:<sup>576</sup>

Any reference in the will of a woman ... to her child or children and any reference in ... the Intestate Succession Act to a descendant, in relation to such a woman, must be construed as *including any child – (a) born of a union between the husband of such a woman and another woman entered into in accordance with customary law for the purpose of providing children for the first-mentioned woman's house; or (b) born to a woman to whom the first-mentioned woman was married under customary law for the purpose of providing children for the first-mentioned woman's house.*

Consequently, "providing children" for another woman's house may refer to customary law adoption. As explained in chapter 1, according to Denson and Nxumalo, one reason why "*formal* adoption does not generally occur in customary law" is because<sup>577</sup>

Parents have other remedies than adopting children, for example, seed-bearers or the *ukungena* custom.

An argument that these "other remedies" can be interpreted as informal adoption cannot be entirely excluded, especially since Denson and Nxumalo refer to "formal" adoption as adoption in terms of the *Children's Act* only. On the other hand, as illustrated in chapter 1, terming adoption practices in customary law as factual instead of legal or formal<sup>578</sup> is problematic. It should be established whether seed-bearing or

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<sup>574</sup> Section 2(2)(b) of the *Reform Act*.

<sup>575</sup> Section 2(2)(c) of the *Reform Act*.

<sup>576</sup> Emphasis added. For a discussion and critique, see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 209-212.

<sup>577</sup> Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 92. Emphasis added. Also see 1.2.1.

<sup>578</sup> See 1.2.4 and 3.7.

the *ukungena* custom is a form of customary law adoption.<sup>579</sup> Consequently, levirate practices or "ancillary marriages"<sup>580</sup> are dealt with briefly in chapter 3.

Despite legal reform pertaining to women's and children's rights, it is not customary to consult children on issues concerning them.<sup>581</sup> Family matters are discussed in private. Bennett concedes that "the idea of children enjoying special rights is fundamentally at odds with the African legal tradition."<sup>582</sup>

Consequently, for customary law adoption it is not necessarily against children's best interests if they are not consulted regarding their adoption. On the other hand, in a study undertaken in 2011<sup>583</sup> the participants<sup>584</sup> indicated that although "it was not their tradition to consult children", the views of especially the "older" children are increasingly sought on "more mundane daily matters of direct relevance to them, such as choices regarding their education."<sup>585</sup> Moreover, although African children may be required to sacrifice their interests for the "common good" and are "not chosen for preferential treatment" (as is the case in Western legal systems), they should not be viewed as "helpless victims".<sup>586</sup>

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<sup>579</sup> Though it has been stated that levirate practices such as the *ukungena* custom have been largely abandoned. Monye 2017 *Journal of Law, Society and Development* 9.

<sup>580</sup> See Bekker and Buchner-Eveleigh *De Jure* 83.

<sup>581</sup> Humby, Kotzé and Du Plessis *Introduction to Law and Legal Skills in South Africa* 114; Martin and Mbambo 2011 <https://bettercarenetwork.org/sites/default/files/An%20exploratory%20study%20on%20the%20interplay%20between%20African%20%20%20customary%20law%20and%20practices%20%20%20and%20children%E2%80%99s%20protection%20rights%20in%20South%20Africa.pdf>.

<sup>582</sup> He states that children are perceived "more in terms of the wealth and labour they can provide for their families". See Bennett *Customary Law in South Africa* 296. "African custom is based on the concept of human dignity, derived not necessarily through the relentless pursuit of individual liberty, but rather through membership of a group." SALC 2002 [http://www.ci.uct.ac.za/sites/default/files/image\\_tool/images/367/childrens\\_act/salrc/24-dp103-ch21.pdf](http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/childrens_act/salrc/24-dp103-ch21.pdf). Sigweni states that "children's views are taken into account indirectly under customary law". *Sigweni Adoption Laws and Procedures of Botswana: Questioning their Effectiveness and Compliance with Regional and International Human Rights Standards* 35.

<sup>583</sup> Involving four communities; two in the Eastern Cape, one in KwaZulu-Natal and one in Limpopo.

<sup>584</sup> Caregivers and traditional leaders.

<sup>585</sup> Martin and Mbambo 2011 <https://bettercarenetwork.org/sites/default/files/An%20exploratory%20study%20on%20the%20interplay%20between%20African%20%20%20customary%20law%20and%20practices%20%20%20and%20children%E2%80%99s%20protection%20rights%20in%20South%20Africa.pdf>.

<sup>586</sup> For a discussion, see Bennett *Customary Law in South Africa* 295-298 and the authority cited.

They [children] have various channels<sup>587</sup> for expressing their needs, whether through established complaint procedures or through the medium of ritualized songs and dances.

Regarding children, one should not merely assume that doing things in a non-Western way necessarily means that a child's best interests are not prioritised in customary law.<sup>588</sup>

## **2.5 Conclusion**

This chapter has contextualised adoption in South Africa by investigating the theoretical foundations of adoptions under Roman, common and customary law.

The investigation commenced with the Roman family and Roman law adoption, highlighting similarities with the African family and customary law adoption. Adoption under customary law has been compared with Roman law *adoptio*, where the focus was more on the family group than on the child. It has been shown that as early as in the reign of Justinian the emperor concerned himself with the individual interests of adopted children. Later in the chapter it was determined that one should be slow to assume children's best interests are not served in the group context in customary law. Though the focus was not so much on highlighting these differences, other differences between Roman and customary law adoption became apparent from the second part of the chapter which dealt the African extended family and African values. The discussions of Roman law adoption were followed by discussions regarding adoption status in Holland and later at the Cape. It was shown that formal adoptions did not exist in common law, and legislation had to fill the gap in the common law.

Consequently, the first part of the chapter focussed mainly on legislation that previously regulated adoption matters, that is, adoption legislation which was in effect before the promulgation of the *Constitution* and ultimately the *Children's Act*. Since 1923 an adopted child's interests have been the golden thread through common law adoption legislation. Courts had to be satisfied that the adopter was a fit and proper

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<sup>587</sup> There are certain people in a family to whom a child can "appeal for protection", such as a grandparent. The family council may meet to "rebuke an offending family head". See Bennett *Customary Law in South Africa* 295 and the authority cited.

<sup>588</sup> Further elaborated on in chapter 3.

person for adoption and that the adoption promoted the child's welfare. Other focus points were the issues of whose consent was necessary for adoption, who qualified as a child, the position of the deserted child, the position of a child born out of wedlock, prohibitions on providing payments regarding adoptions, and the legal effects of an adoption order. The likelihood of intercultural or interracial adoption in the pre-constitutional dispensation was evaluated.

The second part of chapter 2 focussed on the background against which customary law adoptions must be understood. A relatively elaborate discussion of relevant African values and the African family followed. After investigating what "values" means, the discussion focussed on the value of *ubuntu* and the importance of other African beliefs, mainly belief in the ancestors. In customary law, linking to *ubuntu*, emphasis is placed on the child's "belonging" to the extended family as part of the "group context" referred to above. Maintaining a connection with one's family group, culture and tradition is necessary, which is also apparent in the importance attached to the naming a child, amongst other things. Due to the changes in family dynamics that have occurred over the years, it was necessary to explore the different meanings attached to the term "family". The discussion on the African extended family was mainly centred on customary marriage and what it entails, specifically on *ilobolo* and the child's position in the African extended family. The topic of divorce was addressed briefly. It was also determined that customary law does not necessarily support cross-cultural adoption.

The next chapter analyses and conceptualises customary law adoptions to determine their legal implications.

## Chapter 3 Conceptualising customary law adoptions

### 3.1 Introduction

Social anthropologists have identified several reasons for adopting children in "traditional Africa".<sup>1</sup> Reasons for customary law adoptions include childlessness, "recruiting additional members to a given group", and providing for orphans and abandoned children,<sup>2</sup> though it has been stated that abandonment as a reason for adoption occurs only in "unusual circumstances".<sup>3</sup> As shown in chapter 2, African children always "belong" to the mother or father's extended family.<sup>4</sup> Abandoning children is "contrary to the African notion of solidarity".<sup>5</sup> A common saying of the Yaka community in the Democratic Republic of the Congo goes as follows:<sup>6</sup>

[A] child in the womb belongs to the mother but once born, that child belongs to the community.

An African child would rarely be orphaned or abandoned, and as previously explained, an "illegitimate" child or rather a child born out of wedlock<sup>7</sup> belongs to the mother's family.<sup>8</sup> Still, one should not underestimate the emotional toll living in crime-stricken areas whilst being extremely poor and desperate, with no security, has on someone.<sup>9</sup> Research shows that in South Africa in 2014 alone more than 3500 babies were

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<sup>1</sup> See Rwezaura and Wanitzek 1988 *JAL* 153.

<sup>2</sup> Rwezaura and Wanitzek 1988 *JAL* 153.

<sup>3</sup> Rwezaura and Wanitzek 1988 *JAL* 153.

<sup>4</sup> For example, see 2.4.2.2; 2.4.3.3. "Belonging" and consequently "mechanisms for ensuring that every child has a home" were described as "sacrosanct" in the *NW* case. See 2.4.2.2.

<sup>5</sup> Mangayi 2019 *HTS Teologiese Studies / Theological Studies* 1. Also see the discussion on *ubuntu* in 2.4.2.3.

<sup>6</sup> Mangayi 2019 *HTS Teologiese Studies / Theological Studies* 1.

<sup>7</sup> As stated in 2.3.4, the preferred term is "born out of wedlock" rather than "illegitimate".

<sup>8</sup> See 2.4.3.3.

<sup>9</sup> "Residents of Hillbrow-Berea live constantly in insecurity and instability marked by 'fear and anxiety of mugging and grievous crimes that occur from sunset until dawn'". Mangayi 2019 *HTS Teologiese Studies / Theological Studies* 3 and the authorities cited.

abandoned and 5.2 million children were orphaned.<sup>10</sup> During the Covid19 pandemic<sup>11</sup> there was a rise in cases of child abandonment.<sup>12</sup> Of course, child abandonment is not restricted to a race, culture or community. Various issues lead to children being without care, including physical decay in South Africa's inner cities,<sup>13</sup> the high crime rate, homelessness, prostitution and poverty – deprivations that affect the most vulnerable.<sup>14</sup> Young women are "victims of unwanted pregnancy", ending up with babies for whom there is no shelter or security, sometimes leading to mothers abandoning their babies.<sup>15</sup> "Restrictive legislation" is an additional cause for child abandonment,<sup>16</sup> and South Africa's history of segregation and certain African beliefs

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<sup>10</sup> Though these statistics apply to children in general and not to African children exclusively. The estimate of more than 3500 abandoned babies arrived at by Blackie had already been made by Child Welfare SA in 2010. Statistics on abandonment are not provided annually. In the first 7 months of 2021, 43 babies were abandoned, of whom 23 were found alive. The latter statistics were obtained through an "informal gathering of news reports" by Rosenberg. Other (2014) statistics include 4.5 million children not living with their parents, 150 000 children living in child-headed households, more than 13 000 children living in "residential care facilities" and approximately 10 000 children living on the streets. In 2013 more than 11 million children and more than half a million children were registered for child support and foster care grants respectively. In 2014 the estimate was that overall there are 18.5 million children in South Africa. See Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf), Rosenberg 2021 <https://theconversation.com/south-african-women-needing-to-abandon-their-babies-dont-have-safe-options-this-must-change-163992>.

<sup>11</sup> In 2020. The Covid19 pandemic was accompanied by a "devastated economy". News24 2021 <https://www.news24.com/parent/baby/despite-being-illegal-south-africa-needs-more-baby-boxes-as-baby-abandonment-rises-20210527>.

<sup>12</sup> News24 2021 <https://www.news24.com/parent/baby/despite-being-illegal-south-africa-needs-more-baby-boxes-as-baby-abandonment-rises-20210527>.

<sup>13</sup> Accompanied by racial stereotyping. See Mangayi 2019 *HTS Teologiese Studies / Theological Studies 2* and the authorities cited.

<sup>14</sup> See Mangayi 2019 *HTS Teologiese Studies / Theological Studies 2-3* and the authorities cited. Also see Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf).

<sup>15</sup> See Mangayi 2019 *HTS Teologiese Studies / Theological Studies 4*.

<sup>16</sup> Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf). No further information is provided by Blackie. However, see the case of *TT v Minister of Social Development (20/43969)* [2023] ZAGPJHC 41 (25 January 2023) paras 3, 10, 112-114, 156, 158-160, 215, where the court noted that statistics on adoptions "are scant and paint a disturbing picture". The court called the decrease in adoption figures in South Africa and the "concerning" increase in the number of children placed in alternative care a "crisis". Children in alternative care grow up "without any form of permanency and family". Apart from curbing adoptions, the court held that social workers of the DSD in this instance also harassed and stigmatised the young unmarried mothers (who were adult students) and caused them "further trauma in what was already a very traumatic experience for them". The court held that it was unlawful for the social workers to threaten to inform the unmarried mothers' parents of their giving birth against express instructions from the unmarried mothers not to do so. It was also unlawful to delay the adoption process "by seeking multiple postponements over an extended

are further obstacles to adoption.<sup>17</sup> According to a KwaZulu-Natal "Commissioner for Traditional Leadership Disputes and Claims" in 2014:<sup>18</sup>

Ancestral spirits look after their relatives and no one else. In our religion, in our culture, this thing (adoption) is ring-fenced.

Apart from legitimate challenges, it is safe to say that parents are merely "negligent" in some cases. Sigweni states that "many parents are negligent" in Botswana, failing in their duties such as providing children with "general supervision". She adds:<sup>19</sup>

[In] their [parents'] representation of children, they may not convey the child's views effectively.

On the other hand, absorbing children into communities through "informal adoption" raises concerns about child trafficking,<sup>20</sup> making regulation essential. One of the issues addressed in this chapter is whether customary law adoptions are informal or *de facto*. Customary law adoptions are indeed unregulated and a need for regulation is identified.

The aim of chapter 3 is to conceptualise customary law adoptions through analysis against the contextual background provided in chapter 2, bearing in mind the issues identified in chapter 1. Consequently, this chapter considers the possible purposes of customary law adoptions first. After that, the requirements forms and status of

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period of time." Here, the issue was perhaps not so much the restrictiveness of legislation as the DSD and the social workers' misconduct and misinterpretation and wrong application of the *Children's Act's* adoption provisions (which were perpetuated in the DSD's Practice Guidelines on National Adoption). Still, the court concluded that the DSD indeed "got embroiled in bureaucratic red tape". Therefore, one might say that legislative measures were indeed restrictive in this instance, albeit as a result of misconduct and the incorrect interpretation and application of such measures.

<sup>17</sup> Common law adoption legislation under apartheid, as discussed in 2.3.4.3-2.3.4.4, for example, contained subtle and unsubtle bans against interracial and intercultural adoptions. It was shown in 2.4.2.2, for example, that some African beliefs can also cause an "unwillingness to adopt".

<sup>18</sup> See Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf).

<sup>19</sup> Sigweni *Adoption Laws and Procedures of Botswana: Questioning their Effectiveness and Compliance with Regional and International Human Rights Standards* 35 and the authority cited.

<sup>20</sup> Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf). Also see the discussion of the *Flynn* case in 1.2.2, where the DSD raised concerns about child trafficking too.

customary law adoptions are considered through case law analyses.<sup>21</sup> Other practices for providing children for another's house, such as *ukungena*, are also considered.<sup>22</sup>

### **3.2 The purpose of customary law adoption**

It is submitted that in both customary and common law ascertaining the "true" motive(s) for adoption is not an easy task.<sup>23</sup> Even if a particular "motive" for adoption is stated by the adoptee(s), there may also be "unstated" motives.<sup>24</sup> In other words, the "immediate force" behind adoption is not always determinable and may be influenced by "requirements or constraints" imposed by the state and the community.<sup>25</sup>

Nevertheless, more than one reason for customary law adoption might exist.<sup>26</sup> In a Tanzanian context Rwezaura and Wanitzek list four "major motives" for adoption - those which are "family-centred", those that are "child-centred", motives "aiming at strengthening existing filial ties", and reasons intended to "legalise a *de facto* parent

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<sup>21</sup> Also see Sibisi 2021 *Obiter* 59, where before determining the legal implications of *ilobolo* he considers the functions and juristic nature of the practice first. The legal implications of customary law adoptions cannot be determined without first considering the content, forms, requirements and status of the practice.

<sup>22</sup> See, for example 3.6.

<sup>23</sup> Also see Rwezaura and Wanitzek 1988 *JAL* 135.

<sup>24</sup> Rwezaura and Wanitzek 1988 *JAL* 135.

<sup>25</sup> Rwezaura and Wanitzek 1988 *JAL* 141. Rwezaura and Wanitzek provide an example of a step-parent adoption where the couple is "racially mixed". Chapter 2 provides explanations and examples of the effect of racial segregation and certain beliefs on interracial or intercultural adoption. For example, see 2.3.4.3-2.3.4.4, 2.4.2.2-2.4.2.3.

<sup>26</sup> Rwezaura and Wanitzek 1988 *JAL* 135.

and child relationship".<sup>27</sup> As shown below, the listed motives for adoption are not mutually exclusive.<sup>28</sup>

First, a family-centred motive refers to what some have stated as the original purpose of customary law adoption.<sup>29</sup> In this instance adoption provides for "childlessness" or the "lack of a male heir".<sup>30</sup> Until the late 1960s European adoptions were primarily "family-centred", though the focus changed to child-centred.<sup>31</sup> In common law, adoption legislation in which a child's "welfare and interests" have to be promoted was promulgated in South Africa in 1923.<sup>32</sup> In customary law, children's best interests "are determined as part of the interests of the family unit".<sup>33</sup> Consequently, Sigweni states that:<sup>34</sup>

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<sup>27</sup> Rwezaura and Wanitzek 1988 *JAL* 135. Like South Africa, Tanzania is another African country where a "pluralistic legal society [is] governed ... by both statutory and customary laws". Cuskelly states that in Tanzania "few human activities are regulated by statutory laws alone". Cuskelly *Customs and Constitutions: State Recognition of Customary Law Around the World* 142. The Tanzanian *Judicature and Application of Laws Act* 31 of 1966 provides for the application of customary law in s 11. S 11(3) provides that the courts "shall apply" customary law, except those customary law rules or practices that are "abolished, prohibited, punishable, declared unlawful or expressly or impliedly disapplied or superseded by any written law." Consequently, adoption law in Tanzania is influenced by customary law too. Tanzanian legislation states that where an adoptive parent is subject to customary law, the adopted child is subjected to customary law. The Tanzanian "*Law of the Child Act*" of 2009 recognises childcare arrangements, "which may include customary law adoptions", though such adoptions are not provided for in detail in the Act. In Tanzania customary law adoptions are viewed as informal, *de facto* adoptions. See Kimario *Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element In the Best Interest of the Child?* 72; Rwezaura and Wanitzek 1988 *JAL* 125, 152; Kimario *Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element In the Best Interest of the Child?* 77, 198.

<sup>28</sup> Rwezaura and Wanitzek 1988 *JAL* 135.

<sup>29</sup> Therefore, the focus is on the family unit and not necessarily on the individual child to be adopted. Also see 1.2.1; the comparison to Roman law adoption in 2.2; Monye 2017 *Journal of Law, Society and Development* 7; Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* 375-376; Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 22-23; Bennett *Human Rights and African Customary Law under the South African Constitution* 107.

<sup>30</sup> Rwezaura and Wanitzek 1988 *JAL* 135.

<sup>31</sup> Rwezaura and Wanitzek 1988 *JAL* 135-136.

<sup>32</sup> See 2.3.4.1-2.3.4.4.

<sup>33</sup> By the family head.

<sup>34</sup> Though the statement is made in a Botswanian context. In Botswana the position of having a dual legal system, in terms of which customary law adoptions and adoptions under statute "have continuously operated alongside each other", is similar to the position in South Africa. However, according to Dinokopila and Kgoboge: "The framers of the (Botswanian) constitution ... found it imperative to preserve the application of customary law ... even in cases where such laws are discriminatory". They add: "The courts in Botswana, in their efforts to maintain a harmonious society that upholds the rights of men and women and in the face of a relatively outdated

The application of the concept of the best interest of the child under customary law is negligible since customary law in the traditional sense does not treat the rights of children or any other group separately from the rights of the family as a unit. ... This (determining the interest of a child within the family unit) is done by taking into account the values of the family and their cultural and religious background.

Sigweni concedes though that<sup>35</sup>

[P]arents are expected to have the best interests of their children at heart in all actions affecting their children and are regarded as the spokespersons and representatives of their children in all matters by customary law.

Furthermore, when a couple cannot have biological children of their own, it is not to be said that their adoption of a child is necessarily more family-centred than child-centred.<sup>36</sup> Again, the listed motives are not mutually exclusive. A couple may also decide not to have biological children of their own and to adopt instead.<sup>37</sup>

Secondly, a "child-centred" motive for adoption is where the primary focus is on the child who needs a family to care for him or her, as opposed to a family with a "deficiency" such as not having an heir to succeed the family head.<sup>38</sup> Consequently, the needs and rights of the family and parents (whether the adoptee or adoptive parents) are secondary.<sup>39</sup> Typically, adoptions of orphans and children whose families are unable or unwilling to provide for them fall under this category.<sup>40</sup> On the other hand, orphans and children who do not receive care from their families are especially

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constitution, have to turn either to creative legislative interpretations ... or avoid applying some provisions of the constitution altogether." See Sigweni *Adoption Laws and Procedures of Botswana: Questioning their Effectiveness and Compliance with Regional and International Human Rights Standards* 4, 35; Dinokopila and Kgoboge 2022 *Nordic Journal of Human Rights* 356. In her dissertation, Sigweni refers to customary law adoptions by relatives as "the informal ones" – "the informal ones under customary law by relatives". Sigweni *Adoption Laws and Procedures of Botswana: Questioning their Effectiveness and Compliance with Regional and International Human Rights Standards* 4.

<sup>35</sup> Sigweni *Adoption Laws and Procedures of Botswana: Questioning their Effectiveness and Compliance with Regional and International Human Rights Standards* 35.

<sup>36</sup> Rwezaura and Wanitzek state that "many legal systems are still sympathetic to childless families". Children should gain "important benefits", even if adopted by a childless couple. See Rwezaura and Wanitzek 1988 *JAL* 136.

<sup>37</sup> Also see Rwezaura and Wanitzek 1988 *JAL* 136.

<sup>38</sup> Therefore, a family in need of a child.

<sup>39</sup> Rwezaura and Wanitzek 1988 *JAL* 137 and the authority cited.

<sup>40</sup> Where the motive for the adoption of such a child is "more likely" to be child-centred. Rwezaura and Wanitzek 1988 *JAL* 137. Another example of a child-centred adoption listed by Rwezaura and Wanitzek is where adoption takes place between relatives for the child to emigrate with the adoptee relative(s); the main aim is to provide the child with "a higher standard of living as well as better future prospects abroad". Rwezaura and Wanitzek 1988 *JAL* 139.

vulnerable to manipulation and abuse.<sup>41</sup> Therefore, motives for such adoptions may not primarily focus on the child's interests in all instances.

Thirdly, there is the motive of "strengthening legally or socially existing filial ties" such as step-parent adoption and the adoption of children born out of wedlock.<sup>42</sup> Rwezaura and Wanitzek state that the motive for strengthening filial ties in Tanzania stems from "the unfavourable view of the English common law towards illegitimate children."<sup>43</sup> "Children" refers to children born in wedlock only.<sup>44</sup> Therefore a child born out of wedlock did not stand to inherit intestate from the biological parents.<sup>45</sup> Although English common law is to be distinguished from South African common law,<sup>46</sup> discrimination against children born out of wedlock is also historically present in South African common law. For example, as illustrated in chapter 2, no common law maintenance duty existed between a paternal grandfather and his grandchild born out of wedlock.<sup>47</sup> In customary law, maintenance payment is a generally "foreign" concept because a child belongs to a particular family.<sup>48</sup> However, as shown in chapter 1,<sup>49</sup> maintenance or loss of support claims were instituted in several customary law adoption cases. Rwezaura and Wanitzek state that in a situation where<sup>50</sup>

[T]here is no general law providing for legitimation of children by the subsequent marriage of their natural parents, and where the relevant parties cannot or do not wish to take advantage of the customary law rules providing for the legitimation of children, it seems that the law of adoption provides a practical solution towards the strengthening of filial ties between the illegitimate child and his/her parents.

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<sup>41</sup> Also see, for example, Blackie 2014 [http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa\\_Final2.pdf](http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf) where a concern regarding "informally" adopted children and child trafficking is raised.

<sup>42</sup> Therefore, adoption by the biological parent of a child. Rwezaura and Wanitzek 1988 *JAL* 140.

<sup>43</sup> Rwezaura and Wanitzek 1988 *JAL* 140.

<sup>44</sup> Rwezaura and Wanitzek 1988 *JAL* 140.

<sup>45</sup> According to English common law, an illegitimate child is "*filius nullius*"; therefore, "no one", which alienates the child in relation to his or her biological parents. Rwezaura and Wanitzek 1988 *JAL* 140.

<sup>46</sup> In chapter 2 it was established that South African adoption legislation is not founded on English law. See 2.3.1-2.3.2. Also see the explanation of the different meanings of common law in 1.3.4.

<sup>47</sup> See 2.3.4 where the *Motan* case is discussed.

<sup>48</sup> As explained in 2.4.3.3.

<sup>49</sup> 1.2.3.

<sup>50</sup> Such as would arise in Tanzania. Rwezaura and Wanitzek 1988 *JAL* 140-141.

Still, even if categorised as the "strengthening of filial ties", the unstated reason behind formal step-parent adoption could also be to exclude another biological parent from rights and responsibilities or to conceal the child's "illegitimacy".<sup>51</sup>

Fourthly, "legalisation of *de facto* adoptions" refers to an informal adoption being "converted" to a legal one. For example, where the *de facto* adoption does not allow the *de facto* adopted child to inherit or claim maintenance from the *de facto* adoptive parent(s),<sup>52</sup> the child and parent(s) may be motivated to legalise the *de facto* adoption. Therefore, the legalisation of *de facto* adoptions arises where the *de facto* adoption is "insufficient" or where the "relationship appears to be threatened from outside the family". *De facto* customary law adoptions are further discussed below.<sup>53</sup>

In the South African constitutional context, the "true motive" for a customary law adoption must correspond with the child's best interests.<sup>54</sup> Due to their belonging in families, children's interests are considered in customary law.<sup>55</sup> Discussions regarding children are essential in marriage negotiations, and the importance of children links to the purpose of *ilobolo*.<sup>56</sup> A child "belongs" to and is raised in an extended family, with various members responsible for such a child.<sup>57</sup> The child forms part of the family.<sup>58</sup> Therefore, a different view of a child's best interests may exist,<sup>59</sup> but this thesis will not evaluate the best interests of an adopted child under customary law. Instead, the following is submitted: Customary law adoption should not be blindly dismissed for

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<sup>51</sup> Rwezaura and Wanitzek 1988 *JAL* 141.

<sup>52</sup> In this regard see the discussions in 1.2.2 and 1.2.3 respectively.

<sup>53</sup> Also see chapter 1.

<sup>54</sup> In accordance with s 28 of the *Constitution*.

<sup>55</sup> It is submitted that a view opposite from that of Sigweni discussed above can also be taken. Therefore, children's interests are not necessarily neglected in the group context. However, as explained in chapter 1, a thorough evaluation of the child's best interests in customary law adoptions is a study on its own. Also see chapter 2.

<sup>56</sup> It was explained in chapter 2 that *ilobolo* is viewed as a "key" in customary law adoption. See 2.4.3.1.

<sup>57</sup> The extended family was discussed in 2.4.3.

<sup>58</sup> See the discussion in 2.4.2.2, 2.4.3.3.

<sup>59</sup> In chapter 2, with reference to Nhlapho's testimony in the *NW* case, it was explained that the "interests of children are best served in the communal value system by making sure that a child 'belongs'". See 2.4.2.2. Nevertheless, an evaluation of the child adopted under customary law's best interests is not part of this thesis. The aim here is rather to establish the legal implications of customary law adoptions. In doing so, it is important to know the child's position in the African extended family.

supposedly not having a child-centred motive. In fact, what is known as "open adoptions" under the *Children's Act*<sup>60</sup> may be more acceptable in customary law than in common law.<sup>61</sup>

In the *Flynn* case, in a common law context the DSD affidavit submitted to the court noted that the non-regulation of "open adoptions" could lead to an unwillingness to adopt,<sup>62</sup> especially if there is no formal access agreement between the biological and the adoptive parents; however, in customary law recognising and embracing the importance of family can promote willingness to adopt. If one's values and beliefs are constitutionally respected<sup>63</sup> when laws are regulated, the effect should be encouragement instead of unwillingness. Furthermore, customary law adoptions would no longer be viewed as "informal" by those who practice it as law.<sup>64</sup> Kimario confirms that customary laws do not necessarily fit the Western concept of adoption and that "only certain rights and responsibilities over a child may be transferred", at the same time acknowledging that there is uncertainty regarding the customary law concept of adoption:<sup>65</sup>

[T]he forms of adoption governed by *African customary laws of given communities do not fit the Western conceptions of adoption that involve complete severance and replacement of familial relations*. ... Procedures, objectives, elements and effects of traditional law adoption in Africa considerably differ from the Western statutory model, and from one community to another within the continent and individual countries. Customary law differs from one ethnic group to another, and because it is a living law it also changes with time. ... [T]he definition of customary law adoption is unclear even among members of a particular community.

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<sup>60</sup> Discussed in chapter 4.

<sup>61</sup> Also see the discussion of the importance of family in chapter 2; Kimario *Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element In the Best Interest of the Child?* 77.

<sup>62</sup> If there is no formal access agreement this lack will bring uncertainty for adoptive parents (will put them in a "precarious" legal position). See 1.2.2. Open adoptions are regulated by the *Children's Act*, as discussed in chapter 4.

<sup>63</sup> As all laws are subject to constitutional scrutiny.

<sup>64</sup> For an example, see 2.4.2.3.

<sup>65</sup> Though not in a South African context specifically. However, uncertainties pertaining to customary law adoptions in the South African context specifically were indeed illustrated in chapter 1. Kimario *Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element In the Best Interest of the Child?* 77 and the authorities cited.

Customary law adoptions "lack consistency in their motives, elements, procedures, and effects."<sup>66</sup> Hence the discussion that follows.

### **3.3 Generic requirements for customary law adoption**

General requirements for valid customary law adoptions have been identified by academic writers and the courts, amongst others.<sup>67</sup> The requirements are mainly twofold:<sup>68</sup> the respective families must agree, and due publicity must be given. Where relevant, the adoption is usually reported to the traditional leader to indicate that the child was formally transferred.<sup>69</sup> However, not all communities have traditional leaders.<sup>70</sup>

Unlike the position in the *Children's Act*,<sup>71</sup> a court order and the subsequent Department of Home Affairs registration are not required, nor is, amongst some of the other requirements, an assessment by a social worker. Instead, the agreement between the families and due publicity are the two "generic" validity requirements common to all (or most) South African communities practising customary law.<sup>72</sup>

#### **3.3.1 Agreement and consent**

In customary law the family head represents the family members in various transactions,<sup>73</sup> and adult family members will ideally meet to discuss important matters

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<sup>66</sup> See Kimario *Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element In the Best Interest of the Child?*<sup>81</sup>, where it is also stated that unregulated customary law adoptions are not in the best interests of children. According to Rwezaura and Wanitzek 1988 JAL 152, "the protection of adoptable infants is a major justification for state regulation of the adoption practice". Also see concerns regarding trafficking raised in 1.2.2, 2.3, 3.1-3.2.

<sup>67</sup> Also see chapter 1.

<sup>68</sup> The *Maswanganye* case paras 12-13. Also see, for example, the *Metiso* case 1147; Maithufi 2001 *De Jure* 391-392; Olivier *et al Indigenous Law* 154.

<sup>69</sup> Olivier *et al* state that adoption "requires the consent of both the family groups with notification to the tribal chief." "Publicity" is not specifically mentioned. See Olivier *et al Indigenous Law* 154.

<sup>70</sup> Moshoeshoe 2022 <https://www.citizen.co.za/witness/news/unite-or-risk-exclusion-griquas-in-koekstad-told/>; Local Government and Administration; Provincial & Local Government Portfolio Committee: Joint Committee 2003 <https://pmg.org.za/committee-meeting/2922/>.

<sup>71</sup> Discussed in chapter 4.

<sup>72</sup> Also see the *Kewana* case 773; the *Maswanganye* case paras 12-13.

<sup>73</sup> See Rautenbach (ed) *Introduction to Legal Pluralism* 27.

such as adoption.<sup>74</sup> It has been established that women can also be family heads.<sup>75</sup> Statistics show that in 2013, 43% of "young children" lived with their biological mothers only. In particular, a study by the Children's Institute at the University of Cape Town shows that only 29% of African children live with their biological parents.<sup>76</sup> The *Children's Act* requires the biological parents' consent to an adoption under common law.<sup>77</sup> Under customary law the identity of family members who must consent to an adoption is not as clear-cut. Consequently, those family members who must agree to a customary law adoption are discussed next.

### 3.3.1.1 The biological parents and other relatives

In the *Metiso* case<sup>78</sup> the mother of the children and her family were never informed of the customary law adoption.<sup>79</sup> The court recognised a maintenance duty even though the act of adoption was possibly incomplete. During the court proceedings an expert witness testified that informing the mother and her family was a matter of courtesy and that the actual decision-making lay with the father and his family.<sup>80</sup> The court concluded that a mother and her family generally could not "interfere" with a customary law adoption. As explained in chapter 1, the court found that the mother and her family have no *locus standi*.<sup>81</sup> Consequently, the legal implication concerning customary law adoptions is that a mother and her family's right to be heard when deciding on customary law adoption is still (legally) subverted,<sup>82</sup> unless determined

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<sup>74</sup> Also see Rautenbach (ed) *Introduction to Legal Pluralism* 26.

<sup>75</sup> For example, see the discussion of the *Mabena* case in 2.4.3.1.

<sup>76</sup> Greyvenstein 2021 *Servamus Community-based Safety and Security Magazine* 74.

<sup>77</sup> The *Children's Act* is discussed in chapter 4.

<sup>78</sup> As discussed in 1.2.3.

<sup>79</sup> The *Metiso* case 1150; also see Neethling and Potgieter *Deliktereg* 61; Heaton *Annual Survey of SA Law* 453.

<sup>80</sup> The *Metiso* case 1148.

<sup>81</sup> See 1.2.3.

<sup>82</sup> In the *Metiso* case the mother abandoned her children after the father's burial and the court focused on the children's best interests to conclude that a maintenance claim against the deceased's (the supposed adoptive parent) must be recognised. The outcome of the case is not the issue here but rather the general statements made regarding the mother and her family's role in the adoption process. See the *Metiso* case 1145.

otherwise by the community themselves in a particular situation,<sup>83</sup> the courts<sup>84</sup> or the legislator.

The court in the *Metiso* case may have missed an opportunity to use the *Constitution* to transform<sup>85</sup> the traditional position relating to the *locus standi* of mothers in customary law adoption matters. The lack of *locus standi* of mothers can be viewed in the context of male family heads traditionally representing members of their households, including their wives, as explained in chapter 2.<sup>86</sup> However, it was also explained in chapter 2 that the court in the *Mabena* case confirmed that a woman, as a family head, may negotiate and receive *ilobolo*.<sup>87</sup> Furthermore, it was explained that the equal status and capacity of customary law wives were affirmed by the *RoCMA* two years later. Judgment in the *Mabena* case was delivered before the *Metiso* case was heard, and the *RoCMA* was already in force.<sup>88</sup> Therefore, it is submitted that the court in the *Metiso* case could have considered the *Mabena* case and the *RoCMA* to develop the law to provide mothers<sup>89</sup> with legal protection explicitly. Although the *Metiso* case

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<sup>83</sup> By means of living customary law.

<sup>84</sup> It should be noted that the *Metiso* case, like several other customary law adoption cases discussed here, was a high court judgment; therefore, strictly speaking, the judgment applies to the court's particular jurisdiction only - in this instance the jurisdiction formerly known as the "*Transvaalse Provinsiale Afdeling*" in Afrikaans, in English the "Transvaal Provincial Division", which is now known as the "North Gauteng High Court" (situated in Pretoria). Still, high court decisions have persuasive value outside their jurisdictions. See for example the reference to the *Flynn* case by the court in the *Mxhosana* case regarding *de facto* adoptions not being recognised for the purposes of intestate succession. Interestingly, though, the same division of the high court which decided the *Metiso* case also decided the *Mabena* case.

<sup>85</sup> The *Constitution* could be viewed as a tool that can be used to transform South African society. For an elaborate definition of so-called "transformative constitutionalism", see Klare 1998 *SAJHR* 150. The aim of transformative constitutionalism is, according to Langa, "a truly equal society". Langa 2006 *STELL LR* 353. In the way of transformative constitutionalism stands, as Klare puts it, "jurisprudential conservatism" which "may induce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less generous or innovative interpretations and application of the *Constitution* than are permitted by the text and drafting history." As a result, "constitutional transformation might suffer accordingly." Klare 1998 *SAJHR* 171.

<sup>86</sup> 2.4.3.1.

<sup>87</sup> Legislation drafted under the *Constitution*, such as the *RoCMA* and the *Traditional and Khoi-San Leadership Act*, were also mentioned in chapter 2 as examples of legal reform pertaining to women's status in their marriages and their communities altogether. See 2.4.3.1. Women no longer need assistance from male guardians to operate in the legal sphere and may become traditional leaders. However, the *Traditional and Khoi-San Leadership Act* was found to be unconstitutional in 2023. See 2.4.3.1.

<sup>88</sup> The *Mabena* case was decided on 20 November 1997 and the *RoCMA* came into effect on 15 November 2000. The *Metiso* case was decided on 15 March 2001.

<sup>89</sup> And possibly their "families".

does not deal directly with marriage and or *ilobolo*,<sup>90</sup> marriage and *ilobolo* go hand in hand with adoptions in customary law in many instances.<sup>91</sup>

On the other hand, as an unmarried mother's child belongs to the mother's family,<sup>92</sup> the biological father will also not necessarily be consulted during adoption. But, despite the view that an unmarried father's consent is not a requirement for customary law adoption, the facts in the "Schulze matter" indicate the contrary. In the Schulze matter<sup>93</sup> a civil marriage was concluded between a German-born man (Schulze) and a Zulu woman less than a month before Schulze's death. The woman had a daughter born from a previous relationship. A day before the deceased's passing, he paid R60 000 as *ilobolo* to signify his intention to marry the woman under customary law. At the same time, he "adopted" the child as his own under Zulu culture – with the "blessing" of the child's biological father:<sup>94</sup>

He (Schulze) paid R60,000 *lobola* at a traditional ceremony and, in terms of Zulu custom, the child was 'handed over to him' *with the blessing of* the extended family, *the biological father* and traditional leaders and in the presence of an executor of his estate.

The deceased's mother also passed away a few months later in Germany. After the relevant office at the Department of Home Affairs failed to amend the child's birth certificate to identify the deceased as the child's father, the Minister of Home Affairs instructed the office to do so.<sup>95</sup> According to the mother of the child, before they were instructed by the Minister to amend the birth certificate Home Affairs officials treated

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<sup>90</sup> The *RoCMA* deals mainly with customary marriages and the *Mabena* case dealt with a female family head negotiating *ilobolo*.

<sup>91</sup> See, for example, step-parent adoption discussed in 3.4.1.

<sup>92</sup> See 2.4.3.3.

<sup>93</sup> According to media reports.

<sup>94</sup> Emphasis added. TimesLive 2020 <https://www.dispatchlive.co.za/news/2020-08-15-minister-demands-action-to-allow-kzn-girl-to-get-r8m-inheritance/>. Sonnekus questions whether the deceased could have been fully *capax* as at that stage he had been on life support for quite some time already and sedatives had been administered to him. He also points out that an executor is officially appointed or recognised only after one's death. Sonnekus 2021 *TSAR* 231-232.

<sup>95</sup> See Sonnekus 2021 *TSAR* 231-232; TimesLive 2020 <https://www.dispatchlive.co.za/news/2020-08-15-minister-demands-action-to-allow-kzn-girl-to-get-r8m-inheritance/>; Broughton 2020 <https://www.sowetanlive.co.za/news/south-africa/2020-08-17-minister-motsoaledi-hand-delivers-birth-certificate-to-allow-kzn-girl-to-inherit-r8m/>.

her in a "cold and hostile" manner, and were generally unhelpful.<sup>96</sup> The mother accused the officials of "blatant contempt of the court and disregard for the rule of law".<sup>97</sup> She was also told that a "dead person" could not adopt.<sup>98</sup> According to the reports, the amendment on the birth certificate allowed the child, as a descendant, potentially to claim an inheritance from the mother's deceased estate in Germany.<sup>99</sup> One report states that the Minister would apologise to the child's mother, who is from a "rural area in KwaZulu-Natal", for how she was treated.<sup>100</sup> According to the Minister, "the minor child *ought not to have been forced to approach the courts of law in the first place*."<sup>101</sup>

Sonnekus highlights two interesting points from the Schulze matter. First, according to customary law, when a child is born out of wedlock the child forms part of the mother's family.<sup>102</sup> Consequently the biological father's and his family's involvement in the *ilobolo* ceremony seems odd.<sup>103</sup> Secondly, a valid customary marriage could not have been concluded because a civil marriage existed between the deceased and the woman.<sup>104</sup> According to Sonnekus, the validity of the adoption may be challenged altogether.<sup>105</sup> As a result of marrying under common law, a conflict occurred between common law and customary law. Returning to the position of unmarried fathers,<sup>106</sup> Sonnekus is not

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<sup>96</sup> Despite a court order instructing the Department to amend the child's birth certificate. See Broughton 2020 <https://www.sowetanlive.co.za/news/south-africa/2020-08-17-minister-motsoaledi-hand-delivers-birth-certificate-to-allow-kzn-girl-to-inherit-r8m/>.

<sup>97</sup> Broughton 2020 <https://www.sowetanlive.co.za/news/south-africa/2020-08-17-minister-motsoaledi-hand-delivers-birth-certificate-to-allow-kzn-girl-to-inherit-r8m/>.

<sup>98</sup> Broughton 2020 <https://www.sowetanlive.co.za/news/south-africa/2020-08-17-minister-motsoaledi-hand-delivers-birth-certificate-to-allow-kzn-girl-to-inherit-r8m/>.

<sup>99</sup> The media report states: "In terms of German law, a descendant may inherit even if they are not named in the will. While a local doctor was claiming the estate, the German court said it would consider the child's claim, as long as Schulze [the deceased] was named as her father on her birth certificate." Broughton 2020 <https://www.sowetanlive.co.za/news/south-africa/2020-08-17-minister-motsoaledi-hand-delivers-birth-certificate-to-allow-kzn-girl-to-inherit-r8m/>. For a discussion of whether the daughter qualifies as an heir, see Sonnekus 2021 *TSAR* 232-233.

<sup>100</sup> TimesLive 2020 <https://www.dispatchlive.co.za/news/2020-08-15-minister-demands-action-to-allow-kzn-girl-to-get-r8m-inheritance/>.

<sup>101</sup> TimesLive 2020 <https://www.dispatchlive.co.za/news/2020-08-15-minister-demands-action-to-allow-kzn-girl-to-get-r8m-inheritance/>. Emphasis added.

<sup>102</sup> Also see the discussion under 2.4.3.3.

<sup>103</sup> Although, in the South African constitutional dispensation, it makes sense that the father should have consented to the adoption.

<sup>104</sup> Section 10(4) of the *RoCMA*.

<sup>105</sup> See Sonnekus 2021 *TSAR* 231-232.

<sup>106</sup> The discussion of the Schulze matter. Also see 3.4.1.

convinced that the unmarried father of a child adopted in terms of customary law usually has a say in such adoption.

On the other hand, the Schulze matter may prove that customary law has developed to include an unmarried father in adoption proceedings. It is submitted that in a constitutional dispensation neither the requirement of the biological father's nor the biological mother's consent to the adoption of their child should be negated. In *Sukati v The Executor (Musu Motsa) Deceased Estate Sabelo Sukati* (the *Sukati* case)<sup>107</sup> the court agreed that a child's mother must consent to a customary law adoption, even if she lives abroad. Though nothing about the father was revealed, the court interestingly referred to the *Flynn* case as authority for an unmarried father's consenting to a step-father's adopting his son. If not already so provided, customary law must be developed to provide that both biological parents must agree to customary law adoption. The latter may be done by amending the *Children's Act*.

The *Kewana* case exemplifies the position of other relatives involved in the adoption agreement. In the *Kewana* case the child's father died when he was young and "nobody" knew whether the father had a family or where to locate it. The child's mother showed "symptoms of insanity"; consequently, her sister took her in. Due to a lack of means, the sister could not provide for both the mother and the child. Another sister (the appellant) and her daughter (the deceased) looked after the child. The child stayed with the appellant, but the deceased maintained them financially.<sup>108</sup> The appellant and her sister decided that the deceased should adopt the child. The deceased agreed to the adoption and was present during the adoption ceremony. An uncle (the appellant's late husband's brother) served as "the eye"<sup>109</sup> at the publicity ceremony and informed the gathering about the adoption. Other family members<sup>110</sup> of

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<sup>107</sup> *Sukati v The Executor (Musu Motsa) Deceased Estate Sabelo Sukati* [2018] ZAGPJHC 706. The facts of the case are discussed under 3.4.2 below.

<sup>108</sup> She sent money home and therefore did not live with the appellant and the child. The *Kewana* case 772.

<sup>109</sup> "[A] position of responsibility" in the family. The *Kewana* case 772.

<sup>110</sup> Specifics are not provided.

the appellant, the traditional leader and neighbours also attended the adoption ceremony.<sup>111</sup>

A few deductions can be made from the *Kewana* case: due to the mother's being incapable, the mother's caretaker sister was involved in the decision to adopt instead of the mother. The appellant was also involved as the one with whom the child resided. The deceased, the adopter, consented too. Though not expressly stated, it seems safe to conclude that the uncle (the "eye") also agreed; otherwise, he would not have led the ceremony. The father's family played no role in the decision-making process. It is unclear whether the mother and father were married or whether, if located, the father's family would have had a say in the adoption. After all, if the parents are married, a child "belongs" to the father's family.

In the *Kewana* case the capacity to financially maintain the child seems to have been the decisive factor in who should adopt the child.

Further, in both the *Metiso* and the *Kewana* cases the parents were unwilling or unable to provide for their children. In the *Maswanganye* case, discussed below, the court confirmed that adoption is usually the result of the biological parents being unable or unwilling to provide for a child.<sup>112</sup> Whether the biological father was unable or unwilling to provide is unclear in the Schulze matter, which is another uncertainty in the Schulze matter that makes the "adoption" peculiar.

### 3.3.1.2 The to-be-adopted child

Regarding the *Children's Act*,<sup>113</sup> all child guardians must consent to the adoption.<sup>114</sup> Consent from the adopted child is also required when the child is ten years or older, or below ten years of age, where the child is of an adequate age, maturity and stage of development to understand the implications of such consent.<sup>115</sup> In customary law

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<sup>111</sup> The *Kewana* case 772-773.

<sup>112</sup> Though not always. See the *Maswanganye* case para 16. See 3.3.1.2.

<sup>113</sup> Discussed in chapter 4.

<sup>114</sup> Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 329.

<sup>115</sup> Section 233(1)(c) of the *Children's Act*.

proceedings, child participation is doubtful.<sup>116</sup> The customary law adoption cases analysed do not recognise a child's participation in the adoption process.

### 3.3.2 *Due publicity*

Publication occurs in the form of a small ceremony and is "central" to customary law adoption. A symbolic ceremony marks the adoption.<sup>117</sup> Again, the *Kewana* case serves as an example of what the ceremony entails:<sup>118</sup>

A sheep was slaughtered for the enjoyment of the guests and a goat was slaughtered ... 'to give the occasion the significance and solemnity of an act being done in accordance with tribal customs'.

The purpose of the ceremony, to mark a customary law adoption, was clear to everyone. Those who attended included the child's mother's family,<sup>119</sup> the traditional leader and neighbours.<sup>120</sup> In the *Sukati* case the court described the requirement of publication as follows:

The publicity surrounding the adoption is to let everyone know that a child is going to be nurtured according to the customs, norms and values of the adoptive parents. The adoptive parents are welcoming a new member to their family and they let this fact be known to all and sundry.

Similarly, the purpose of a Xhosa customary law adoption ceremony was explained by the court in *Maneli v Maneli* (the *Maneli* case):<sup>121</sup>

[T]o proclaim and signify to the world that the adoptive parents have formally accepted parental responsibility for the minor child. The adopted minor child is thereafter accepted and regarded by society as a child of the adoptive parents.

The publicity requirement aims to make a customary law adoption known. However, it is not certain which "society" must regard the child as the adoptive parents' child, whether society as a whole or the society consisting of a specific community practising

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<sup>116</sup> Child participation in court proceedings in terms of the *Children's Act* may contradict African values, which preclude children under a certain age from appearing in court. See a brief discussion of the conflict of laws with respect to child participation, in Bekker 2008 *Obiter* 402-403.

<sup>117</sup> See, amongst others, the *Sukati* case para 18.

<sup>118</sup> The *Kewana* case 772-773.

<sup>119</sup> As discussed above. See 3.3.1.1.

<sup>120</sup> The *Kewana* case 772.

<sup>121</sup> *Maneli v Maneli* 2010 JOL 25353 (GSJ) para 5.

customary law. The reference to "the world" indicates that publicity is not intended for a specific community alone. Therefore, it is submitted that the reporting and record-keeping of customary law adoptions should be strictly regulated. Otherwise, the reality is that the adoption will be known only within a specific community, limiting the rights of the adopted child and the adoptive parents. Reporting and record-keeping are further discussed below.<sup>122</sup>

In step-parent adoption cases,<sup>123</sup> publicity can form part of the *ilobolo* celebration.<sup>124</sup> In the *Rakhav* case it is stated that,

[T]he adoption ... was celebrated together with the *lobola* celebration, as an indication that it was announced.

Furthermore, publicity occurs "in the traditional areas that the parties were living together."<sup>125</sup>

In the *Maswanganye* case, an application of an adult woman ("Maswanganye") claiming to be the adopted child of the deceased was dismissed as a result of the lack of due publicity of the adoption. The deceased and Maswanganye's mother were sisters, sharing the surname, "Baloyi". Maswanganye alleged that her mother and father had had her adopted by the deceased. She stayed with the deceased and took the Baloyi surname until she married. Maswanganye submitted an occupation certificate in which she was referred to as "a 'daughter' and one of the occupants of the deceased's dwelling".<sup>126</sup> Maswanganye stated that she was also the deceased's sole caretaker. However, when *Maswanganye* married the *ilobolo* was delivered to her biological parents.

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<sup>122</sup> In 3.3.3.

<sup>123</sup> Discussed below. See 3.4.1.

<sup>124</sup> Also see the *Rakhav* case para 5.

<sup>125</sup> The *Rakhav* case para 6.

<sup>126</sup> Issued by the West Rand Bantu Administration Board in November 1973. The *Maswanganye* case para 3

In the *Maswanganye* case the court referred to the *Kewana* case, amongst others, as an example of confirmation that due publicity<sup>127</sup> is a validity requirement of customary law adoption. A ceremony was not proven to have taken place in the *Maswanganye* case. All that was established was that Maswanganye had resided with the deceased and had shared her surname, which was not enough to prove that a customary law adoption had been intended.<sup>128</sup> Though one might wonder why Maswanganye shared her aunt's surname and not that of her father, the court concluded that it would not venture into that matter. The court speculated that retaining her mother's maiden name could have resulted from her being born out of wedlock. Perhaps Maswanganye first received her mother's surname and kept it after her parents were married.<sup>129</sup> Another fact the court notes that "strongly points away from, and militates against adoption" was that her biological parents received *ilobolo* for her, and not the deceased.<sup>130</sup> Adoptive parents' obtaining *ilobolo* rights in an adopted daughter is a legal implication of customary law adoption. It follows, then, that the parents of an adopted son<sup>131</sup> will be responsible for the payment of *ilobolo* when the son marries.

The *Maswanganye* case is an example of a party averring that sharing a surname with the supposed adoptive parent indicates that a customary law adoption took place. However, as indicated in the *Maswanganye* case, the fact that a child shares a surname with a caretaker relative is not decisive in proving customary law adoption. Instead, agreement and publicity, as discussed above, must be proven. On the other hand, naming a child<sup>132</sup> and sharing a surname with the family one belongs to is important in

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<sup>127</sup> In the *Maswanganye* case the court referred to publicity as one of the "elements" of customary law adoption. The court also confirmed that due publicity is a validity requirement for customary law adoption. The *Maswanganye* case paras 12-13.

<sup>128</sup> In the *Maswanganye* case the court stated that "it is significant that the children in both cases of *Kewana* and *Metiso* also resided with their relatives. To signify an intention to adopt them, the relatives went a step further: they publicised the adoption of those children."

<sup>129</sup> See the *Maswanganye* case para 19.

<sup>130</sup> The *Maswanganye* case para 21.

<sup>131</sup> If not the son himself. In some cases, such as where it is a second marriage, the man himself is responsible for the *ilobolo*. Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 99.

<sup>132</sup> Naming a child has symbolic value in customary law, as discussed in 2.4.3.3. The importance of a child's name, since it is linked to the ancestors, was emphasised in the *NW* case. See 2.4.2.2. However, in the *NW* case having different bloodlines did not stand in the way of children staying with their psychological parents instead of their biological parents, if the appropriate rituals and ceremonies were attended to. Also see Watson 1980 *The Journal of African History* 362 and the

customary law.<sup>133</sup> Therefore, it is safe to conclude that being given the surname of your adopter is one of the legal implications of customary law adoption.

Therefore, publication aims to make a customary law adoption known. Fulfilment of the relative (as against absolute) requirement to report a customary law adoption to a traditional leader, discussed next, could also prove that the adoption has taken place.

### *3.3.3 Reporting to a traditional leader: A relative requirement*

According to Maithufi, if there was an adoption agreement and due publicity was given to the adoption, the customary law adoption is valid.<sup>134</sup> Reporting the adoption to a traditional leader<sup>135</sup> does not affect the validity of the adoption.<sup>136</sup> If the adoption is reported, the timeframe in which the reporting has to take place is not stipulated.<sup>137</sup> In the *Metiso* case, though the reporting was done later, the court accepted that it indicated the community's acceptance of the adoption. Since all communities might not have traditional leaders, it makes sense that reporting to a traditional leader is not a decisive factor. It is a relative rather than a firm requirement.

However, reporting a customary law adoption can assist in proving an adoption, as in the *Metiso* case. Furthermore, suppose a child's adoption was reported and recorded by a traditional leader, then the record of the adoption might assist a child who might require it later in life, as noted by the DSD in the *Flynn* case.<sup>138</sup> The DSD affidavit presented to the court in the *Flynn* case noted record-keeping as imperative for protecting children against child trafficking.<sup>139</sup>

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authorities cited, where it is explained that "hints about a son's status" could be done through naming. For example, naming a son "Morwagabuse" might imply that "a Bushman (or Korana) shall not rule."

<sup>133</sup> See 2.4.3.3.

<sup>134</sup> The *Maswanganye* case para 12 and the authority cited.

<sup>135</sup> Or the traditional leader's representative.

<sup>136</sup> The *Maswanganye* case para 12 and the authority cited. Also see the *Sukati* case para 20.

<sup>137</sup> See the *Metiso* case 1149.

<sup>138</sup> Albeit in a common law context, the importance of having adoption information in the public domain was strongly reiterated by the DSD in the *Flynn* case. See the discussion in 1.2.2.

<sup>139</sup> The *Children's Act* prohibits advertising adoption in s 252. See 4.2.4.15.

Therefore, it is again submitted that the procedure for reporting and recording customary law adoptions must be clearly and strictly regulated,<sup>140</sup> whether done to and by a traditional leader or by another state authority. The obligation of adoptive parents to report the adoption must also be clear, and the particulars that traditional leaders should record must be specified. Requiring stricter record-keeping should not detract from the publicity requirement in customary law. The importance of strict record-keeping in customary law adoptions is not the same as with customary marriages, where registration is not a validity requirement. Though the non-registration of customary marriages also causes practical challenges, marriages usually involve adults. Adoptions always involve children.<sup>141</sup> However, investigating the practical problems pertaining to customary marriages arising from their non-registration is not germane to this study. Instead, the Schulze matter discussed earlier exemplifies the practical challenges experienced after a customary law adoption.<sup>142</sup> Even after a court order had been obtained and despite the Minister of Home Affairs indicating that it should not have been necessary for the child's mother to approach a court on behalf of the child "in the first place",<sup>143</sup> the Home Affairs officials were reluctant to recognise the customary law adoption. Therefore, after a valid customary law adoption occurs an adoptive family with no financial resources to approach a court faces practical challenges that can leave them without the full protection of the law. Thus the actual status of customary law adoptions is subverted. The status of customary law adoptions is further discussed below.<sup>144</sup>

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<sup>140</sup> Also see 3.3.2.

<sup>141</sup> Though I must concede that it is sometimes the vulnerable who must deal with practical challenges due to the non-registration of customary marriages. After a husband dies a wife might struggle to prove her marriage at the Department of Home Affairs. She might even find out that she was not the only wife of the husband. Furthermore, if her husband did not involve her when he obtained consent for a further marriage from his first wife and proceeded to marry her as if she were his first, such a second wife would find out that she was married out of community of property instead of in community of property. However, the practical challenges relating to the non-registration of customary marriages along with the existing inequalities between women in pre-*RoCMA* marriages and those in post-*RoCMA* marriages, specifically pertaining to patrimonial consequences, require further research in another study. See, for example, Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 101-102 and the authorities cited there.

<sup>142</sup> See 3.3.1.1.

<sup>143</sup> Leading one to conclude that the Minister views customary law adoptions as being as valid as adoptions concluded under the *Children's Act*. Also see 3.3.1.1.

<sup>144</sup> In 3.7.

It has been established that customary law adoptions should not be dismissed for supposedly not being child-centred. The generic validity requirements of customary law adoptions have also been established, and an argument for stricter reporting and record-keeping procedures has been made. Consequently, the different forms of customary law adoptions can now be analysed.

### **3.4 "Forms" of customary law adoption**

Customary law adoption has developed to include different "forms" requiring the determination of their legal implications. Chapter 1 of this study lists the "forms" of customary law adoption identified by Mokotong.<sup>145</sup> The list includes the adoption of a child by a relative or a friend, the adoption of his own child by an unmarried father, the adoption by a sibling of a deceased brother's or sister's child,<sup>146</sup> adoption by a step-parent and the adoption of an orphan by a childless couple.<sup>147</sup>

At first glance, it seems strange that adoption by a relative, friend, sibling or childless couple should be distinguished as different "forms" of customary law adoption by Mokotong. Especially if the validity requirements discussed above are adhered to, one wonders about the purpose of distinguishing them from one another. It is submitted, though, that the context explained in chapter 2 is also relevant here. For example, it may not be obvious for a woman to adopt under official customary law.<sup>148</sup> Therefore, Mokotong might have identified a need to express these as "forms", especially since examples of the forms are to be found in case law.

Nevertheless, some "forms" need further explanation. Conclusions regarding the legal implications of customary law adoptions are made. It is also uncertain whether the forms Mokotong discusses are the only ones that exist or whether other forms are

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<sup>145</sup> See 1.2.1.

<sup>146</sup> Or *umlanjwane yingane kaninalume*, which may loosely be translated as "the illegitimate child is the child of one of the maternal side's relatives". Ombudsman for Long-Term Insurance 2018 <https://www.ombud.co.za/download-attachment/5093> para 29.3.

<sup>147</sup> See Mokotong 2015 *THRHR* 344 for variations of "step-parent adoption" in other languages. Also see Mokotong 2015 *THRHR* 347 and the authority cited.

<sup>148</sup> Due to woman's inferior status according to official customary law. The ranking of members in the African family is discussed in 2.4.3.1.

possible. For example, it is not clear whether step-parent adoptions have developed to include a stepmother adopting her husband's child born of a previous marriage.

#### 3.4.1 Step-parent adoption

"Step-parent adoption" is also known as *ukuthatha inkomo nekonyana* in Zulu/Xhosa/Swati,<sup>149</sup> *stiefoueraanneming* in Afrikaans<sup>150</sup> and *oe gapa le namane* in Pedi/Tswana/Southern Sotho.<sup>151</sup> *Oe gapa le namane* is loosely translated as "you lead it with its calf".<sup>152</sup> The term "calf", or *namane*, refers to a minor.

Step-parent adoption involves the groom's marrying the bride and simultaneously adopting the child(ren) born from a previous relationship(s).<sup>153</sup> *iLobolo* is delivered for the mother and her child(ren). The child(ren) is/are affiliated with the husband's family.<sup>154</sup> Step-parent adoption recognises the importance of bonding between a mother and her new-born child - the need for a child to be with the mother in early childhood.<sup>155</sup> A few examples of step-parent adoption exist.

In the *Motsepe* case,<sup>156</sup> the applicant relied on *oe gapa le namane*<sup>157</sup> as the ground for an application for an interim maintenance claim for her two minor children not born of the respondent, pending a divorce action.<sup>158</sup> One child was younger than fourteen years and the other older than fourteen. Therefore, the court dealt with each child

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<sup>149</sup> However, some authorities suggest that the Zulu and Swazi communities do not recognise customary law adoption. See, amongst other things, Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 114 and the authority cited. "Historically, adoption was not practised in Natal and Zululand and an adopted son could not become an heir. Adoption was nevertheless practised by some communities in the Eastern Cape." Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 92.

<sup>150</sup> Mokotong 2015 *THRHR* 344. Also see Ombudsman for long-term insurance 2018 <https://www.ombud.co.za/download-attachment/5093> para 29.3.

<sup>151</sup> Mokotong 2015 *THRHR* 344. He also lists variations in other languages.

<sup>152</sup> The *Motsepe* case para 11.

<sup>153</sup> See Mokotong 2015 *THRHR* 347-348.

<sup>154</sup> Mokotong 2015 *THRHR* 348. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 114-115.

<sup>155</sup> The *Motsepe* case para 14.

<sup>156</sup> Also see 1.2.1 above.

<sup>157</sup> See the *Motsepe* case para 9.

<sup>158</sup> Mokotong 2015 *THRHR* 350; The *Motsepe* case paras 2-3, 9.

separately.<sup>159</sup> The court explained that a "child" often refers to someone below fourteen years in the Nguni and Sotho-speaking communities.<sup>160</sup> From fourteen a child "is deemed of such age, maturity and stage of development as to be able to assume responsibilities within a homestead".<sup>161</sup> However, a child above fourteen years old is not necessarily precluded from customary law adoption. The judge in the *Motsepe* case explained that nothing prevents a man from expressing during the marriage negotiations a desire to adopt a child above the age of fourteen.<sup>162</sup> The court stated that in this instance it was common cause that the older child was disclosed to the respondent, moved to the respondent's home, and was maintained by the respondent in various respects.<sup>163</sup> Concerning the younger child, the court in the *Motsepe* case reasoned that "*oe gapa le namane is assumed*"<sup>164</sup> for a child under the age of fourteen unless it is expressly excluded."<sup>165</sup> The court held that the respondent was liable for the interim maintenance of both of the children born from the mother's previous relationship.<sup>166</sup>

The view that a customary law adoption is assumed in certain circumstances, as held by the court in the *Motsepe* case, contradicts certain other judgments. In the *Thibela* case, which is discussed in chapter 1,<sup>167</sup> it was evident that the man agreed to adopt the woman's child from a previous relationship by agreeing to pay *ilobolo* for both of them.<sup>168</sup> In contrast, the facts in the *Motsepe* case did not indicate an explicit

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<sup>159</sup> Even though the age of only one of the children (stated to be eleven years of age) is mentioned, it seems obvious that the judge dealt with the children separately because one was below and the other above the age of fourteen, although this might not have been the only reason.

<sup>160</sup> The *Motsepe* case para 13. Also see *Modisane v The Road Accident Fund* (71221/2011) [2013] ZAGPPHC 145 (30 May 2013) para 15.

<sup>161</sup> The *Motsepe* case para 18.

<sup>162</sup> The *Motsepe* case para 19.

<sup>163</sup> The *Motsepe* case para 20.

<sup>164</sup> Emphasis added.

<sup>165</sup> The *Motsepe* case para 16.

<sup>166</sup> The *Motsepe* case paras 17, 20-21. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 116.

<sup>167</sup> 1.2.3.

<sup>168</sup> Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 117; Also see *Modisane v Road Accident Fund* (71221/2011) [2013] ZAGPPHC 145 (30 May 2013) para 17, where it is stated that "nothing precludes a man from *expressly manifesting a desire*, during the negotiations and the entering into a customary marriage, to take the children into his marriage with their mother, and to assume the role of fatherhood for these children." Emphasis added. In *Modisane v Road Accident Fund* (71221/2011) [2013] ZAGPPHC 145 (30 May 2013), Tswana law applied to the

agreement regarding the respondent's adoption of the children, meaning that the court inferred it. A remark made by the high court in another case dealing with customary law adoption, *Maswanganye v Baloyi* (the *Maswanganye* case),<sup>169</sup> also contradicts the view that customary adoption can be assumed.<sup>170</sup> The court noted:<sup>171</sup>

[G]iving away a child for adoption is a life-altering decision, involving, as it does, a clear and irrevocable severance of a parent [from] their offspring. This should not easily be inferred. Therefore, when considering a case of alleged adoption outside the statutory framework, especially where the biological parent(s) of a child are alive, a court should hesitate long, and be slow, to conclude in a given situation, that there has been an informal, *de facto* adoption.

Therefore, the court in the *Maswanganye* case implies that regulated adoption is preferred, thus making a case for regulating customary law adoption. Customary law adoption is also equated with *de facto* adoption, thus casting doubt on its equal status with common law adoption.

As shown, step-parent adoption is linked to marriage - the Schulze matter discussed above comes to mind. However, Schulze and his partner were married in terms of common law. As a result, Sonnekus argues that the validity of the adoption in the Schulze matter may be challenged altogether.<sup>172</sup> *iLobolo* is delivered when Africans conclude civil marriages too.<sup>173</sup> The desire to do this is understandable as the state did not previously recognise customary marriages.<sup>174</sup> Delivering *i lobolo* as part of the marriage negotiations is a way of staying true to one's culture. Now that customary marriages are recognised, the issue arising from the Schulze matter is whether spouses in a civil marriage can proceed to adopt under customary law. As a result of the outcome in the Schulze matter, it seems possible to adopt under customary law whilst in a civil marriage. Though Schulze delivered *i lobolo*, it is uncertain whether the *i lobolo*

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plaintiff who relied on *oe gapa le namane*. See *Modisane v Road Accident Fund* (71221/2011) [2013] ZAGPPHC 145 (30 May 2013) para 8, 13.

<sup>169</sup> *Maswanganye v Baloyi* 2015 JOL 34005 (GP).

<sup>170</sup> Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 117.

<sup>171</sup> The *Maswanganye* case para 16. Also see Ibraheem 2013 *Journal of Law, Policy and Globalization* 7, where it is stated that "adoption is a "commitment for life".

<sup>172</sup> See Sonnekus 2021 *TSAR* 231-232. See 3.3.1.1.

<sup>173</sup> As explained in 2.4.3.1.

<sup>174</sup> Customary marriages enjoy legislative recognition since 15 November 2000. See s 2 of the *RoCMA*. Also see 2.4.3.3, where it was explained that children born of customary marriages were previously registered as "illegitimate".

agreement had already been negotiated before the civil marriage.<sup>175</sup> If not, and if the intention was to convert their marriage into a customary marriage, the customary "marriage" would have been invalid. A civil marriage cannot be converted into a customary marriage.<sup>176</sup> In other words, a later agreement on *ilobolo* where adoption is agreed upon cannot be recognised as step-parent adoption. *ilobolo* should have formed part of the marriage negotiations.

On another note, the motive behind the supposed adoption in the Schulze matter seems clear – for the child to be able to inherit. However, it has been submitted that motives for adoption can be misleading and venturing into this issue further is unnecessary. Ultimately, with step-parent adoption the importance of *ilobolo* as part of the marriage and adoption negotiations is apparent. *ilobolo's* importance in African culture has been established.<sup>177</sup> It is submitted that it is not the *ilobolo* that "buys" a child;<sup>178</sup> instead, the agreement to adopt when negotiating the *ilobolo* is essential. A legal implication of customary law adoption agreed to during *ilobolo* negotiations is not that children are bought through a husband paying for a child. Instead, a child is adopted due to the adoption agreement reached during the *ilobolo* marriage negotiations.

Whether parties have a customary or civil marriage, an *ilobolo* agreement as part of the marriage negotiations is the decisive factor in deciding whether step-parent

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<sup>175</sup> An *ilobolo* agreement and not deliverance itself is required for a customary marriage, as confirmed in 2.4.3.1.

<sup>176</sup> See s 10(4) of the *RoCMA*.

<sup>177</sup> See the discussion in chapter 2, for example 2.4.2.2, where it is stated that *ilobolo* even has a "religious" aspect.

<sup>178</sup> In chapter 2 it was shown that since 1923 common law adoption legislation did not allow an adoptive parent to "give or receive a premium or other consideration" in relation to an adopted child. See 2.3.4.1-2.3.4.4. However, *ilobolo* cannot be viewed through a common law lens to simply mean the "buying" of a child (or woman). After all, *ilobolo's* meaning and importance in African culture is highlighted throughout this thesis. Furthermore, s 1(1) of the *Law of Evidence Amendment Act* provides that it is unlawful for "any court to declare that the custom of *lobola* or *bogadi* ... is repugnant" to the principles of "public policy and natural justice", once again recognising the embeddedness of *ilobolo* in African culture. The *Law of Evidence Amendment Act* was promulgated under apartheid; needless to say, under the *Constitution*, *ilobolo* can be tested against constitutional principles. The point here is rather that it seems that even under apartheid the legislator realised that the *ilobolo* custom cannot be undermined. It is conceded though that a danger of an *ilobolo* deliverer having a sense of entitlement in relation to a child cannot be excluded entirely. This so-called "sense of entitlement" is briefly analysed later in this paragraph.

adoption under customary law is valid. Express agreement by the adoptive father is necessary, though. An example of a young child "adopted" without the adoptive father's explicitly expressing his consent was provided in chapter 1.<sup>179</sup> In the light of the concerns raised in the *Maswanganye* case, it is submitted that where the adoption of a young child is inferred, this is not step-parent adoption under customary law but possible *de facto* adoption instead. In other words, the husband and child have a relationship resembling an adoption, but the requirements for a legal customary law adoption were not followed. According to the *Motsepe* case, express agreement for an older child is already part of customary law,<sup>180</sup> but it should be so for younger children too. Legislation can clarify the requirements of step-parent adoption under customary law. If not, and as it currently stands, the legal implications of customary law adoption include adopting a child without the adopter's express consent, which is untenable.

A recent example of where step-parent adoption was recognised is the *Rakhav* case, in which the court recognised a customary law adoption for a maintenance claim against the Road Accident Fund. A precarious statement by the court stands out. According to the court in the *Rakhav* case, a step-parent, therefore the biological parent's spouse,<sup>181</sup> is "entitled" to adopt the child. Entitlement suggests that a step-parent can without qualification expect to adopt a child if s/he so chooses. Furthermore, this could feed the misconception that delivering *ilobolo* provides entitlement to a person.<sup>182</sup> Therefore, the word "entitled" seems ill-advised but could point towards another legal implication of customary law adoption: that children are adopted without their adoptive parents being evaluated as fit because they are "entitled" to the child. In this way, customary law adoption undermines children's constitutional rights. Children deserve that their adoptive parent be evaluated before the adoption is allowed. However, an argument may be that a child's family will not provide consent for adoption by a step-parent when they believe that the latter is unfit. The uncertainty must be removed in the light of the importance of children's rights.

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<sup>179</sup> See 1.2.3.

<sup>180</sup> See the discussion of the *Motsepe* case under 3.4.1.

<sup>181</sup> The biological parent being the guardian of the child.

<sup>182</sup> Also see the discussion regarding the critique against *ilobolo* in 2.4.3.1.

Indeed, there are cases where children stay with their biological parent's family. Where step-parent adoption has not occurred, cases of *umlanjwane yingane kaninalume* can arise.

### 3.4.2 Umlanjwane yingane kaninalume

*Umlanjwane yingane kaninalume*, in turn, is loosely translated as "the illegitimate child is the child of one of the maternal side's relatives".<sup>183</sup>

Through this adoption someone with the maternal surname becomes the parent of a child born out of wedlock due to the biological mother no longer "being part of the maternal surname"<sup>184</sup> (because she might be deceased or married to a man other than the child's father). Therefore, *umlanjwane yingane kaninalume* allows a relative on the maternal side of the family to adopt the child born out of wedlock of a woman who no longer forms part of the family.<sup>185</sup>

However, it is submitted that the validity requirements must be adhered to for *umlanjwane yingane kaninalume* to be recognised as customary law adoption. A case of *umlanjwane yingane kaninalume* is not a valid customary law adoption when the child is "naturally" or "automatically" absorbed into the family group the child belongs to, as directed by customary law. The *Sukati* case and *Wilsnach v TM* (the *Wilsnach* case)<sup>186</sup> may be illustrations.

In the *Sukati* case a boy went to live with his mother's brother (his "uncle") after the death of his grandmother, who had been looking after the boy. He went to live with his uncle. His mother went to live abroad three years after the death of the boy's grandmother. Nothing was said about the boy's father.

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<sup>183</sup> Ombudsman for Long-Term Insurance 2018 <https://www.ombud.co.za/download-attachment/5093> para 29.3.

<sup>184</sup> Ombudsman for Long-Term Insurance 2018 <https://www.ombud.co.za/download-attachment/5093> para 29.3.

<sup>185</sup> Ombudsman for Long-Term Insurance 2018 <https://www.ombud.co.za/download-attachment/5093>. Also see 3.4.2.

<sup>186</sup> *Wilsnach v TM* 2020 JOL 49017 (GP).

Approximately two years after the boy had moved to his uncle's house, his uncle died intestate. The boy submitted that as the adopted son of the deceased he must be recognised as the deceased's intestate heir. However, the court did not agree because there was no proof of a ceremony for publicity, amongst other things.

It was explained in chapter 1 that due to the broad interpretation provided to a descendant in the *Reform Act*, the Act possibly provides for a *de facto* adopted child under customary law to inherit intestate. As explained, in the *Sukati* case the court referred to the *Flynn* case, a common law *de facto* adoption case, indicating that the court in the *Sukati* case also did not recognise *de facto* adoption under customary law for intestate inheritance. Though the non-recognition of *de facto* adoption under customary law and *de facto* adoption under common law put intestate heirs on an equal footing, the court neglected to refer to the *Reform Act*. The *Sukati* case was decided in 2017, several years after the *Reform Act* had been enacted.

In the *Wilsnach* case in 2020 a child had lived with his maternal grandmother since birth. Though the child's mother also lived with them, she could not take care of the child.<sup>187</sup> The child's father was not married to the mother, and neither were they in a life partnership.<sup>188</sup> The father had not applied to be identified as the father,<sup>189</sup> nor had he paid damages in customary law or contributed to the child's upbringing in any way.<sup>190</sup> The grandmother was granted parental responsibilities and rights regarding the child,<sup>191</sup> who had cerebral palsy.<sup>192</sup> As the child's mother would sometimes leave home for days without informing the grandmother, leaving the child unattended, the latter had given up her employment and cared for the child full-time up to his passing.<sup>193</sup> The grandmother had applied to be recognised as the child's sole guardian in terms of the

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<sup>187</sup> She suffered from depression after the child's birth and could not take proper care of him. She was also unemployed and, during the child's lifetime, relied on her own mother, the child's grandmother, for "shelter" and "other basic needs". The *Wilsnach* case para 13.

<sup>188</sup> Refer to the brief discussion on the developments surrounding life partnerships in 1.2.3.

<sup>189</sup> In terms of s 26 of the *Children's Act*. See the *Wilsnach* case para 23.

<sup>190</sup> The *Wilsnach* case paras 12, 23.

<sup>191</sup> The *Wilsnach* case paras 54, 83. Section 1(1)(d) of the *Intestate Succession Act* provides for parents to inherit upon intestacy from a deceased who is not survived by a spouse or descendant.

<sup>192</sup> The *Wilsnach* case paras 10-11, 21.

<sup>193</sup> The *Wilsnach* case para 14. The child died on 28 April 2018. The *Wilsnach* case para 33.

*Children's Act*.<sup>194</sup> However, after considering the mother's case, full parental responsibilities and rights and the child's guardianship had been awarded to both the mother and grandmother.<sup>195</sup> After the child's death the court now had to decide whether the grandmother was to be regarded as a "parent" of the child for the purposes of section 1(1)(d) of the *Intestate Succession Act*.

Regarding the *Intestate Succession Act*, if a deceased has no surviving spouse or descendants, the deceased's parents are the intestate heirs.<sup>196</sup> Therefore, in the *Wilsnach* case this would be the mother of the deceased child.<sup>197</sup> On the other hand, an adoptive parent is regarded as a "parent" in the *Children's Act*.<sup>198</sup> The court was reluctant to consider whether a *de facto* adoption of the child by the grandmother had taken place:<sup>199</sup>

While there was some suggestion on the part of the applicant that the court order granted on 26 April 2018 may well have had the same effect as an adoption order and could constitute a *de facto* adoption, the matter was not seriously pursued in argument. It is in any event not an issue I will deal with further ...

Interestingly, the court in the *Wilsnach* case also did not refer to the non-recognition of *de facto* adoption in the common law context specifically but rather in South African law in general.<sup>200</sup> The court in the *Wilsnach* case is not ready to acknowledge *de facto*

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<sup>194</sup> The *Wilsnach* case para 20.

<sup>195</sup> For the litigation history, see the *Wilsnach* case paras 15-30.

<sup>196</sup> See s 1(1)(d) of the *Intestate Succession Act*.

<sup>197</sup> The *Children's Act* excludes a person as a parent if such a person's "parental responsibilities and rights in respect of a child have been terminated", such as in the case of the father of the child in the *Wilsnach* case. Consequently the court in the *Wilsnach* case found that the father of the child was not to inherit from the child in terms of the *Intestate Succession Act*. Also see the *Wilsnach* case para 49, 55-68, 90. The court found that to find to the contrary would "offend the entire constitutional scheme and the values it is founded upon and would ultimately not be in the best interest of the child." The judge stated that though he was "mindful that M (the child) is deceased, I do not believe that the best interest principle ceases to operate upon the death of the child." The *Wilsnach* case para 66.

<sup>198</sup> See the *Wilsnach* case para 49.

<sup>199</sup> The *Wilsnach* case para 54. Even though courts will rarely pronounce on issues not argued before them (see, for example, the *Gumede* case, where the court limited its decision to parties in monogamous marriages because the parties before the court were in a monogamous marriage), in the *Wilsnach* case the court listed - as one of the issues to be determined by the court - the question as to whether the effect of a previous court order (which determined that the maternal grandmother of the deceased had full parental responsibilities for and rights over the child) was "equivalent to a *de facto* adoption". See the *Wilsnach* case paras 30, 34.

<sup>200</sup> The court stated that "it is highly doubtful that South African law recognises the concept of a *de facto* adoption." The *Wilsnach* case para 54.

adoption in customary law as official adoption and did not refer to the *Reform Act*. Still, the court found that the grandmother was to be recognised as an intestate heir for the purposes of section 1(1)(d) of the *Intestate Succession Act*.<sup>201</sup> Consequently, the uncertainty over who qualifies as intestate heirs in the *Reform Act* remains. The position is further analysed later in this chapter.<sup>202</sup>

It has been established that a legal implication of customary law adoption is for the adopted child to be recognised as an intestate heir and that the adoptive parent has a maintenance duty towards the child.<sup>203</sup> However, it was explained in chapter 2 when considering inheritance in customary law and common law that succession and inheritance have different meanings,<sup>204</sup> leading to the discussion next of customary law adoption and succession.

### ***3.5 Customary law adoption and succession: The Seleka-Barolong matter***

In 2022 the succession story of the Barolong Boo Seleka royal family (the "Seleka-Barolong matter") caught media attention.<sup>205</sup>

King Moshoeshoe of Lesotho granted the Seleka-Barolong permission to settle on the land around the mountain known as Thaba Nchu in 1833. At that stage, the population consisted of about 12 000 to 15 000 people, and the area was 1200 square miles. Though various African communities lived in Thaba Nchu, the "core of the community

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<sup>201</sup> Along with the mother of the child. See the *Wilsnach* case paras 76, 83. For the reasons of the court for finding that the grandmother is still to be regarded as a parent of the deceased despite not being an adoptive parent, see the *Wilsnach* case paras 77-83. For more discussion, see Moore 2020 <https://www.dailymaverick.co.za/article/2020-12-03-granny-was-the-true-parent-cautious-reflection-is-required-on-the-court-ruling-allowing-a-caregiver-grandparent-to-inherit/>.

<sup>202</sup> See the discussion of the *Mxhosana* case in 3.7.

<sup>203</sup> Numerous court case discussed as examples throughout this thesis show that a maintenance duty is one of the legal implications of customary law adoption. Examples are the *Motsepe* case, the *Metiso* case (even if the adoption was incomplete), the *Thibela* case, the *Mlati* case and the *Rakhav* case. See 1.2.3, 3.3.1.1., 3.4.1. With respect to intestate inheritance, though the claims were not successful under the circumstances, should there have been valid customary law adoptions such adopted children would have qualified as intestate heirs in the *Maswanganye* case and in the *Sukati* case. See 3.3.2, 3.4.2.

<sup>204</sup> Unlike in common law, where "succession" and "inheritance" basically mean the same. Also see 2.4.3.3.

<sup>205</sup> See, amongst others, Afriforum 2022 <https://afriforum.co.za/en/barolong-boo-seleka-royal-family-acieves-historic-victory-with-afriforums-support/>; eNCA 2022 <https://www.enca.com/news/barolong-boo-seleka-queen-moroka-ready-ascend-throne>.

was the Seleka branch of the Rolong".<sup>206</sup> Other Barolong "branches" also lived there. In a time of struggles between the British and the Boers over the Orange Free State, disputes arose regarding Thaba Nchu, which is situated in the Orange Free State area.<sup>207</sup>

The chief of the Seleka, *kgos*<sup>208</sup> Moroka II ("Moroka"), had several wives. His great wife was Moilana, but his supposedly favourite wife was a widow whom he had married, Tlala. Tlala had a son from her previous marriage, Tshipinare.<sup>209</sup> Moroka, whom Watson calls Tshipinare's "stepfather", favoured Tshipinare.<sup>210</sup> Tshipinare is described as a "handsome, brave, and unusually intelligent" child and, more specifically, he had saved Moroka's life on one occasion.<sup>211</sup>

However, in customary law succession rules the first-born son (or his male offspring; if the first-born son is predeceased and has no male offspring, the second-born son and so forth) of the great wife is his father's successor.<sup>212</sup> Therefore, a son from Moilana would qualify as Moroka's legal successor. Moilana indeed had three sons. Moilana's first-born son and second-born son predeceased Moroka. The second son had a son, Motlhwane, who was supposed to succeed but died without male offspring. The death of Motlhwane without male offspring resulted in seed-raising, which meant that Motlhwane's widow would be impregnated by "another member of the royal family". If

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<sup>206</sup> "[A] Sotho-Tswana people. Watson 1980 *The Journal of African History* 357.

<sup>207</sup> Watson explains: "Thaba Nchu lay between the Free State in the west and Lesotho in the east, and because the Free State's borders had been extended toward the east by gains in its war with Lesotho, Thaba Nchu became a black enclave within a white state ... a remarkable situation." Watson 1980 *The Journal of African History* 358-359. See Watson 1980 *The Journal of African History* 357-359 and the authorities cited.

<sup>208</sup> "Chief" or traditional leader.

<sup>209</sup> Watson 1980 *The Journal of African History* 360-361 and the authorities cited.

<sup>210</sup> Watson 1980 *The Journal of African History* 361.

<sup>211</sup> Watson 1980 *The Journal of African History* 361 and the authorities cited. More details of the occasion where Tshipinare saved Moroka's life are not provided by Watson, but the statement is backed by an authority who "had access to oral traditions unavailable to modern historians". See Watson 1980 *The Journal of African History* 361.

<sup>212</sup> Also see the explanation in 2.4.3.3.

a son were born, he would be next in line to succeed. A son, Samuel, was born, but Samuel was "rejected" by Moroka.<sup>213</sup>

On the other hand, public opinion was essential in Barolong politics. A chief who "disregarded the public's standards of good chiefly performance" risked his position as chief.<sup>214</sup> Whether Tshipinare was accepted as successor through public opinion is disputed.<sup>215</sup> In other words, whether a "*pitsd*"<sup>216</sup> "established Tshipinare's legitimacy" was disputed.<sup>217</sup> Still, when Moroka became too old to rule Tshipinare ruled over the community.<sup>218</sup> When Moroka died, Samuel and Tshipinare claimed to be the legitimate successor, and a leadership dispute split the community into two groups. The dispute regarding the legitimate successors of the Seleka-Barolong stemmed from these events.

The dispute finally ended in September 2021 with the inauguration of Kgosi Gabolelwa Moroka as the first female traditional leader of the Barolong boo Seleka community. If Moroka had adopted Tshipinare under customary law,<sup>219</sup> an adopted child he could succeed under traditional customary law. However, it is not certain whether the requirements for a valid customary law adoption were adhered to.<sup>220</sup> At the least, it can be deduced that a *de facto* customary law adoption took place.

Furthermore, even if an adoption took place, the reasons why Samuel was not recognised as a legitimate heir would have to be investigated first as he was an

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<sup>213</sup> The rejection stemmed from Samuel's being an Anglican convert. Hence it was "doubtful whether he could perform the ritual duties of the *kogsi* as principal intermediary with the ancestors: as a Christian he could not be ... 'the link between human rule and spiritual government'." Due to being Christian, he would also be forbidden to have a polygynous marriage. Furthermore, apart from Samuel's being described as an "oddity", Moroka was already "partial to the son of his ... favourite wife", Tlala. See Watson 1980 *The Journal of African History* 361-362 and the authorities cited.

<sup>214</sup> Watson 1980 *The Journal of African History* 360.

<sup>215</sup> See Watson 1980 *The Journal of African History* 360-361.

<sup>216</sup> Or "national assembly". See Watson 1980 *The Journal of African History* 361.

<sup>217</sup> Watson 1980 *The Journal of African History* 361.

<sup>218</sup> Watson states that Tshipinare was the "real political authority". Watson 1980 *The Journal of African History* 361.

<sup>219</sup> For example, see Starfield *Dr S Modiri Molema (1891-1965): The Making of an Historian* 53 and the authorities cited, where it is stated that "... Moroka ... 'adopted' Tshipinare as his heir". However, not much detail is further provided.

<sup>220</sup> Once again, sufficient specifics are not provided in the written sources consulted to determine whether Moroka validly adopted Tshipinare.

offspring of the great wife. Still, it is not necessary to determine the legitimate successor of the Seleka-Barolong community here. Instead, the Seleka-Barolong matter is relevant for customary law adoption because it disproves the suggestion that an adopted child cannot succeed under traditional customary law.<sup>221</sup> It is submitted that one of the legal implications of customary law adoption is the right to succeed one's adoptive parent. As explained in previous chapters, the customary law of inheritance and succession was changed after the *Bhe* decision and the commencement of the *Reform Act*.<sup>222</sup>

The Seleka-Barolong matter is further confirmation that seed-raising existed in customary law. Levirate practices such as seed-raising or *ukungena* are attended to next in the context of customary law adoption. Though levirate practices<sup>223</sup> under customary law have been largely abandoned,<sup>224</sup> legal certainty is needed. A reasonably brief discussion should suffice.

### **3.6 Levirate practices under customary law**

According to Denson and Nxumalo, one reason why "formal adoption does not generally occur in customary law" is because<sup>225</sup>

Parents have other remedies than adopting children, for example, seed-bearers or the *ukungena* custom.

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<sup>221</sup> See, for example, Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 195. For the purposes of customary law succession, one of the general principles is that "male descendants enjoy preference over male ascendants ...". "Descendants" refers to "your own children". In that it included an adopted child as a descendant, the Seleka-Barolong matter might be an exception to the rule that only biological sons could be considered for succession.

<sup>222</sup> See 1.1, 1.2.2, 2.4.3.3.

<sup>223</sup> The word "levirate" stems from the Latin word "*levir*", which means "husband's brother" (if not a biological brother, a person "socially classified" as the husband's brother and according to Bekker, "even an outsider"). See Bekker "Children and Young Persons in Indigenous Law" 190. Also see Bekker *et al* 2017 *De Jure Law Journal* 91.

<sup>224</sup> Monye 2017 *Journal of Law, Society and Development* 9. Also see Bekker and Buchner-Eveleigh *De Jure* 86.

<sup>225</sup> Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 92. Emphasis added.

However, an argument that these "other remedies" are customary law adoption cannot be entirely excluded, especially since Denson and Nxumalo refer to "formal" adoption as adoption in terms of the *Children's Act* only. In his turn, Sibisi states that<sup>226</sup>

[In] African culture, a bride need not necessarily bear a child to ensure continuity; families do *work around this*. The latter is a *very broad practice*.

Sibisi continues by stating that he will not "overburden" his discussion on *ilobolo* by discussing the "very broad practice" of "working around it" when a wife cannot bear children. Presumably, what is known in isiZulu as "*ukungena*" is an example of a way "to work around" not having an heir to succeed.<sup>227</sup>

Indeed, *ukungena* has been referred to as an "other (than 'formal' adoption) customary law remedy".<sup>228</sup> *Ukungena* aims to provide a successor for a deceased man by allowing his widow to bear a child by the deceased's brother,<sup>229</sup> with the child then being regarded as belonging to the deceased. Bekker and Buchner-Eveleigh explain:<sup>230</sup>

The practice of *ukungena* is resorted to in the case of a widow, whereby a brother of the deceased husband or another near male relative is given access to the woman in order to father children on behalf of her deceased husband.

*Ukungena* resembles the Tswana custom *go nyala lebitla* ("marrying the grave"). In terms of *go nyala lebitla*, the Tswana community allows a widow to have children with a relative of her deceased husband. The children born from the widow have traditionally been deemed the children of the deceased. However, as explained below, under the *Reform Act* the children will inherit under their mother's estate. Legally they

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<sup>226</sup> Sibisi 2021 *Obiter* 61-62. Also see Rwezaura and Wanitzek 1988 *JAL* 155. Emphasis added.

<sup>227</sup> Other practices aimed at securing an offspring for the husband's family include "marrying the womb" (in Tswana, "*go nyala mpa*") or "marrying the child" (again, in Tswana, "*go nyala ngwana*"). *Go nyala mpa* occurs where a man whose wife cannot bear children "takes" his wife's sister for the purpose of reproduction, normally after consultation of the families. *Go nyala ngwana* refers to where a man chooses not to marry the mother of his children but negotiates and pays *ilobolo* for the children "as if he were to marry their mother". Monye calls *go nyala ngwana* "adoption". He states that "... she (the mother) gives her consent to the children's being *adopted* by the father." Emphasis added. Monye 2017 *Journal of Law, Society and Development* 9 and the authorities cited. It is submitted that to qualify as customary law adoption, the validity requirements for customary law adoptions, as discussed, must be adhered to.

<sup>228</sup> Denson and Nxumalo *LSSA (and LEAD) Customary Law Training Guide* 92.

<sup>229</sup> Or a relative. Sometimes even an outsider. Bekker "Children and Young Persons in Indigenous Law" 190.

<sup>230</sup> Bekker and Buchner-Eveleigh 2017 *De Jure* 92 and the authorities cited.

will be regarded as children born out of wedlock and intestate heirs of the *ukungena* consort, their biological father, and not the deceased. The traditional purpose of *ukungena* seems to be defeated.<sup>231</sup>

In other instances a husband may take a son of a junior wife and "put it into the womb" of a senior wife who does not have a son. Rwezaura and Wanitzek state that in the Swazi community "to put into the womb of another" means that a younger female relative of an older woman bears a son for the older woman's house.<sup>232</sup> An "extension of maternity through co-wives" takes place. The child is acknowledged as the child of both the older and the younger woman.<sup>233</sup> A deep attachment between the boy and the senior wife is preferred.<sup>234</sup> It was explained in chapter 2<sup>235</sup> that a child provided for another woman's house is to be regarded as a descendant of the wife to whom the child was provided.<sup>236</sup> "Providing children" for another woman's house may refer to customary law adoption in which the woman for whose house the child was born adopts the child from the biological mother. If customary adoption laws view both women as the child's mothers,<sup>237</sup> there was no severance of ties between the biological and non-biological mothers. However, "open adoptions" may be preferred, especially when family members adopt children.<sup>238</sup> As for the deceased husband for whom the child was born, Bekker and Buchner-Eveleigh argue that due to the workings of the *Reform Act*, the deceased's estate "would be wound up and cannot be revived after

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<sup>231</sup> Bekker and Buchner-Eveleigh confirm that "it (*ukungena*) has lost its traditional role" and that "it (*ukungena*) has no legal effect". See Bekker and Buchner-Eveleigh 2017 *De Jure* 92.

<sup>232</sup> Rwezaura and Wanitzek 1988 *JAL* 153.

<sup>233</sup> Rwezaura and Wanitzek 1988 *JAL* 153-154

<sup>234</sup> Rwezaura and Wanitzek 1988 *JAL* 153.

<sup>235</sup> See 2.4.3.3.

<sup>236</sup> See 2.4.3.3; s 4(2) of the *Reform Act*.

<sup>237</sup> The Igbo and Ijo people of Eastern Nigeria make use of a practice in terms of which "a senior barren wife may invite a young woman relative to become a junior co-wife and bear children for her." The young wife does not have her own house and the children born from her are referred to as the children of both the senior and the junior wife. Rwezaura and Wanitzek add "and bear children for her"; however, they also state that both women are the mothers. Rwezaura and Wanitzek 1988 *JAL* 153. For discussions of other adoption practices among the Kuria people and the Haya people of Tanzania, see Rwezaura and Wanitzek 1988 *JAL* 153-154. Also see 2.4.3.3, where it was explained that more than one family member can be called "mother".

<sup>238</sup> Also see 3.2.

his death."<sup>239</sup> Therefore, "children born from an *ukungena* union would succeed to their mother's estate."<sup>240</sup>

At face value, as in the case of *ukungena*, the primary motive is family-centred (providing for childlessness and ensuring an heir in a specific household). However, the "deep attachment" between the child and the non-biological mother required by "putting into the womb", for example, points towards consideration being given to the child's interests. In instances of "putting into the womb", it does not make a difference whether the biological mother has died or is still alive and is reminiscent of step-parent adoption - only in the context of a polygynous family. If the marital relationship between a widow and her deceased's husband's family is dissolved, any children born after her husband's death belong to her family.<sup>241</sup> However, the validity requirements for customary law adoption will have to be proven first. Also, for *ukungena* to entail customary law adoption it must adhere to the validity requirements of customary law adoption, but a deceased person cannot adopt. Legal personality ends with death.<sup>242</sup> Even if an adoption agreement is reached by other members of the deceased's family on the deceased's behalf, it is submitted that no evidence in the (common or customary) law suggests that *ukungena* results in customary law adoption and will not do so unless the law regarding legal personality changes.<sup>243</sup>

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<sup>239</sup> Bekker and Buchner-Eveleigh 2017 *De Jure* 92.

<sup>240</sup> Bekker and Buchner-Eveleigh 2017 *De Jure* 92. Bearing in mind that the possibility exists that a distinction could have been drawn between succession and inheritance to the effect that such a child would "inherit" from their mother, but would "succeed" the deceased. On the other hand, say *ukungena's* traditional purpose was in fact focused on succession and not inheritance per se, it could be that the relevant child would still be regarded the general heir of the deceased, too, depending on the community. Hence, the call for legal clarity. Also see the discussion in 2.4.3.3.

<sup>241</sup> Bekker "Children and Young Persons in Indigenous Law" 190.

<sup>242</sup> In common law at least. For a discussion, see Boezaart *Law of Persons* 164-166. Also see the discussion on the Schulze matter in 3.3.1.1, where officials of the Department of Home Affairs stated that a "dead person" cannot adopt.

<sup>243</sup> To take cognisance of the role of the ancestors and those who have passed on. See 2.4.3.3 and 3.5.

Precise regulation is preferred because, according to Bekker and Buchner-Eveleigh, in *ukungena* cases "the deceased's wife, the children and the consort find themselves in a legal vacuum." Further discussions of related practices are redundant.<sup>244</sup>

### **3.7 The status of customary law adoption**

This study has hinted that treating customary law adoptions as *de facto* undermines the status of such adoptions.<sup>245</sup> Given what has been stated about *de facto* adoptions,<sup>246</sup> the status of customary law adoptions can now be considered against relevant sections in the *Constitution*, namely sections 39 and 211(3). Section 211(3), which elevated the status of customary law in general, is considered first. Section 211(3) of the *Constitution* provides that:<sup>247</sup>

The courts must apply customary law *when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*

Consequently, in some instances it will be necessary first to establish whether customary law "is applicable".<sup>248</sup> As South African courts apply common and customary law,<sup>249</sup> conflicts of law are to be expected.<sup>250</sup> The Schulze matter, as discussed above,<sup>251</sup> is an example of uncertainty about whether common law adoption laws should have been applied instead of customary law adoption laws. Usually, the choice of law rules

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<sup>244</sup> They raise similar issues. Rather see Bekker and Buchner-Eveleigh 2017 *De Jure* 83-92 for a discussion.

<sup>245</sup> See 1.1, 1.2.1, 1.2.4, 1.3. In 3.3.3, the submission was made that the lack of reporting and record-keeping of customary law adoptions undermine their actual status.

<sup>246</sup> See 1.2.2-1.2.4, 1.4, 2.4.2, 3.1-3.2, 3.3.1.1, 3.4.1-3.4.2, 3.5.

<sup>247</sup> Emphasis added.

<sup>248</sup> The word "applicable" in s 211(3) may also be interpreted as meaning that the "application of customary law is dependent on the vagaries of state policy", and that courts have an "unrestricted discretion" in applying customary law. However, such a reading seems out of keeping with "the general tenor of the *Constitution*". Bennett *Customary Law in South Africa* 43.

<sup>249</sup> Or between different systems of customary law.

<sup>250</sup> Bennett *Customary Law in South Africa* 50.

<sup>251</sup> See 3.3.1.1, 3.4.1. Also refer to the illustration in 1.2.4.

assist courts in determining whether customary law is applicable.<sup>252</sup> If customary law applies, the courts have no choice but to apply it.<sup>253</sup>

Section 211(3) also requires customary law to adhere to the *Constitution* and legislation dealing with customary law. With regard to being subject to legislation, Bennett states:<sup>254</sup>

General legal doctrine would suggest that statutes automatically override all precedent, custom and juristic writings, but customary law was sometimes treated as exempt. For instance, certain statutes, such as the Divorce Act<sup>255</sup> and the Matrimonial Property Act,<sup>256</sup> were presumed to amend only Roman-Dutch law, because customary marriages were not fully recognised. Other statutes, however, such as the Age of Majority Act,<sup>257</sup> were of uncertain effect. Section 211(3) [of the *Constitution*] now makes it clear that *customary law is amended only when the legislation concerned makes this purpose clear*.

Therefore, a state relevant to for customary law adoption such as the *Children's Act* must be clear on whether it deals with customary law adoption or not. Section 8(1)-(3) deals with the application of the *Children's Act* but does not state that the *Children's Act* applies to all South African children. Consequently, a proposed amendment has

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<sup>252</sup> In the past, the resolution of conflicts of laws was based on race. In colonial times it was assumed that customary law applied to Africans alone, and legislation was promulgated accordingly. The *Black Administration Act* has been dubbed the "main pillar of legal dualism" in South Africa. The *Black Administration Act* established a separate court system that dealt with civil matters between "Native and Native only". Sections 10 and 13 respectively provided for native commissioners' courts and native appeal courts. Also see s 11(1) of the *Black Administration Act*; Pieterse 2001 *SAJHR* 375; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 220; and, Bennett *Customary Law in South Africa* 70-74 for a discussion of the *KwaZulu-Natal Codes* as well as the former homeland legislation, specifically in the context of discrimination on the grounds of race and citizenship, as well as the problem of courts applying these instruments territorially, and Bennett *Customary Law in South Africa* 34-41 for more discussion of the colonial history of the recognition/non-recognition of customary law in South Africa up until the enactment of the *Black Administration Act*. Further see ss 1(1) and 1(3) of the *Law of Evidence Amendment Act*. Apart from discriminatory legislation, Bennett and Himonga and Nhlapo have listed several "choice of law" rules that the courts had laid down over time. Though most of the rules were determined prior to the constitutional dispensation, it has been argued that "with appropriate modification" they may continue to decide conflicts of laws. See Bennett *Customary Law in South Africa* 53-56; Himonga and Nhlapo *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* 72-73, 83-85. An in-depth discussion of the intricacies surrounding the conflict of laws and the rules used to solve them falls outside the scope of this thesis.

<sup>253</sup> Also see the *Alexkor* case para 51.

<sup>254</sup> Bennett *Customary Law in South Africa* 43-44. Emphasis added.

<sup>255</sup> 70 of 1979.

<sup>256</sup> 88 of 1984.

<sup>257</sup> 57 of 1972.

since been tabled. The *Children's Amendment Bill*<sup>258</sup> seeks to add a fourth subsection to section 8, reading as follows: "This Act applies to every child in the Republic of South Africa." However, the *Children's Amendment Bill* does not specifically provide for customary law adoption. According to the state law advisers, as the Bill does "not contain provisions pertaining to customary law or customs of traditional communities", there is no need for the Bill to be referred to the National House of Traditional Leaders.<sup>259</sup> As a result, if chapter 15 of the *Children's Act*, which deals with adoption specifically, is not amended to provide for customary law adoptions, the amendment to section 8 will profoundly affect what is termed in chapter 1 the "actual status" of such adoptions. Valid customary law adoptions will continue to be applied as if they are common law *de facto* adoptions practised unofficially. Officially, customary law adoptions might become obsolete. Furthermore, linking to Bennett's statement above,<sup>260</sup> to prevent further vagueness and uncertainty, the *Children's Act* should clarify that the purpose of the Act includes recognising customary law adoptions.

The *Reform Act* is an example of a statute that purposefully amends customary law.<sup>261</sup> The Act's purpose is, amongst other things:<sup>262</sup>

To modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession ... in relation to persons subject to customary law.

The uncertainty regarding whether the definition of a descendant in the *Reform Act* includes *de facto* adopted children has been pointed out.<sup>263</sup> As stated in chapter 1, the possibility exists that a *de facto* adopted child is considered an intestate heir of the *de facto* adoptive parents in customary law. In contrast, a *de facto* adopted child is not considered as such in the common law. The uncertainty arises mainly from customary

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<sup>258</sup> *Children's Amendment Bill*, 2020.

<sup>259</sup> Section 5 of the *Children's Amendment Bill*, 2020.

<sup>260</sup> To the effect that s 211(3) of the *Constitution* "makes it clear that customary law is amended only when the legislation concerned makes this purpose clear". Bennett *Customary Law in South Africa* 43-44.

<sup>261</sup> Section 2 of the *Reform Act* states that "[t]he estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the *Intestate Succession Act*." Emphasis added. Also see 1.2.2; 3.6.

<sup>262</sup> For a discussion, see Bennett *Customary Law in South Africa* 295-298 and the authority cited.

<sup>263</sup> See the discussion in 1.2.2.

law being branded *de facto* in numerous instances, as has been shown. However, the equal recognition of customary law and common law by the *Constitution* implies the equal recognition of customary law adoption and common law adoption. Accordingly, Louw argues that customary law adoptions are not "typical informal adoptions"; they are "recognised in terms of a separate legal system on a dual basis with formal adoptions".

Furthermore, as stated in chapter 1, she argues that a *de facto* adoption doctrine "can or should find no application in customary law".<sup>264</sup> After considering what it means to regard an otherwise valid customary law adoption<sup>265</sup> to be the same as a *de facto* adoption in common law, I can safely agree with Louw. Surely, continuing to regard valid customary law adoptions as "informal" or "unofficial" is an injustice. It is reminiscent of a time when customary law did not enjoy official status in state law – when customary marriages were also deliberately referred to as "unions" instead of "marriages".<sup>266</sup> It is submitted that customary law adoptions are also either *de lege* or *de facto*, as in common law. An official adoption occurs if the validity requirements of a customary law adoption are adhered to; namely, the relevant parties agree, and due publicity is given.

On the other hand, when a person raises a child as her or his own but does not adhere to one or both of the validity requirements, the "adoption" is unofficial or *de facto*. The equal status of customary law with common law seems to have been the rationale for the broader scope of the judgment in 2010, in the *Maneli* case. This case was decided a few months before the commencement of the *Reform Act* later that same year.<sup>267</sup> The matter was referred to the high court for a special review.<sup>268</sup> The court had to determine whether the magistrate presiding in the maintenance court had been correct

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<sup>264</sup> See 1.2.4; Louw 2017 *Obiter* 480-481. According to her, the definition of a descendant in the *Reform Act* has "settled the uncertainty in the customary law of succession" concerning customary law adoption. She states that "while customary law adoptions are arranged and completed extra-judicially and could thus broadly be termed 'informal', these adoptions fall in a class of their own".

<sup>265</sup> A valid customary law adoption refers to an adoption where the requirements as discussed in 3.3 were adhered to.

<sup>266</sup> See, for example, the repealed s 22(1) of the *Black Administration Act*. Also see the discussion in Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 118-120.

<sup>267</sup> Also see the *Mxhosana* case para 52.

<sup>268</sup> In terms of s 304(4) of the *Criminal Procedure Act* 51 of 1977. See the *Maneli* case para 1.

in finding that the respondent had a legal duty to maintain a child adopted under Xhosa customary law. Further, the high court had to determine whether the maintenance court had been correct in developing customary law in sections 39(2)-(3) and 173 of the *Constitution*.<sup>269</sup> Section 39(2)-(3) of the *Constitution* determines that:

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The high court not only confirmed the maintenance court's finding but also, amongst other things, stated that the Xhosa customary law of adoption was not "in conflict with the Bill of Rights or section 18(1)(a) of the *Child Care Act* and sections 23 and 25 of the *Children's Act*".<sup>270</sup> The court further ordered the Director-General of the Department of Home Affairs to register the child as the parties' adopted child.<sup>271</sup>

The finding in the *Maneli* case that a Xhosa customary law adoption does not conflict with the *Bill of Rights* (or the other legislation cited) was reached without clear supporting evidence.<sup>272</sup> Except for stating that a legal adoption in terms of Xhosa customary law had taken place and that "Xhosa traditional rites and rituals" had been performed,<sup>273</sup> no further specifics regarding the requirements of a Xhosa customary law adoption were provided.<sup>274</sup> Consequently, the court made no "assessment" on

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<sup>269</sup> The *Maneli* case para 1.

<sup>270</sup> The *Maneli* case para 19. Also see Heaton 2010 *Annual Survey of South African Law* 453.

<sup>271</sup> In terms of s 2 of the *Births and Deaths Registration Act*. The *Maneli* case para 45. Also see Heaton 2010 *Annual Survey of South African Law* 454-455; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 117.

<sup>272</sup> Schäfer *Child Law in South Africa Domestic and International Perspectives* 310.

<sup>273</sup> See the *Maneli* case para 4.

<sup>274</sup> The background facts of the *Maneli* case were also elaborated on in the *Mxhosana* case (para 53): "The minor child (in the *Maneli* case) who was taken into the parties' home at the age of eight (8) months was then (by the time of the court case) twelve years old. A fully developed parent/child relationship existed, and the child in all respects was regarded and treated as the child of the parties. Pursuant to the customary law adoption, the parties approached the Department of Home Affairs where they registered the minor child "as their own child". The respondent maintained and paid for the educational and medical needs of the minor child. The minor child has bonded with the parties whom it regarded as parents, was emotionally and psychologically attached to the respondent, to such an extent that even after the parties had separated, the minor child still regarded the respondent as its parent." Still, it is not clear whether an agreement to adopt and publicity of the adoption, as stipulated by customary law, took place.

whether the respective parties had adhered to the requirements of such an adoption.<sup>275</sup> Instead, it merely accepted that the child had been "lawfully adopted".<sup>276</sup> Furthermore, the court's order that the child be registered as an adopted child by the Department of Home Affairs was not part of the relief sought by the applicant. Therefore, the order seems to create a broader scope than that required by the legal issue at stake.<sup>277</sup> It casts a wider net than the other judgments, where a mere parental duty of maintenance was created. Louw explains:<sup>278</sup>

The conclusion reached by the magistrate that the customary law adoption created a legally enforceable duty of support was thus deemed to be in accordance with the precepts of justice ... *More important* for purposes of this discussion ... is *the additional order directing the Director-General of the Department of Home Affairs to register the child as the adopted child of the parties in terms of the Births and Deaths Registration Act*. This order thus effectively equated the status of a child adopted in terms of Xhosa law with a child adopted in terms of the Children's Act. The order is significant because it is *wholly unprecedented in our law*. While customary law adoptions have been recognised for purposes of creating a legally enforceable duty of support in the past, such adoptions have *never before been recognised in express terms as having the same legal effect as formal adoptions*.

In the *Mxhosana* case the court interpreted this broader approach taken in the *Maneli* case as a "pronouncement on the validity of the *de facto* adoption in accordance with customary law ... to improve the effectiveness of the application of the maintenance system". Furthermore, the court confirmed that the order in the *Maneli* case<sup>279</sup>

effectively *equated the status of a child adopted in terms of Xhosa customary law* with a child adopted in terms of the Children's Act, which gives rise to certain rights including the right of succession which was not possible at the time unless done in terms of the applicable statute.

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<sup>275</sup> Instead, the court in the *Maneli* case referred to Xhosa customary law adoption in general: "The rationale of Xhosa customary law adoption ceremony is to proclaim and signify to the world that the adoptive parents have formally accepted parental responsibility for the minor child. The adopted minor child is thereafter accepted and regarded by society as a child of the adoptive parents." Schäfer *Child Law in South Africa Domestic and International Perspectives* 310. It is also not clear from the judgment whether the maintenance court indeed conducted such an assessment.

<sup>276</sup> *Maneli* case para 4.

<sup>277</sup> Also see Heaton 2010 *Annual Survey of South African Law* 456.

<sup>278</sup> Louw 2017 *Obiter* 480-481. Emphasis added. Also see, for example, the *Metiso* case discussed under 3.3 above; Schäfer *Child Law in South Africa Domestic and International Perspectives* 310; Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 118.

<sup>279</sup> The *Mxhosana* case para 56. Emphasis added.

Therefore, according to the court in the *Mxhosana* case, Xhosa customary law adoptions were now equal in status with common law adoptions. However, the court also pointed to certain mistakes made by the court in the *Maneli* case.<sup>280</sup>

The *Mxhosana* case was decided after the *Reform Act* took effect. In the *Mxhosana* case the applicant sought an order to remove the deceased's mother as the executrix of the deceased's estate. The applicant further requested a declaration recognising him as a descendant of the deceased in terms of the *Reform Act*. The deceased had died intestate in November 2018 of ill health. His late wife, Claudia Komane (Komane) had predeceased him in 2016.<sup>281</sup> The deceased and Komane had married in 1997. No children had been born from the marriage. However, before marrying the deceased, Komane had had a child, the applicant, born in 1993. The deceased had had no biological children.<sup>282</sup>

The applicant in the *Mxhosana* case alleged that his mother, Komane, and the deceased had already been in a relationship when she was pregnant. The applicant averred that he had been accepted by the deceased as the deceased's son. Consequently, the deceased had also been registered as his father.<sup>283</sup> According to a birth certificate issued in 2019, the applicant carried the deceased's surname, Mxhosana. He averred that he "grew up knowing the deceased to be his father".<sup>284</sup> Komane and the deceased only informed him about the "true status" before Komane's death in 2016.<sup>285</sup> He never knew his biological father. The applicant stated that he had lived with the deceased since 2001. Before that, he had stayed with his aunt,<sup>286</sup> but the deceased still "supported and provided for him since birth".<sup>287</sup> The applicant's version was that he was financially dependent on the deceased and had discontinued his studies to look after the deceased when the latter got ill. Proof of his enrolment at an institution of higher learning confirmed his residential address as the deceased's

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<sup>280</sup> See the *Mxhosana* case para 57 for more detail in this regard.

<sup>281</sup> Claudia Sefora Komane died in June 2016. The *Mxhosana* case para 6.

<sup>282</sup> The *Mxhosana* case paras 1, 6-7.

<sup>283</sup> In terms of the Births and Deaths Registration Act. The *Mxhosana* case para 8.

<sup>284</sup> The *Mxhosana* case para 8.

<sup>285</sup> The *Mxhosana* case para 8.

<sup>286</sup> Komane's sister. The *Mxhosana* case para 9.

<sup>287</sup> The *Mxhosana* case para 9.

address. He presented a fee statement to the court. He was also registered as the deceased's dependant on his medical aid and a beneficiary to his pension fund. According to the applicant, during his lifetime the deceased "accepted and raised him as his own child in accordance with customary law".<sup>288</sup> Therefore, the applicant alleged that he was the deceased's only son and heir for the purposes of intestate succession in terms of the *Reform and Intestate Succession Acts*.<sup>289</sup>

The deceased's mother disputed the applicant's version. According to her, the deceased and Komane had not had a relationship. While Komane had been pregnant with the applicant, the deceased had been in prison. The deceased had been released from jail early in 1997. Consequently, the deceased "could not have accepted the applicant as his own son at the time of the applicant's birth". The deceased and Komane had married in 1997, after his release from prison. When they had married, the applicant had been born but stayed with his aunt. According to the deceased's mother, the applicant's birth had been registered in Komane's name. She also emphasised the recent nature of the birth certificate presented by the deceased and said that it had recently been altered. She disputed the authenticity of the documents presented by the applicant, including his proof that he was a beneficiary of the deceased's pension fund. She further alleged that the deceased had never paid the applicant's tuition fees. Indeed, the applicant had provided no proof of any payments made by the deceased. She further denied that the applicant had been dependent on or supported by the deceased, seeing that the latter had been in prison until 1997. She reiterated that after the deceased's release and marriage to Komane, the applicant had continued to stay with his aunt until 2001. The deceased's mother denied a customary law adoption of the applicant by the deceased had taken place. She pointed out that the applicant had provided "no further details regarding his biological father", including whether the father consented to the adoption. The applicant also had not

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<sup>288</sup> The *Mxhosana* case para 8.

<sup>289</sup> The *Mxhosana* case paras 8-10.

informed the court of when his adoption had taken place.<sup>290</sup> Interestingly, and somewhat opposed to her earlier statements, according to the deceased's mother:<sup>291</sup>

Even though they agree as the family that the applicant was treated as a son by the deceased there was however no adoption by customary law.

In his answer, the applicant claimed that an *ilobolo* letter confirming his adoption had been "confiscated and destroyed" by the deceased's mother. He said there had indeed been such agreement, and the adoption had been "proclaimed, signifying to the world that he adopted the applicant and formally accepted parental responsibility for him". Consequently, the deceased and Komane had reregistered the applicant's birth in 1998. The applicant stated that the deceased and Komane had wanted him "to stay with them in 1998 already, but his aunt refused as she had no children of her own". Consequently, after his aunt died in 2001, he had gone to live with Komane and the deceased. Indeed, some family members from both sides had been unaware that the applicant was not the deceased's biological child. Komane's sister-in-law on her side of the family<sup>292</sup> was under the impression that the applicant was the deceased's child until Komane, before her death, the deceased asked her to look after the applicant. The sister-in-law had agreed to look after the applicant if Komane died. However, from the facts of the case, it seems that the sister-in-law started to care for the applicant only after the deceased's death.<sup>293</sup> In her turn the deceased's mother denied most of the allegations in the new version of events supplied by the applicant. However, she now agreed that the "sister-in-law *and* the deceased" had supported the applicant financially.<sup>294</sup> Consequently, the applicant's application was dismissed.

As stated in chapter 1, the court in the *Mxhosana* case referred to the definition of "descendant" in the *Reform Act* as an "extension" of section 1(4) of the *Intestate Succession Act*. The court stated that:<sup>295</sup>

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<sup>290</sup> The *Mxhosana* case paras 12-17.

<sup>291</sup> The *Mxhosana* case para 13.

<sup>292</sup> Married to Komane's brother. The *Mxhosana* case para 20.

<sup>293</sup> The *Mxhosana* case paras 20-21.

<sup>294</sup> The *Mxhosana* case para 24. Emphasis added.

<sup>295</sup> The *Mxhosana* case para 48. Emphasis added.

The provisions of 1(4) [section 1(4) of the *Intestate Succession Act*] were subsequently amended to include s 1(4)(eA) *or to extend the provision in recognition of adoptions that take place de facto in the context of customary law.*

The conclusion drawn in chapter 1 was that the court's interpretation might confirm that *de facto* adopted children are recognised as intestate heirs under customary law.<sup>296</sup> However, even though certain statements by the court might be perceived as interpreting the *Reform Act* as providing for *de facto* adopted children,<sup>297</sup> the court also made statements to the contrary. The court stated that the *Reform Act* has, through the definition of descendant, "codified the adoption by customary law to be legal". Therefore:<sup>298</sup>

[P]roof by the applicant of (customary law adoption having taken place) having been accepted by the deceased during his lifetime as his own child in accordance with the Xhosa customary law will entitle him to be regarded as a descendent of the deceased, eligible to inherit in terms of the Intestate Succession Act.

Therefore, according to the court in the *Mxhosana* case, a descendant in the *Reform Act* refers to a child who a deceased person accepted as his own through valid customary law adoption. In other words, through adoption that adhered to the validity requirements as prescribed by customary law. Consequently, according to the court *de facto* adoptions are excluded from the *Reform Act*. However, contradictory statements were made. For example, at one stage the court referred to "customary law adoption" and "legal adoption" as different things.<sup>299</sup> Consequently, I maintain that legal certainty is needed. Nonetheless, after evaluating the evidence before it, the

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<sup>296</sup> See 1.2.2.

<sup>297</sup> In para 50 of the *Mxhosana* case the court states that the *Reform Act* "is said to ... *provide for the recognition of other people related to the deceased as descendants. Section 1 thereof recognises a minor child that during the lifetime of the deceased was accepted by the deceased as his own child in accordance with the customary law. Customary law means customs and practices observed amongst indigenous African people of South Africa which forms part of their culture. This was intended to legitimise customary law adoptions concluded regardless of the absence of a court order.*" Emphasis added.

<sup>298</sup> The *Mxhosana* case para 59.

<sup>299</sup> In para 62 of the *Mxhosana* case: "The sister-in-law's affidavit does not confirm the customary law adoption but in contradiction alleges the adoption to have been a legal adoption".

court found that the deceased did not qualify as a descendant in terms of the *Reform Act*.<sup>300</sup>

A few observations can be made about the *Mxhosana* case. First, the case again illustrates that sharing a surname or address with another person is insufficient to prove customary law adoption.<sup>301</sup> Instead, adherence to the validity requirements must be sufficiently proven. Second, it is apparent that the mother's family mainly took responsibility for the applicant's care,<sup>302</sup> which was *umlanjwane yingane kaninalume*<sup>303</sup> rather than step-parent adoption by the deceased. Lastly, the deceased's mother's asking whether the consent of the applicant's father had been obtained for adoption might indicate that customary law has developed to require an unmarried father's consent.<sup>304</sup>

If customary law adoptions are left unregulated, the real and practical concerns raised by the DSD in the *Flynn* case and by the mother in the Schulze matter become pertinent.<sup>305</sup> Suppose a child adopted under customary law lacks the financial means to have a court instruct that his or her rights as an adopted child be realised, the reality is that the child and the adoptive parents would be left in the dark. Also, for the applicant in the *Mxhosana* case the outcome could have been different if his version of events were true and a customary law adoption had taken place. Consequently, the "actual" status of valid customary law adoptions would be undermined by their not being regulated. Accepting that customary law adoptions enjoy the same status as adoptions under the *Children's Act* also means that an adoption concluded in terms of

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<sup>300</sup> "The applicant has ... failed to prove that the deceased had during his lifetime accepted him as his son in accordance with the customary law. Having failed to prove that the rites and rituals including the usual pronouncement to the whole world that usually takes place according to the Xhosa customary law, did take place." The *Mxhosana* case para 67.

<sup>301</sup> Also see the discussion of the *Maswanganye* case in 3.3.2.

<sup>302</sup> Komane also seemed to have had the view that the applicant belonged to her family and not her husband's. As discussed, when Komane got married, the applicant stayed with her sister, and before she died she also asked a sister-in-law on her side of the family to care for the applicant once she had gone.

<sup>303</sup> See 3.4.2.

<sup>304</sup> See the discussion in 3.3.1.

<sup>305</sup> The *Flynn* case is discussed in 1.2.2. The Schulze matter is discussed in 3.3.1.1, 3.3.3.

the *Children's Act* may be challenged for not adhering to customary law requirements. The potential for a conflict of laws is again evident. The need for regulation is apparent.

### **3.8 Conclusion**

This chapter has aimed to conceptualise customary law adoptions mainly through the analysis of case law.

The purpose of customary law adoptions was investigated first. After various motives for adoption under customary law had been considered, it was submitted that customary law adoption could not be blindly dismissed for not being child-centred. Focussing on the family group instead of on individuals *per se* does not imply that a child's interests are not taken seriously in customary law. To this end, the preference for so-called "open adoptions" was also identified.

Still, due to a "lack of consistency in their motives, elements, procedures, and effects", the requirements for customary law adoptions were next investigated through an analysis of case law. The agreement and publicity requirements were identified as the two general requirements for all forms of customary law adoptions. However, some problematic aspects pertaining to these requirements were also identified; for example, the lack of *locus standi* of mothers in the customary law adoption process. Another requirement, reporting the adoption to a traditional leader, was identified as a relative requirement as opposed to a generic one. However, it was established that proper reporting and record-keeping procedures are becoming imperative for customary law adoptions.

After an investigation of the requirements for valid customary law adoptions, the different forms of customary law adoptions were considered. Examples from several cases illustrated these forms and raised some questions that must be clarified through regulation. The Seleka-Barolong matter provided a welcome illustration of possible customary law adoption practised many years ago. Levirate practices such as *ukungena* were also briefly considered.

The chapter ended with a lengthy discussion of the status of customary law adoptions and ways in which their status is subverted, which became clear. Tabling a *Children's Amendment Bill* to the effect that the *Children's Act* must without amendment apply to all children in South Africa threatens the existence of customary law adoptions altogether. Given the status of customary law in South African law, it was submitted that due regard must be given to customary law before "erasing" customary law adoptions by applying the *Children's Act* in its current form.

The analysis done in chapter 3 made apparent various legal implications of customary law adoptions. However, the need for the regulation of various aspects was also identified throughout. Hence the discussion of the *Children's Act*.

## Chapter 4 The *Children's Act*: An analysis

### 4.1 Introduction

As stated in earlier chapters, legislation passed under the *Constitution* has amended the customary marriage and succession laws.<sup>1</sup> In marriage law the *RoCMA* provides for the validity requirements of a valid customary marriage. At divorce a court can make an order regarding the custody or guardianship of minor children.<sup>2</sup> In succession law the Constitutional Court effectively scrapped the customary law of succession and inheritance. The *Reform Act* was promulgated, determining that the *Intestate Succession Act* also applies to people living under customary law, with a few modifications considering the differences in customary law.<sup>3</sup>

Like the *RoCMA* and the *Reform Act*, the *Children's Act* was drafted under the *Constitution*. The *Constitution* provides for a child's right to adoptive care. Section 28(1)(b) of the *Constitution* states that:<sup>4</sup>

- (1) Every child has the right –
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment.

However, the relationship between the *Children's Act* and customary law adoptions has received very little attention. The *Children's Act* provides for adoption in chapter 15, but customary law adoptions are not explicitly provided for.<sup>5</sup>

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<sup>1</sup> See 1.1.

<sup>2</sup> See s 8(3)(d) of the *RoCMA*. The *RoCMA* also states that the *Mediation in Certain Divorce Matters Act* 24 of 1987 and s 6 of the *Divorce Act* are applicable to a divorce under customary law. See the discussion in Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 109-110 and the authorities cited, where it is stated that when the child's best interests are considered in customary law divorce, "the court should take African cultural values and belief systems into account; for example, the link with their ancestors". See the discussion of African values in chapter 2. As stated in 2.4.3.2, Rautenbach (ed) states that: "An award of custody to the mother is interpreted as breaking the child's connection with the father's family group (to which the child 'belongs'). It is submitted that children's interests will be best served by granting joint custody to both parents unless there are specific reasons for not doing so". See the discussion in 2.4.2-2.4.3 regarding the ancestors and a child's belonging in a family. Also see s 8(3) of the *RoCMA*.

<sup>3</sup> See 1.1; the discussions in 1.2.2, 2.4.3.3.

<sup>4</sup> Also see Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 5.

<sup>5</sup> See 1.1, 2.3.3, 2.5.

The *Children's Act* defines an "adopted child" as a "child adopted by a person in terms of *any law*".<sup>6</sup> Consequently, an adoptive parent is "a person who has adopted a child in terms of *any law*".<sup>7</sup> The Act requires a court order for adoption.<sup>8</sup> The effect of an adoption order is that an adopted child must be regarded as the child of the adoptive parent.<sup>9</sup> Likewise, an adoptive parent must be considered the adopted child's parent for all purposes.<sup>10</sup>

Even though "any law" in the definitions of an adopted child and an adoptive parent might as well include customary law, adoptions under customary law do not require a judicial act. On the other hand, adoptions under common law do indeed require a judicial act.<sup>11</sup> Adoptions under the common law are recognised in the *Children's Act* and as such are fully recognised in South African law.<sup>12</sup> However, it has been shown that the position is less certain for customary law adoptions. Louw reiterates:<sup>13</sup>

It is not certain whether, or to what extent, the legislator contemplated the possible parallel recognition of extra-judicial adoption in terms of any 'other' legal system, such as Islamic or customary law system.

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<sup>6</sup> Section 1 of the *Children's Act*. Emphasis added.

<sup>7</sup> Section 1 of the *Children's Act*. Emphasis added.

<sup>8</sup> As did its predecessors. See the discussion of the common law adoption legislation in chapter 2. Section 228 is the first section listed under chapter 15 of the *Children's Act*. The section states that a child is adopted "if the child has been placed in the permanent care of a person in terms of a court order."

<sup>9</sup> "For all purposes". See s 242(3) of the *Children's Act*.

<sup>10</sup> Section 242(3) of the *Children's Act*.

<sup>11</sup> Also see *Maneli v Maneli* 2010 JOL 25353 (GSJ) para 19; the discussions of common law adoption legislation in chapter 2.

<sup>12</sup> However, Monye states that even though "the *Children's Act* appears not to provide specifically for the recognition of customary law adoptions, a closer analysis indicates that it in fact does." No immediate explanation for this statement is provided. He later indicates that despite the meanings of an "adopted child" and an "adoptive parent" in the Act, the Act "gives no clarity on the recognition of customary adoptions." He further argues that "any law" (as stipulated in s 1 of the *Children's Act*) includes "the common law and customary law", and, therefore, that adoption can occur under customary law, although it is unclear whether adoption under customary law should follow the "procedural route" stipulated in the *Children's Act*. Monye 2017 *Journal of Law, Society and Development* 3, 15. It is submitted that the legislator's intention is not clear. Another view to consider is that the legislator, in referring to "any other law", might have meant the adoption laws of other countries and not necessarily customary law *per se*. The latter reading is supported by the fact that customary law adoption was apparently not duly considered when the Act was drafted. To equate customary law adoptions with those in international law undermines their status. Also see Mokotong 2015 *THRHR* 346.

<sup>13</sup> See Louw 2017 *Obiter* 458-459.

However, equating customary law with systems that do not enjoy the same status as common law undermines the status of customary law.<sup>14</sup> The *Children's Act* ensures that only common law adoptions enjoy the full protection of the law.

A need for the regulation of customary law adoptions has been identified throughout the previous chapter.<sup>15</sup> This chapter analyses the *Children's Act* as the most appropriate legislation to regulate customary law adoptions. Consequently, various sections of the Act are considered against the context of customary law adoptions provided in chapters 2 and 3. The focus is mainly on chapter 15 of the Act, which deals with common law adoption in South Africa.<sup>16</sup> More legal implications of customary law adoptions come to the fore from the analyses.

## ***4.2 The Children's Act as the appropriate vehicle for customary law adoptions***

The *Children's Act* is an extensive legislative contribution. The Act comprises 387 pages and has seen various regulations issued in terms of it. The whole *Children's Act* took effect on 1 April 2010.<sup>17</sup> Despite its broad scope, as can be deduced from the Act's purpose and preamble, customary law adoptions are excluded.

### *4.2.1 The Children's Act's purpose and preamble*

According to the long title of the *Children's Act*, its purposes, amongst other things, include:<sup>18</sup> giving effect to the constitutional rights of children; providing for children in foster care and youth care and drop-in centres; defining parental responsibilities and rights; making further provisions concerning children's courts; and making "*new provision for the adoption of children*".<sup>19</sup> The phrase "new provision for the adoption

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<sup>14</sup> Also see the discussion in 1.2.4 and 3.7.

<sup>15</sup> See 3.2, 3.3.1.1, 3.3.2-3.3.3, 3.4.1, 3.6, 3.7.

<sup>16</sup> As opposed to inter-country adoption, which is covered in chapter 16 of the *Children's Act*.

<sup>17</sup> Also see 1.2.1 above.

<sup>18</sup> Emphasis added.

<sup>19</sup> Also, amongst other things, to give effect to the Hague Conventions on inter-country adoption and international child abduction. Emphasis added. See the *Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption* (1993); the *Hague Convention on the Civil Aspects of International Child Abduction* (1980). Also see Bosman-Sadie, Corrie and Swanepoel A

of children" is broad enough to cater for customary law adoptions. However, to remove doubt, regulating customary law adoptions should be explicitly included in the Act's purpose.

In turn, the preamble to the *Children's Act* refers to the state's obligation to respect, protect, promote and fulfil the rights of every child as set out in section 28 of the *Constitution*. Section 28 provides that:

- (1) Every child has the right –
  - (a) to a name and a nationality from birth;
  - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - ...
  - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
  - ...
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

Except for the set age of majority in subsection (3),<sup>20</sup> nothing in section 28 of the *Constitution* seems to contradict views about children contained in customary law, as discussed in chapter 2. For customary marriage the *RoCMA* determines that "despite the rules of customary law" the age of majority is the age as stipulated in relevant legislation.<sup>21</sup> In line with the *Constitution*, the *Children's Act* confirms the age of majority for "males" and "females" as eighteen.<sup>22</sup> Therefore, no further amendment is needed if the Act specifically provides for customary law adoptions. Regarding a child's best interests referred to in section 28(2) of the *Constitution*: it has been shown that the views in customary law about the best interests of a child in a specific matter concerning a child, such as adoption, might differ from those in the common law. This

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*Practical Approach to the Children's Act* 10. Though inter-country adoptions fall outside the scope of this study, concerns regarding child trafficking across borders have been raised in relevant discussions earlier in this thesis. See, for example, 1.2.2.

<sup>20</sup> See the discussions in 1.3.8, 2.4.3.3.

<sup>21</sup> Section 9 of the *RoCMA*.

<sup>22</sup> Section 17 of the *Children's Act* states: "A child, *whether male or female*, becomes a major upon reaching the age of 18 years". Emphasis added. See the discussion in 1.3.8 and 2.4.3.3 on reaching adulthood in customary law and how it can be different for boys and girls.

is not to say that customary law adoptions do not consider a child's individual interests because of their "belonging" to a group.<sup>23</sup> The *Children's Act's* preamble acknowledges that the protection of children's rights results in a corresponding improvement "in the lives of other sections of the community", as it is not desirable, or possible, to protect such rights "in isolation from their [the children's] families and communities". Therefore, the preamble aligns with the child's belonging to an extended family or family group in customary law.

The objects of the *Children's Act* are listed in section 2 and correspond with the Act's long title. The objects include: promoting the preservation and strengthening of families;<sup>24</sup> giving effect to various constitutional rights of children<sup>25</sup> and South Africa's obligations in terms of binding international instruments;<sup>26</sup> making provision for structures, services, and means to promote and monitor the "sound physical, psychological, intellectual, emotional and social development of children";<sup>27</sup> strengthening and developing community structures to help care for and protect children;<sup>28</sup> and protecting children from discrimination.<sup>29</sup> Discrimination by the state has occurred in the past, prohibiting cross-cultural and cross-racial adoption.<sup>30</sup> Still today, culture might serve as a barrier to adoption.<sup>31</sup> Differentiation between children adopted under the *Children's Act* and children adopted under customary law has also illustrated through examples in the laws of succession and maintenance.<sup>32</sup>

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<sup>23</sup> See 3.2. The child's best interests, as provided for in the *Children's Act*, are briefly discussed in 4.2.3 below.

<sup>24</sup> Section 2(a).

<sup>25</sup> Section 2(b)(iv). Other children's rights listed are family care or parental care, or appropriate alternative care when removed from the family environment; social services; protection from maltreatment, neglect, abuse or degradation, and the best interests of a child are of paramount importance in every matter concerning the child. See s 2(b)(ii)-(iv).

<sup>26</sup> Section 2(c).

<sup>27</sup> Section 2(d).

<sup>28</sup> Section 2(e).

<sup>29</sup> Also from exploitation "and any other physical, emotional or moral harm or hazards". Section 2(f).

<sup>30</sup> Refer to the discussions of adoption legislation in chapter 2.

<sup>31</sup> See 2.4.2.

<sup>32</sup> See chapters 1 and 3.

#### 4.2.2 Interpretation and application

Apart from a child's being adopted under "any law" and the definitions of an "adopted child" and "adoptive parent",<sup>33</sup> the *Children's Act* interprets several other adoption-related definitions in section 1. Examples include what is meant by the "adoption registrar", an "adoption social worker", and an "adoption service".<sup>34</sup> The registrar and social workers play a vital role in upholding an adopted child's best interests during the common law adoption process.<sup>35</sup> However, these role-players are not necessarily involved in the customary law adoption process.<sup>36</sup>

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<sup>33</sup> See 4.1. Section 1 of the *Children's Act*. Also see 4.1.

<sup>34</sup> Which includes the counselling of the parent and the child (where applicable); assessing a child in terms of s 230(2) (to determine whether a child is adoptable); assessing a prospective adoptive parent in terms of s 231(2) (to determine whether such a person is fit and proper to be entrusted with full parental responsibilities and rights in respect of the child, and is willing and able to undertake, exercise and maintain those responsibilities and rights); gathering information for proposed adoptions as per s 237 (the clerk of the children's court must take the prescribed steps to establish the names and addresses of people whose consent is required for the adoption, and to take reasonable steps to establish the names of those whose consent would have been necessary, but is no longer required, for example where such a person has abandoned the child), and drafting a report as per s 239(1)(b) (a report by an adoption social worker that accompanies an application for the adoption of a child, containing information on whether the child is adoptable, whether the adoption is in the best interests of the child, and prescribed medical information with respect to the child). See ss 230(2) and 231(2) of the *Children's Act* and the provisions referred to there. Also see 4.2.4.3, 4.2.4.8-4.2.4.9.

<sup>35</sup> The adoption registrar is "the person designated by the Director-General in terms of section 247(1)". Section 247(1) stipulates that the adoption registrar "must, in the prescribed manner, record information pertaining to and keep a register of – (a) the registration numbers allocated to records of adoption cases; (b) the personal details of adopted children, of their biological parents and of their adoptive parents; (c) particulars of successful appeals against and rescissions of adoption orders; and (d) all other prescribed information in connection with adoptions". Section 247(2)(a)-(b) then imposes a duty on the clerk of the children's court to "keep a record of all adoption cases by a children's court, including all adoption orders issued by the court" and to "as soon as is practicable after an adoption order has been issued, forward the adoption order, a copy of the record of the adoption inquiry and other prescribed documents relating to the adoption to the adoption registrar." This is also discussed in 4.2.4.13. In turn, "social worker" refers to a social worker in private practice who specialises in adoption services and is registered in the *Social Service Professions Act* 110 of 1978 and accredited in s 251 of the *Children's Act*. "Adoption social worker" also refers to a social worker employed by a child protection organisation accredited in terms of s 251 of the *Children's Act* or by the national or a provincial DSD (including a person employed part-time or on contract) with a speciality in adoption services, and who is registered in terms of the *Social Service Professions Act* 110 of 1978. Section 251 of the *Children's Act* provides for the Director-General (of the relevant department) to provide the necessary accreditation. This is also discussed in 4.2.4.15. S 4 of the *Children's Act* deals with the implementation of the Act by organs of state in the national, provincial and local spheres of government.

<sup>36</sup> The process applicable in customary law adoptions is discussed in chapter 3.

Section 1 of the *Children's Act* further defines other relevant concepts, such as the meaning of "abandoned".<sup>37</sup> Abandoned children as adoptable children in common law are discussed later in this chapter.<sup>38</sup> They were also viewed as adoptable children in previous adoption legislation.<sup>39</sup> The modern reality of abandoned children under customary law has been discussed in chapter 3,<sup>40</sup> and customary law has developed to provide for adoptions outside the family setup,<sup>41</sup> though children in customary law traditionally belong to a family. "A family member of a child" is defined in the *Children's Act* as a parent of such child; any other person with parental responsibilities and rights in respect of the child;<sup>42</sup> a brother, sister, uncle, aunt, cousin or grandparent of the child, or:

[A]ny other person with who the child has developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship.

In other words, a child's family member may include someone who is not necessarily a blood relative but has developed a familial relationship with the child. Hence, the description of a family member seems wide enough to provide for family members in the African extended family.<sup>43</sup> As discussed in chapter 2, a "close biological link" is not needed in customary law.<sup>44</sup> Still, it must be borne in mind that relatives are divided into broader categories in customary law than in common law. For example, a child may call more than one person his or her father.

Consequently, it is submitted that the legislator's adding a phrase to this effect might prevent the African family from being viewed through a common law lens by the courts and other role players in the adoption process. Indeed, customary law adoption was not duly considered in drafting the *Children's Act*.<sup>45</sup> As discussed in chapter 3, the

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<sup>37</sup> A child who "has obviously been deserted by their parent, guardian or caregiver" or has had no contact with such a person for at least three months (for no apparent reason).

<sup>38</sup> In 4.2.4.2.

<sup>39</sup> See the discussion of common law adoption legislation in chapter 2.

<sup>40</sup> See 3.1.

<sup>41</sup> See the "forms" of customary law adoptions discussed in 3.4. Earlier, customary law adoptions were viewed to serve a limited purpose: providing a family with an heir. See, for example, the comparison with adoption under Roman law in 2.2.3.

<sup>42</sup> Also see the discussion of the *Wilsnach* case in 3.4.2.

<sup>43</sup> Discussed in chapter 2.

<sup>44</sup> See 2.4.3.3.

<sup>45</sup> See Mokotong 2015 *THRHR* 346.

*Children's Act* does not allow the Act to apply to all children in South Africa. Consequently, the *Children's Amendment Bill*<sup>46</sup> was tabled to amend the purpose of the Act. If such an amendment is made without properly considering customary law adoptions this would subvert their status.<sup>47</sup> However, some "customary law concepts" do indeed feature in the Act. One example is the description of a "traditional authority" in section 1:

Any authority which in terms of indigenous law or any other law administers the affairs of any group of indigenous people or any other persons resident within an area under the control of a traditional leader.

Indeed, traditional authorities could assist in keeping records of customary law adoptions.<sup>48</sup>

#### 4.2.3 *The best interests of the child*

Section 6 of the *Children's Act* provides certain general principles to guide "the implementation of *all legislation* applicable to children",<sup>49</sup> including the *Children's Act*, and to inform "*all proceedings, actions and decisions by any organ of state*"<sup>50</sup> in *any matter concerning a child* or children in general."<sup>51</sup>

Section 6(2) then states, amongst other things:<sup>52</sup>

- (2) All proceedings, actions or decisions in a matter concerning a child must –
- (a) respect, protect, promote and fulfil the child's rights set out in the *Bill of Rights*, the *best interests of the child standard set out in section 7* and the rights and principles set out in this Act, subject to any lawful limitation;
  - (b) respect the child's inherent dignity;
  - (c) treat the child fairly and equitably; [and]
  - (d) *protect the child from unfair discrimination on any ground*, including on the grounds of the health status or disability of the child or a family member of the child.

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<sup>46</sup> The *Children's Amendment Bill*, 2020.

<sup>47</sup> Refer to the discussion on status in 3.7. The context in which customary law adoptions must be considered is discussed in previous chapters, especially chapter 2.

<sup>48</sup> See, for example, the discussion and arguments made in 3.3.

<sup>49</sup> See s 6(1)(a) of the *Children's Act*. Emphasis added.

<sup>50</sup> As defined in the *Constitution*. Therefore, "any department of state or administration in the national, provincial or local sphere of government" or "any other functionary or institution ... exercising a power or performing a function in terms of the *Constitution* or a provincial constitution" or "exercising a public power or performing a public function in terms of any legislation" (but not a court or judicial officer). See s 239 of the *Constitution*; ss 1, 6(1)(b) of the *Children's Act*.

<sup>51</sup> Section 6(1)(b) of the *Children's Act*. Emphasis added.

<sup>52</sup> See s 6(2) of the *Children's Act*. Emphasis added.

Bosman-Sadie, Corrie and Swanepoel remark that section 6(2) of the *Children's Act* "is reminiscent of certain provisions in the Constitution".<sup>53</sup> Section 6(2) is also in line with the objects of the *Children's Act*, as stated above.<sup>54</sup> Still, as repeatedly shown, discrimination between children adopted under customary law and those adopted in terms of the common law does occur.<sup>55</sup> The *Constitution* provides that, unless established otherwise, discrimination on one or more of the following grounds is unfair:<sup>56</sup>

[R]ace, gender, sex, pregnancy, marital status, *ethnic or social origin*, colour, sexual orientation, age, disability, *religion*, conscience, *belief, culture*, language and birth.

The *Constitution* further provides that "national legislation must be enacted to prevent or prohibit unfair discrimination".<sup>57</sup> This is yet another reason to regulate customary law adoptions.

Sections 6(3)-(5) of the *Children's Act* acknowledge and confirm the "legality of the family and the importance of hearing their views" in matters involving children<sup>58</sup> by following an "approach which is conducive to conciliation and problem-solving" as opposed to a "confrontational" approach.<sup>59</sup> However, it has been shown that women and their families are seemingly excluded from the customary law adoption process due to a lack of *locus standi*.<sup>60</sup> Including customary law adoptions in the *Children's Act* should rectify the position. On the other hand, customary law is already a legal system

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<sup>53</sup> The authors explain their statement: "The primary duty to respect, protect, promote and fulfil most of the rights guaranteed in section 28 of the *Constitution* (also see s 239) rests on the parents or legal guardians of children. Only when the parents of a child fail to or are unable to realise a particular right for that child does the duty rest on the state." Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 24. Also see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), where it is stated that the primary duty to provide shelter to a child rests on the parents and family of the child, "and only alternatively on the state". However, this does not mean "that the state incurs no obligation in relation to children who are being cared for by their parents or families". *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 77-78.

<sup>54</sup> See 4.2.1.

<sup>55</sup> See, for example, 1.2.2.

<sup>56</sup> Emphasis added. Section 9(3) of the *Constitution*.

<sup>57</sup> Section 9(4) of the *Constitution*.

<sup>58</sup> See Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 24; s 6(3) of the *Children's Act*.

<sup>59</sup> See s 6(4)(a) of the *Children's Act*.

<sup>60</sup> See 2.4.3.1; 3.3.1.1.

focussing on conciliation.<sup>61</sup> Section 6 of the *Children's Act* also stipulates that delays in actions or decisions regarding a child should be avoided.<sup>62</sup> A child and a person with parental responsibilities and rights concerning a child must be informed of an action or decision taken in any matter affecting the child.<sup>63</sup> Involving the family in the adoption process aligns with the customary way of life, especially when dealing with family matters,<sup>64</sup> and delays in reporting a customary law adoption should be avoided.<sup>65</sup>

Section 7 of the *Children's Act* prescribes several factors to consider when dealing with the "best interests of the child" enquiry, which could be grouped into different categories. The first category of factors refers to the personal circumstances and attitudes of the child's parent(s) and other relevant persons. They include: the nature of the personal relationship between a child and the parent(s);<sup>66</sup> the general attitude of both parents towards the child and their attitude towards the exercise of their parental responsibilities;<sup>67</sup> the capacity of the parent(s), caregiver or other relevant persons to provide for the needs of the child, which needs include but are not limited to the child's emotional and intellectual needs;<sup>68</sup> and, the practical difficulties and expenses involved in ensuring the child maintains a personal relationship with the parent(s).<sup>69</sup> The second category of factors refers to the impact of change and the importance of stability. They include: the effect of a separation from family members on a child;<sup>70</sup> the importance of maintaining a connection with the immediate and extended family members and culture or tradition;<sup>71</sup> the need to be raised in a stable

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<sup>61</sup> One of the features of customary law procedure is that it emphasises reconciling differences. See, amongst other things, Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 26; 3.3.1.

<sup>62</sup> See s 6(4)(b) of the *Children's Act*.

<sup>63</sup> While having regard to the child's "age, maturity and stage of development". Section 6(5) of the *Children's Act*. Also see s 7(1)(g)(i) of the *Children's Act*.

<sup>64</sup> See, amongst other things, 2.4.2.2 and 2.4.3.2. Also see Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* 26.

<sup>65</sup> See, for example, the discussion in 3.3.3.

<sup>66</sup> Or caregiver or other relevant person. See s 7(1)(a)(i)-(ii) of the *Children's Act*. For a discussion, see Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 26-27 and the authorities cited.

<sup>67</sup> Section 7(1)(b) of the *Children's Act*.

<sup>68</sup> Section 7(1)(c) of the *Children's Act*.

<sup>69</sup> Section 7(1)(e) of the *Children's Act*.

<sup>70</sup> Section 7(1)(d) of the *Children's Act*.

<sup>71</sup> Section 7(1)(f) of the *Children's Act*.

family environment or an environment resembling that;<sup>72</sup> and the need to be protected from physical and psychological harm.<sup>73</sup> A third category of factors, those relating to the child's characteristics, such as age, maturity, development, physical and emotional security, disability and chronic illnesses, must also be considered.<sup>74</sup> Section 7 lastly requires consideration to be given to family violence impacting on the child and considering which decision or action minimises "further legal or administrative proceedings in relation to the child".<sup>75</sup>

The factors listed in section 7 do not constitute a closed list. Any reference to "parent" is not limited to a child's biological parents but includes any person with parental rights and responsibilities regarding the child.<sup>76</sup> From the wording of section 7(1), one may deduce that should the *Children's Act* not apply to a particular matter involving a child, the court, in dealing with such a matter and in considering the best interests of the child, does not need to consider these listed factors. However, further discussion falls outside the scope of this study.

#### 4.2.4 Adoption: Chapter 15 of the Children's Act

Chapter 12 of the *Children's Act* deals with foster care, chapter 15 with adoption, and chapter 16 with intercountry adoption. While the discussion below focuses mainly on chapter 15 of the Act, some reference is made to foster care where necessary. Intercountry adoption falls outside the scope of this study.

##### 4.2.4.1 Definition and purposes

Chapter 15 starts with section 228,<sup>77</sup> which stipulates as follows:

#### 228. Adoption

A child is adopted if the child has been placed in the permanent care of a person *in terms of a court order* that has the effects contemplated in section 242.<sup>78</sup>

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<sup>72</sup> Section 7(1)(k) of the *Children's Act*.

<sup>73</sup> Section 7(1)(l) of the *Children's Act*.

<sup>74</sup> Section 7(1)(g)-(j) of the *Children's Act*.

<sup>75</sup> Section 7(1)(m)-(n) of the *Children's Act*.

<sup>76</sup> Section 7(2) of the *Children's Act*.

<sup>77</sup> And continues to s 253 of the *Children's Act*. Emphasis added.

<sup>78</sup> Discussed below.

In explaining section 228, Bosman-Sadie, Corrie and Swanepoel conclude:<sup>79</sup>

Adoptions are *only legal if a court order has been made by the presiding officer of a children's court. An 'informal' adoption is not an adoption. A legal adoption is the administrative action of a lower court.*

However, as established in previous chapters, the courts have recognised customary law adoption since the commencement of the *Children's Act*. Hence, the conclusion by Bosman-Sadie and colleagues may be challenged.<sup>80</sup> In addition, one should be careful to refer to customary law adoption as "informal adoption", as previously discussed.<sup>81</sup> Obtaining court orders from traditional "Western" courts is not necessarily viewed as crucial in customary law.<sup>82</sup> Nhlapo has the following to say in this regard:<sup>83</sup>

Suffice it to say that the introduction of procedures requiring court orders and lawyers in a customary law setting never really had a chance of succeeding in implementation. The truth of the matter is that recent research is beginning to reveal that these new mechanisms are being ignored wholesale in traditional communities.

The statement by Nhlapo reiterates the careful consideration of customary law before regulating it. Chapter 2 of this study has confirmed that customary laws are obeyed because they are accepted and compel belief.<sup>84</sup> Otherwise, there is the danger that legislation dealing with customary law will become mere paper law.<sup>85</sup>

Section 229 goes on to explain the purpose of adoption,<sup>86</sup> namely, to protect and nurture children by providing a "safe, healthy environment with positive support" and to promote "the goals of permanency planning"<sup>87</sup> by "connecting children to other safe

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<sup>79</sup> Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 325. Emphasis added.

<sup>80</sup> Also see Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 3.

<sup>81</sup> For example, see 3.1, 3.7.

<sup>82</sup> See, amongst other things, Nhlapo 2017 *SAJHR* 11.

<sup>83</sup> Nhlapo 2017 *SAJHR* 11 and the authorities cited.

<sup>84</sup> See 2.4.2.2.

<sup>85</sup> For example, see Rwezaura and Wanitzek 1988 *JAL* 124, 152-153 where in a Tanzanian context it is shown that although the majority of the Tanzanian population consists of African people, their use of the adoption legislation issued from colonial times (1944) up to the year in which their research was published (1988) was minimal.

<sup>86</sup> Section 229(a)-(b). Emphasis added.

<sup>87</sup> "The systematic process of carrying out, within a brief, time-limited period, a set of goal-oriented activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers, and the opportunity to establish lifetime relationships." Bosman-

and nurturing family relationships *intended to last a lifetime*". Therefore, it would be fair to say that section 229 confirms permanency as one presumed implication of adoption.<sup>88</sup> The purposes of adoption are achieved through processes which,<sup>89</sup>

while centred on the best interests of the child, also safeguard the interests of the biological parents and the prospective adopters.

Promoting permanency planning is also listed as a purpose of foster care, but reuniting with one's family remains a priority.<sup>90</sup> Along with protecting and nurturing children by providing a safe and healthy environment "with positive support",<sup>91</sup> another listed purpose of foster care is to respect "the individual and family by demonstrating a respect for *cultural*, ethnic and community diversity".<sup>92</sup> The emphasis on family aligns with the values of customary law. However, the *Children's Act* should distinguish between foster care and customary law adoptions for legal certainty.

#### 4.2.4.2 Adoptable children

For "any" child to be adopted, such an adoption must be in the child's best interests, the child must be "adoptable", and the provisions of chapter 15 of the *Children's Act* must be adhered to.<sup>93</sup> A child aged ten or above has to agree to the adoption in writing, as opposed to the position in customary law.<sup>94</sup> An adoption social worker must assess

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Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 275-276 and the authority cited. The authors also state that permanency planning "implies the right of every child to a stable home, quickly, and with as few moves or temporary situations as possible. It demands increasing efforts to keep children out of substitute care or, once there, to move them back into their own homes, adoptive homes, or some other permanent living arrangement as soon as possible. The implication is that the biological family has a limited period of time (two years) to rehabilitate before facing the possibility of long-term foster care, termination of parental responsibilities, or adoption".

<sup>88</sup> Also see Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 325.

<sup>89</sup> Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 4.

<sup>90</sup> See s 181(b) of the *Children's Act*.

<sup>91</sup> Section 181(a) of the *Children's Act*.

<sup>92</sup> Section 181(c) of the *Children's Act*. Emphasis added.

<sup>93</sup> Section 230(1)(a)-(c) of the *Children's Act*.

<sup>94</sup> Also see Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 326.

whether a child is adoptable,<sup>95</sup> for which a "child-centred approach" must be followed.<sup>96</sup>

Children considered "adoptable" are: an orphan who has no guardian or caregiver willing to adopt him or her;<sup>97</sup> a child that has been abandoned;<sup>98</sup> a child abused or intentionally neglected by the parent or guardian (or whose parent or guardian has allowed abuse or neglect of the child); a child in need of permanent alternative placement; a step-child of the person who wants to adopt; or a child whose parent or guardian has provided consent for the child to be adopted (unless consent is not required).<sup>99</sup>

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<sup>95</sup> Section 230(2).

<sup>96</sup> According to Bosman-Sadie, Corrie and Swanepoel, adoption agencies and social workers must obtain as much information on the child as possible. Adoptive parents would be better equipped to deal with a specific situation if they knew, for example, about any serious medical conditions in the child's extended family. See Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 326.

<sup>97</sup> In deciding whether a child has been orphaned (and is, therefore, in need of care and protection, as per s 150(1)(a) of the Act), the presiding officer must "be satisfied that the child has been orphaned", and must be furnished with a copy of the required advertisement that was published in at least one local newspaper in circulation in the area where the child had been found, calling upon any person to claim responsibility for the child. Depending on the situation, a period of at least one month or up to three months must have lapsed since the advertisement's publication, with no one claiming responsibility for the child. Where one month has lapsed, such a child may be found in need of care and protection for being orphaned and unable to support himself or herself, which inability must be "readily apparent" (see s 150(1)(a) of the Act). However, where three months have lapsed, the child may be made available for adoption, except where it is not in his or her best interests (see s 157(3) of the Act). The presiding officer must also consider the death certificate(s) of the child's parent(s), guardian or caregiver or an affidavit by a person(s) who testified to the death. Reg 56(1)-(2)(a)(b)(c) in GN R261 in GG 33076 of 1 April 2010.

<sup>98</sup> In deciding whether a child has been abandoned (and is, therefore, in need of care and protection, as per s 150(1)(a) of the Act), the presiding officer must "be satisfied that the child has been abandoned", and must be furnished with a copy of the required advertisement that was published in at least one local newspaper in circulation in the area where the child had been found, calling upon any person to claim responsibility for the child. Depending on the situation, a period of at least one month or up to three months must have lapsed since the advertisement's publication, with no one claiming responsibility for the child. Where one month has lapsed, such a child may be found in need of care and protection for being abandoned and unable to support himself or herself, which inability must be "readily apparent" (see s 150(1)(a) of the Act). Where three months have lapsed, the child may be made available for adoption, except where it is not in his or her best interests (see s 157(3) of the Act). The presiding officer must also consider an affidavit that sets out the steps taken to trace the child's parent, guardian or caregiver and states that no such person could be traced, as well as an affidavit by any other person (if any) who can testify that the child had not had contact with his or her parent, guardian or caregiver for a period of at least three months. Reg 56(1)-(2)(a)(b)(d) in GN R261 in GG 33076 of 1 April 2010.

<sup>99</sup> See s 230(3)(a)-(g). For a discussion, see Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 5-6 and the authorities cited.

#### 4.2.4.3 Prospective adoptive parents

A child may be adopted by a husband and wife jointly,<sup>100</sup> by "partners in a *permanent* domestic life-partnership" jointly or "by other persons sharing a common household and forming a *permanent* family unit".<sup>101</sup> In explaining who may be included as "partners in a permanent domestic life-partnership", Bosman-Sadie, Corrie and Swanepoel state that such partners also include "partners in Muslim and polygamous marriages (such as *customary marriages*)".<sup>102</sup> Therefore, although such an interpretation allows for the inclusion of customary polygynous marriages, these marriages are not explicitly catered for in section 231.

Concerning "other persons sharing a common household and forming a permanent family unit",<sup>103</sup> Bosman-Sadie, Corrie and Swanepoel highlight certain uncertainties, such as whether this would refer "to all members of the household" or only a particular number of the members:<sup>104</sup>

The scope of this sub-paragraph (section 231(1)(a)(iii)) is broad, and consequently vague. There are no legal restrictions on the number of adults adopting a child, nor is there provision for one of the adult members of a household to adopt as a single parent. This aspect will probably eventually be subjected to individual interpretation and is confusing.

It seems that more than two people can adopt a child simultaneously.<sup>105</sup> Therefore, despite the concerns raised by the authors, section 231(1)(a)(iii) might offer enough scope for the African extended family. Other potential adoptive parents are "a widower, widow, divorced or unmarried person", "a married person whose spouse is the parent of the child", and "a person whose permanent domestic life partner is the parent of

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<sup>100</sup> Except where one spouse is the natural parent of the child, in which case the other spouse may adopt on her or his own. Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 328. See s 231 of the *Children's Act*.

<sup>101</sup> Section 231(1)(a)(i)-(iii). Emphasis added.

<sup>102</sup> Emphasis added. See Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 328.

<sup>103</sup> As per s 231(1)(a)(iii).

<sup>104</sup> See Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 328-329.

<sup>105</sup> Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 329.

the child".<sup>106</sup> The "biological father of a child born out of wedlock"<sup>107</sup> and a child's "foster parent" are also listed as prospective adoptive parents.<sup>108</sup>

Prospective adoptive parents must be "fit and proper to be entrusted with full parental responsibilities and rights"<sup>109</sup> and "willing and able to undertake, exercise and maintain"<sup>110</sup> rights and responsibilities regarding the child. They must also be over 18 years old and have been assessed by a social worker.<sup>111</sup> In this assessment the adoption social worker<sup>112</sup>

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<sup>106</sup> Bosman-Sadie, Corrie and Swanepoel explain: "Under this section (dealing with a married person whose spouse is the parent of the child or a person whose permanent domestic life-partner is the parent of the child), the mother retains guardianship and physical care of the child throughout the process. A social worker will only recommend such an adoption, and a presiding officer will only sign an adoption order, if the marital relationship is stable and has existed for a reasonable period. ... It is obvious that, where the mother is not the only guardian of the child, the consent of the second spouse is also required. ... [T]he natural father [will] have to give consent. Even when exclusive guardianship was granted to one parent at the time of divorce, the consent of the other parent is still required. In practice, this means that the latter parent still has legal recourse to the court to have their parental rights re-instated." Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 329.

<sup>107</sup> However, only a father without parental responsibilities and rights. A natural father who obtained full parental rights under s 21 of the Act has full parental authority, including guardianship. See Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 329. According to s 21, a biological father who does not have parental responsibilities and rights in respect of a child acquires such full responsibilities and rights if, at the time of the child's birth, he is living with the mother in a "permanent life partnership" (not defined by the Act), or if, regardless of whether he has lived with or is living with the mother, he consents or successfully applies (in terms of s 26) to be identified as the child's father or "pays damages in terms of customary law", contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period, and contributes or has attempted in good faith to contribute towards expenses in connection with the child's maintenance for a reasonable period (the latter is also not defined). In terms of s 20, a biological father has full parental responsibilities and rights if he is married to his child's mother, or if he was married to the mother at the time of the child's conception or birth, or at any time between the child's conception and birth. S 26 provides that, except when conceived through rape or incest or being biologically related only by being a gamete donor for the purposes of artificial fertilisation, an unmarried biological father may apply for an amendment to the birth registration of the child to identify him as the father (if the mother consents) or, in certain circumstances, apply to the court for an order confirming paternity. See Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 46-47, 54 and the authorities cited.

<sup>108</sup> Section 231(1)(b)-(e). Chapter 12 of the Act describes a foster parent as having to be fit and proper to be entrusted with the foster care of a child (which would naturally exclude a person "unsuitable" to work with children), willing and able to undertake, exercise and maintain the responsibilities of foster care, and capable of providing an environment that is conducive to the child's development and growth. A social worker should also assess such a person. S 182(2)-(3) of the *Children's Act*.

<sup>109</sup> Which means that a person "unsuitable to work with children" would be excluded. Section 231(6).

<sup>110</sup> Although a person may no longer be disqualified by financial status. Section 231(4) of the *Children's Act*. Also see Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 329.

<sup>111</sup> Section 231(2)(a)-(d).

<sup>112</sup> Emphasis added. Section 231(3) of the *Children's Act*.

*may take the cultural and community diversity of the adoptable child and prospective adoptive parent into consideration.*

In this regard Bosman-Sadie, Corrie and Swanepoel argue as follows:<sup>113</sup>

The fact that culture is largely learned behaviour and not genetically inherited needs to be emphasised. This makes cross-cultural adoptions more feasible, especially if a child has been reared in a culture other than that of his/her parents since birth. Respect for and knowledge of the culture of the family of origin is, however, not negotiable, and should be taught to a child from his/her earliest childhood years.

It should also be noted that by using the word "may", the *Children's Act* allows for the exercise of discretion.

Biological fathers who do not have guardianship, foster parents, and family members who notified the clerk of the children's court of their interest in adopting a child also have the right to be considered prospective adoptive parents of such a child.<sup>114</sup>

#### 4.2.4.4 Register on Adoptable Children and Prospective Adoptive Parents (RACAP)

In terms of the *Children's Act*, the Director-General of the DSD must keep a Register on Adoptable Children and Prospective Adoptive Parents (RACAP), which must contain information about adoptable children as well as prospective adoptive parents.<sup>115</sup> Access to the register is limited.<sup>116</sup> Adoption service providers use the register to assess an adoptable child against the list of prospective adoptive parents. Should a match be found, the relevant social worker communicates with the social worker who registered the prospective adoptive parent(s). If the two social workers, and the prospective adoptive parent(s), agree, the process to finalise the adoption will be initiated. The

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<sup>113</sup> Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 329.

<sup>114</sup> Section 231(7)-(8) of the *Children's Act*. It is assumed that a biological father or foster parent has elected not to apply for the adoption of his or her child if the person fails to apply within 30 days after being served notice. See s 231(7)(b) of the *Children's Act*. For a discussion of s 231 of the *Children's Act*, including a comparison of s 231 and its predecessor (s 17 of the *Child Care Act*), also see Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 7-8 and the authorities cited.

<sup>115</sup> Section 232 of the *Children's Act*.

<sup>116</sup> In this regard, see s 232(6) of the *Children's Act*.

provincial head of the DSD must also support the adoption and issue a letter stating this.<sup>117</sup>

Bosman-Sadie, Corrie and Swanepoel state that RACAP is intended for South Africans "who wish to adopt a South African child",<sup>118</sup> reiterating the importance of a child's "own cultural and family group". However, despite the potential for promoting customary law adoptions in instances where some preference for a specific culture is communicated, it is not a given that children adoptable under customary law (as well as the prospective adoptive parents) are recorded in the RACAP.

#### 4.2.4.5 Consent

Section 233(1) of the *Children's Act* requires the consent of various persons before adopting a child. First, it requires the consent of both parents, irrespective of their marital status, or any person holding guardianship in respect of the child. Where the parent is a child, they need to be assisted by their guardian before giving consent.<sup>119</sup> Secondly, the child's consent is required if the child is "10 years of age or older".<sup>120</sup> If the child is younger than ten years but is of sufficient maturity and can understand the implications of giving consent, the child's consent is then required.<sup>121</sup> Traditional customary law does not support children's consultation in family matters such as adoption, and the modern position under customary law in this regard is uncertain.<sup>122</sup>

Section 236, on the other hand, makes provision for instances in which the consent of parents or guardians will not be required. Their consent will not be required where the parents or guardians: cannot consent due to mental illness; have abandoned the child, or the whereabouts or identity of the parents or guardians is unknown and cannot be established; have subjected or caused the child to be subjected to abuse or deliberate

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<sup>117</sup> Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 332. For another discussion and critique see Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 9-10.

<sup>118</sup> Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 331.

<sup>119</sup> Section 233(1)(a)-(b) of the *Children's Act*. This is an improvement on s 18(4)(d) of the *Child Care Act*, which did not require a guardian's assistance. See Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 11.

<sup>120</sup> S 233(1)(c)(i) of the *Children's Act*.

<sup>121</sup> S 233(1)(c)(ii) of the *Children's Act*.

<sup>122</sup> Also see 2.4.3.3.

neglect; have in the past 12 months failed to fulfil any of their parental responsibilities in respect of the child; have been deprived by a court order of their right to consent to the adoption of the child; or have failed to respond within 30 days to respond to a notice of the proposed adoption.<sup>123</sup>

In addition to the factors mentioned above, consent will not be required if the child concerned is an orphan or if certified copies of the death certificates of the child's parents have been lodged with the court.<sup>124</sup>

Section 236(3) lists instances where a child's biological father's consent is unnecessary; for instance, where a child is conceived from an incestuous relationship or as a result of the rape of the mother. Consent is unnecessary for an unmarried biological father<sup>125</sup> who was not acknowledged as the father in terms of the Act.<sup>126</sup> Ways of acknowledging fatherhood include a written acknowledgement,<sup>127</sup> the father voluntarily paying maintenance, having his particulars entered in the child's birth registration,<sup>128</sup> and "paying damages in terms of customary law".<sup>129</sup> Therefore, recognising the payment of damages by an unmarried father does indicate at least some consideration of customary law. It implies that such a payment would in all probability not be viewed as the "buying of a child". Should living customary law<sup>130</sup> not already provide for child participation in matters of adoption, customary law may have to be developed to allow for it.

#### 4.2.4.6 (Optional) post-adoption agreements: so-called "open adoptions"

Section 234 of the *Children's Act* provides for post-adoption agreements, being a "first in South African history and a major variation on previous customs and legislation".<sup>131</sup>

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<sup>123</sup> Section 236(1) of the *Children's Act*.

<sup>124</sup> Section 236(2) of the *Children's Act*.

<sup>125</sup> Or a father who was not married to the mother at the time of conception or at any time thereafter.

<sup>126</sup> Section 236(3)(a) of the *Children's Act*. Also see s 4 of the Act.

<sup>127</sup> To the mother or the clerk of the children's court before the child turns six months old. Section 236(4)(a) of the *Children's Act*.

<sup>128</sup> In terms of the Births and Deaths Registration Act. See s 236(4)(d) of the *Children's Act*.

<sup>129</sup> Section 236(4) of the *Children's Act*. For a discussion of s 236 of the *Children's Act* and how it differs from the *Child Care Act* see Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 15-16.

<sup>130</sup> Also see 1.3.2.1.

<sup>131</sup> Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 335.

Such agreements must be drawn up before an adoption order is signed.<sup>132</sup> The agreement is concluded between the prospective adoptive parents and the (current) guardians of the child. According to Bosman-Sadie, Corrie and Swanepoel, section 234 "is likely to be used in cases where the natural parents realise that the adoption of their child (who is already being fostered) is in the best interests of the child, but are not ready to lose all contact with the child".<sup>133</sup> The post-adoption agreement, they argue, would help the child understand that "his/her parents gave him or her up for adoption out of caring, love and concern, and not because they rejected the child".<sup>134</sup>

The introduction of the post-adoption agreement forms part of a<sup>135</sup>

movement towards openness [which] will help remove the vestiges of the stigma which is sometimes attached to adoption. A trend that has developed in recent decades is '*open adoption*', in which a biological parent is provided with substantial information about prospective adopters who are available for his or her child, and may be given an opportunity to choose between them.

The agreement, drafted in a prescribed format, is facilitated by an adoption social worker and must be confirmed by a court. Counselling on the implications of such an agreement must also be provided to the parties. The child's consent is again required.<sup>136</sup>

As discussed earlier, an open adoption agreement (or something similar) may also assist in customary law adoptions.<sup>137</sup>

#### 4.2.4.7 Freeing orders

Section 235 of the *Children's Act* allows parents to be "freed" from their parental obligations and rights, pending the adoption of their child. Under the *Child Care Act*, the biological parents remained the legal guardians until the adoption order was issued.

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<sup>132</sup> This has been recognised as a limitation of s 234. See Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 13.

<sup>133</sup> Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 335.

<sup>134</sup> Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 335.

<sup>135</sup> Emphasis added. Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 13.

<sup>136</sup> See s 234 of the *Children's Act*; Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 335-337. The latter source also includes an example of a post-adoption agreement.

<sup>137</sup> Also see the discussion in 3.2.

This meant that the biological parents could be approached if, for example, the child needed surgery.<sup>138</sup> Technically, such a parent was also still liable for maintaining the child, despite the child already being in the prospective adopters' care. As the issuing of adoption orders may be delayed due to, amongst other things, the "overload on the courts", this can cause disruption, stress and insecurity for all parties concerned,<sup>139</sup> which a freeing order might help alleviate. The application for a freeing order, which should also be supported by the person who needs to consent to the child's adoption, may be brought by the DSD, a provincial department of the DSD, an accredited child protection organisation, or an adoption social worker.<sup>140</sup> Section 235 also provides for instances where a freeing order lapses.<sup>141</sup>

#### 4.2.4.8 Gathering relevant information for and giving notice of adoption

Sections 237 and 238 of the *Children's Act* deal with gathering information for and giving notice of a proposed adoption. Regarding section 237, the clerk of the children's court must take prescribed steps to establish the name and address of each person who must consent to an adoption in section 233.<sup>142</sup> "Reasonable" steps must also be taken to establish the name of a person whose consent would have been required.<sup>143</sup> Mosikatsana and Loffell state that, along with the RACAP, the information provided in section 237 "could greatly help to facilitate the placement of children countrywide".<sup>144</sup> However, this is not currently the case for children living under customary law. In terms of section 238, the sheriff must serve a notice of adoption on each person who needs to consent to the adoption. Such a person may either consent to the adoption or withhold consent. An unmarried father may consent, withhold consent, or apply to

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<sup>138</sup> Louw 2018 *THRHR* 32.

<sup>139</sup> See s 235 of the *Children's Act*; Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 14; Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 338-340. The latter source also includes an example of a freeing order.

<sup>140</sup> Section 235(1)-(2) of the *Children's Act*.

<sup>141</sup> Such as where the child has not been adopted within 12 months and there is no reasonable prospect of him or her being adopted, or if such an order is no longer in the best interests of the child. See s 235(4) of the *Children's Act*.

<sup>142</sup> For more on the provisions of s 233, see 3.2.4.5 above.

<sup>143</sup> See s 237 of the *Children's Act*.

<sup>144</sup> Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 16.

adopt the child himself.<sup>145</sup> Should 30 days go by without any response from a person on whom such a notice was served, the relevant person shall be deemed to have consented to the adoption.<sup>146</sup> If consent is found to be unreasonably withheld,<sup>147</sup> section 241 stipulates that a children's court may still grant the order of adoption if the adoption is in the child's best interests.<sup>148</sup>

#### 4.2.4.9 Application for and consideration of an adoption order

All applications for adopting a child must be made to a children's court and accompanied by an adoption social worker's report.<sup>149</sup> The report must contain all medical information about the child, an assessment of the child's adoptability<sup>150</sup> and an opinion on whether the adoption would be in the child's best interests. In addition, the adoption social worker's report must be accompanied by what has colloquially become known as a section 239 letter.<sup>151</sup> This letter is essentially a "letter of recommendation by the provincial head of social development recommending the adoption of the child".<sup>152</sup> Section 239(1)(d) highlights the involvement of public officials in the social worker's assessment process.

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<sup>145</sup> Both parents of a child born out of wedlock must receive notice of any pending adoption proceedings. See Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 17 and the authority cited.

<sup>146</sup> See s 238 of the *Children's Act*; Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 17. For an example of such a notice, see Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 343-344.

<sup>147</sup> In determining this, the court may take into account "all relevant factors" including "the nature of the relationship during the last two years between the child and the person withholding consent and any findings by a court in this respect; and the prospects of a sound relationship developing between the child and the person withholding consent in the immediate future". Section 241(2) of the *Children's Act*.

<sup>148</sup> See s 241 of the *Children's Act*. Also see Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 20.

<sup>149</sup> In the prescribed format. Section 239(1)(b) of the *Children's Act*.

<sup>150</sup> As per s 230(3) of the Act. Section 239(1)(b)(i) of the *Children's Act*. Also see 3.2.4.2.

<sup>151</sup> Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 22.

<sup>152</sup> However, the "section 239 letter" has been rather contentious. Issues that have arisen include uncertainty as to the purpose of the letter, whether the provincial head of social development "is entitled to reassess (and conduct an independent investigation into) the prospective adoption", the consequences should the provincial head fail to provide a letter, reasonable timeframes within which (s)he should provide the letter, as well as the status of a section 239 letter that does not recommend adoption. Although the courts have provided some guidance, law reform is suggested. In this regard see Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 18, stating: "There has been some measure of clarity given by the courts. In the

When considering an adoption application, the children's court must take into account "all relevant factors", including<sup>153</sup> the child's, the child's parent's and the prospective adoptive parent's religious and cultural background;<sup>154</sup> the parent's reasonable preferences as delineated in the consent; and the contents of the section 239(1)(b) report.<sup>155</sup> However, this initial assessment does not empower the court to make an adoption order. The court must further be satisfied that the adoption will be in the child's best interest, that "the prospective adoptive parent complies with section 231(2)",<sup>156</sup> and that the required consent has been obtained and not withdrawn in terms of the provisions of section 233(8).<sup>157</sup> Where a child is adopted by someone other than that child's foster parent, the provisions of section 231(7) must be complied with.<sup>158</sup>

Making an adoption order "only if" it is regarded to be in the child's best interests is consistent with section 28(2) of the *Constitution*. The above provisions aim to ensure that an adoption "complies with the protective mechanisms contained in the Act".

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matter of *In re XIV* the court clarified *the purpose of the s 239 letter*. It held that an s 239 letter is a necessary prerequisite in any adoption application; its *purpose is to ensure governmental oversight* to 'prevent what is becoming a reality that children are being used for human trafficking, as well as for illegal purposes'.<sup>153</sup> Emphasis added. For a discussion of relevant case law, see Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 18-19.

<sup>153</sup> See s 240(1) of the *Children's Act*.

<sup>154</sup> "Where this is feasible". Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 19.

<sup>155</sup> In other words, the report drafted by an adoption social worker. See s 239(1)(b) of the *Children's Act*. Also see 4.2.4.9.

<sup>156</sup> By being an adult, "fit and proper", "willing and able" (to maintain the relevant rights and responsibilities), and having been assessed by an adoption social worker. See s 231(2) of the *Children's Act*. Also see 4.2.4.3.

<sup>157</sup> A person who has consented to an adoption may withdraw such consent within 60 days. However, once the 60 days have lapsed without a withdrawal, the consent is final. See ss 233(8) and 240(2) of the *Children's Act*.

<sup>158</sup> According to s 231(7) of the *Children's Act*, preference is given to biological fathers who do not have guardianship but are fit and proper, and to foster parents with whom a child has already formed a bond. Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 346. Also see Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 20, 24-25; s 240(2)(e) of the *Children's Act*.

#### 4.2.4.10 Consequences/effects of an adoption order

Unless the order or a post-adoption agreement provides otherwise, an adoption order terminates all "parental ties" a person had regarding a child before the adoption.<sup>159</sup> For all legal purposes, an adopted child becomes the child of the adoptive parent, and the adoptive parent becomes the child's parent.<sup>160</sup> Consequently, section 242 of the *Children's Act* provides as follows:

##### 242. Effect of adoption order

(1) Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates –

(a) all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic life partnership, had in respect of the child immediately before the adoption;

(b) all claims to contact with the child by any family member of a person referred to in paragraph (a);

(c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and

(d) any previous order made in respect of the placement of the child.

(2) An adoption order –

(a) confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent;

(b) confers the surname on the adoptive parent of the adopted child, except when otherwise provided in the order;

(c) does not permit any marriage or sexual intercourse between the child and any other person which would have been prohibited had the child not been adopted;

(d) does not affect any rights to property the child acquired before the adoption; and

(e) does not automatically terminate all parental responsibilities and rights of the parent of a child, when an adoption order is granted in favour of the spouse or permanent domestic life partner of that parent.

(3) An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child.

#### 4.2.4.11 Rescission of an adoption order and its effects

Section 243 of the *Children's Act* allows a children's court or a high court to rescind an adoption order. Rescission can be done at the instance of the adopted child, a parent of the adopted child, another person who had guardianship before the adoption, or

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<sup>159</sup> Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 21.

<sup>160</sup> Which corresponds with previous legislation. See s 20 of the *Child Care Act* and the discussions of common law adoption legislation in chapter 2; Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 21.

the adoptive parent. Such an application must be lodged within a reasonable time, although no later than two years from the date of adoption. An adoption order may be rescinded "only if" such an order will be in the child's best interests and the applicant is a parent whose consent for the adoption was required but not obtained. Alternatively, the order may be rescinded if the adoptive parent did not qualify as a person whose consent had to be obtained at the time of the order.<sup>161</sup>

Notice of an application for rescission must be given to the adoptive parent,<sup>162</sup> all persons who consented to the adoption,<sup>163</sup> anyone who withheld consent,<sup>164</sup> and "any other person whom the court finds has a sufficient interest in the matter".<sup>165</sup>

The effects provided for in section 242(2) and (3) of the *Children's Act* no longer apply from the date when a rescission order takes effect, and all rights and responsibilities (and any other matters terminated by section 242(1)) are restored. The court may nevertheless make an appropriate placement order in respect of the child or order that the child be kept in temporary care until an appropriate placement order can be made.<sup>166</sup>

#### 4.2.4.12 Registration by the Department of Home Affairs

Sections 245 and 246 of the *Children's Act* are important for having statistics on the number and demographic features of adoptions that have taken place in South Africa. Regarding section 245, the adoptive parent must apply to record the adoption and a possible surname change of a child whose birth was registered in South Africa in the birth register. The application is made to the Director-General of the Department of Home Affairs and must be accompanied by the adoption order, the child's birth certificate, a birth registration form and the prescribed fee.<sup>167</sup> Section 246 deals with adoption concerning children born outside of the Republic. The adoptive parent must

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<sup>161</sup> In terms of s 231 of the Act. See s 243(1)-(3) of the *Children's Act*; Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 22-23.

<sup>162</sup> If any other person brings the application.

<sup>163</sup> In terms of s 233 of the Act.

<sup>164</sup> In terms of s 241 of the Act.

<sup>165</sup> See s 243(4) of the *Children's Act*.

<sup>166</sup> Section 244 of the *Children's Act*.

<sup>167</sup> See s 245(1)-(2) of the *Children's Act*.

also apply to the Director General of the Department of Home Affairs and provide certain documentation concerning the child.<sup>168</sup>

#### 4.2.4.13 Adoption register

Sections 247 and 248 respectively provide for developing a database of all adoptions that went through the children's court, namely the adoption register kept by the adoption registrar<sup>169</sup> and access to the adoption register. Section 247 places a duty on the clerk of a children's court to record all adoption cases and adoption orders issued by such a court. The clerk must as soon as is practically possible forward a specific adoption order, a copy of the record of the adoption inquiry and other documents about the adoption to the adoption registrar. Consequently, the number of adoptions and their success rate can be monitored.

Therefore, due to the specific mention in section 247 of the *Children's Act* of adoption orders issued by the children's court, customary law adoptions again do not form part of the process stipulated in the *Children's Act*.<sup>170</sup> The number of customary law adoptions and the success rate of these adoptions are in all probability uncertain.

Section 248 lists several people, such as the adopted child, who may have access to the adoption register under certain conditions.<sup>171</sup> An adopted child or adoptive parent is entitled to medical information concerning the child or the child's biological parents.<sup>172</sup> Parties to a post-adoption agreement are also entitled to access to information as stipulated in the agreement.<sup>173</sup> Therefore section 238 seems to be part

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<sup>168</sup> For example, amongst other things, the adoption order, the child's birth certificate or other documentation proving the child's birth (if a birth certificate is not available). See 246(2) of the *Children's Act*; Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 24-25.

<sup>169</sup> As designated by the Director-General of the Department of Home Affairs. See s 247 of the *Children's Act*.

<sup>170</sup> See s 247 of the *Children's Act*; Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 25.

<sup>171</sup> For example, an adopted child requesting access must be eighteen years old or older. See s 248(1)(a).

<sup>172</sup> If it relates directly to the health of the adopted child. S 248(3)(b) of the *Children's Act*.

<sup>173</sup> Section 248(4) of the *Children's Act*. Also see 4.2.4.6.

of the "ongoing movement towards greater openness with regard to adoption";<sup>174</sup> and, as discussed, which correspond with customary law adoption in some way.<sup>175</sup>

#### 4.2.4.14 No consideration in respect of adoption

The Children's Act provides as follows: except for the biological mother in certain circumstances,<sup>176</sup> a lawyer, psychologist or "other professional person" receiving fees for adoption services provided, an accredited protection organisation receiving the prescribed fees, an "organ of state" or "any other prescribed persons", no person may:<sup>177</sup>

- (a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child...;<sup>178</sup> or
- (b) induce a person to give up a child for adoption....

Therefore, section 249 of the *Children's Act* corresponds with earlier common law adoption legislation<sup>179</sup> and should assist in protecting children against trafficking. However, no exception for any kind of payment about customary law is provided for in this section (section 249 of the *Children's Act*).<sup>180</sup>

#### 4.2.4.15 Persons allowed to provide adoption services, accreditation and advertising

Section 250 allows duly accredited child protection organisations and social workers<sup>181</sup> to perform adoption services. Lawyers, psychologists and members of other

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<sup>174</sup> Mosikatsana and Loffell *Commentary on the Children's Act / Chapter 15 Adoption (ss 228-253)* 26. Also see 4.2.4.6 above.

<sup>175</sup> See, for example, 3.2.

<sup>176</sup> Such as receiving compensation for reasonable medical expenses or expenses incurred for counselling. S 249(2)(a)(i)-(ii) of the *Children's Act*.

<sup>177</sup> Section 249(1)-(2) of the *Children's Act*.

<sup>178</sup> Chapter 16 of the *Children's Act* deals with inter-country adoption, which falls outside the scope of this study.

<sup>179</sup> See the discussion in 2.3.4.

<sup>180</sup> See, for example, the discussion of customary law step-parent adoption in 3.4.1, where *ilobolo* plays an important role.

<sup>181</sup> Social workers in the employ of the DSD or a provincial department of social development (including those employed on a part-time basis) "who [have] a specialty in adoption services and [are] registered in terms of the *Social Services Profession Act* 110 of 1978" are now also recognised as "adoption social workers" in terms of the *Children's Act*. Mosikatsana and Loffell *Commentary on*

professions can render their professional services in connection with an adoption.<sup>182</sup> Section 251<sup>183</sup> provides for accreditation, by the Director-General of the DSD, of individuals and agencies who deliver adoption services.<sup>184</sup> Section 252 prohibits advertisements dealing with the placement or adoption of a child.<sup>185</sup> Like section 249, section 252 is believed to prevent crimes such as human trafficking and other possible unethical practices.<sup>186</sup>

#### 4.2.4.16 Regulations in terms of the *Children's Act*

To ensure that proper procedures are in place and that proper implementation and administration of section 15 of the *Children's Act* take place, section 253 (the last section in chapter 15) provides for regulations to be promulgated in terms of the Act.

#### 4.2.4.17 Conflicts between the *Children's Act* and other regulations

Section 3 of the *Children's Act* prescribes how conflicts between the Act and other pieces of legislation are to be resolved. When a conflict between a section of the *Children's Act* and provincial legislation or a municipal by-law arises, sections 146 and 156 of the *Constitution* must be applied, respectively.<sup>187</sup> The provincial legislation or

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*the Children's Act/Chapter 15 Adoption (ss 228-253)* 27. Also see the amended definition of an "adoption social worker" in s 1 of the *Children's Act*. The amendment providing for a wider scope of social workers being allowed to assist in the adoption process is welcomed. It would also be helpful, if the *Children's Act* were to be amended to make proper provision for customary law adoption, to have more social workers available.

<sup>182</sup> See s 250(1)-(2) of the *Children's Act*; Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 27.

<sup>183</sup> Read with regulation 108.

<sup>184</sup> Also see Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 28.

<sup>185</sup> See s 252(1) of *the Children's Act*. The prohibition does not apply to publications in terms of the Act or a court order, advertisements placed by child protection organisations for the purpose of recruitment (according to prescribed guidelines) or to other regulated forms of advertisements, though. Also see s 252(2) of the *Children's Act*.

<sup>186</sup> Also see Mosikatsana and Loffell *Commentary on the Children's Act/Chapter 15 Adoption (ss 228-253)* 28. S 249 is discussed in 4.2.4.14.

<sup>187</sup> See s 3(1) of the *Children's Act*; Bosman-Sadie, Corrie and Swanepoel *A Practical Approach to the Children's Act* 19. Section 146 of the *Constitution* deals with conflicts between national and provincial legislation. Section 156 deals with by-laws issued by municipalities and regulates what must happen when conflicts between by-laws and national and provincial legislation occur.

municipal by-law must relate to "the protection and well-being of children".<sup>188</sup> A conflict between a regulation issued in terms of the *Children's Act* and provincial legislation or a municipal by-law is again to be resolved in terms of sections 146 and 156 of the *Constitution*, respectively.<sup>189</sup>

Lastly, section 3 obliges the relevant Minister to submit all regulations regarding the *Children's Act* that "affect a province" to the National Council of Provinces for approval.<sup>190</sup>

It is almost needless to repeat that customary law adoptions are currently excluded from legislative protection, and this chapter can now be concluded.

### **4.3 Conclusion**

In previous chapters it was shown that customary law adoptions must be regulated against their relevant context. Consequently, this chapter has analysed the *Children's Act* as the most appropriate caterer for customary law adoptions. Several parts of the *Children's Act* have been considered, focussing mainly on various sections in chapter 15. Chapter 15 deals particularly with common law child adoption in South Africa.

Other relevant sections needed consideration too, though, before commencing with chapter 15 of the *Children's Act*. For example, the Act's purpose includes making "new provision" for adoption, allowing enough scope for customary law adoptions. Also, like the *Children's Act's* common law predecessors discussed in chapter 2, the Act is clear that a child's best interests are paramount. Consequently, the Act echoes section 28(2) of the *Constitution*.

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<sup>188</sup> See s 3(1)(a)-(b) of the *Children's Act*. Section 3(2)(a) of the *Children's Act* provides as follows: "(2) In the event of a conflict between a regulation made in terms of this Act and – (a) an Act of Parliament, the Act of Parliament prevails." Pertaining to s 3(2), Bosman-Sadie, Corrie and Swanepoel note that the subsection "does not require that the conflicting regulation must relate to the protection and well-being of the child."

<sup>189</sup> Section 3(2)(b)-(c) of the *Children's Act*. Section 146 of the *Constitution* deals with conflicts between national and provincial legislation. Section 156 deals with by-laws issued by municipalities and regulates what must happen when conflicts between by-laws and national and provincial legislation occur.

<sup>190</sup> Section 3(3) of the *Children's Act* and in line with s 146(6) of the *Constitution*.

The *Children's Act* interprets various concepts and describes the obligations of various role players in the adoption process, such as social workers, who are not part of the adoption process under customary law. The Act also determines that a child is someone below eighteen years old, yet another constitutional provision reiterated by the *Children's Act*. The importance of the extended family is already recognised in the Act's preamble, and chapter 15 introduces so-called "open adoptions," which may better accommodate the needs under customary law.<sup>191</sup> The *Children's Act* further considers South Africa's international obligations to children, and measures are in place to protect children against crimes like human trafficking.

Therefore, the discussion in this chapter has shown that procedures regulating common law adoption require careful consideration regarding a child's new parent(s). Contrary to the position in customary law, the legal implications of common law adoptions are stipulated with certainty in the *Children's Act*. Though the adoption regulations in the *Children's Act* still echo its common law predecessors<sup>192</sup> in many respects, it was drafted under the *Constitution*. Excluding children adopted under customary law from the Act's protection therefore seems illogical.

Consequently, some recommendations on how the *Children's Act* may be amended are made in the next and last chapter.

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<sup>191</sup> See the discussion pertaining to customary law adoptions in chapters 2 and 3.

<sup>192</sup> Discussed in chapter 2.

## Chapter 5 Conclusion and Recommendations

### 5.1 Background

The context of the central research question asked in this study was provided in chapter 1. The question was: "What are the legal implications of customary law adoptions in South Africa?".<sup>1</sup> The research question was inspired by uncertainty surrounding the legal implications of customary law adoptions, more specifically, the threat the uncertainty poses to the actual status of customary law adoptions.<sup>2</sup>

Consequently, chapter 1 illustrated the doubtful nature of the legal implications of customary law adoptions compared to adoptions under the *Children's Act*.<sup>3</sup> Customary law adoptions are not provided for in the *Children's Act*.<sup>4</sup> Instead, the *Children's Act* provides for common law adoptions.<sup>5</sup> Customary law adoptions occur through adhering to requirements prescribed by customary law itself.<sup>6</sup> Examples of adoption case law shed light on uncertainties regarding the validity requirements of customary law adoptions, their content and their legal consequences.<sup>7</sup> The succession and maintenance cases discussed illustrated the differential treatment of adopted children in the customary and common law.<sup>8</sup> Chapter 1 also showed that interpreting customary law adoptions as "informal" or "*de facto*" could undermine the validity of customary law adoptions.<sup>9</sup> The *Children's Act* and several pieces of legislation on aspects of

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<sup>1</sup> See 1.4.

<sup>2</sup> See 1.1, and the discussion in 1.2 and 1.3.9.2. The meaning of "actual status" was explained in 1.2.4 (in a fn), and refers to the status of customary law adoptions in reality, opposed to in theory.

<sup>3</sup> For the discussions of various uncertainties pertaining to customary law adoptions in chapter 1, see 1.2.2-1.2.4.

<sup>4</sup> Despite some views that the *Children's Act* codified South African child law. See 1.2.1. Also see the assumption made in 1.4.1.

<sup>5</sup> Adoptions under common law have been regulated by legislation since 1923. See 1.1. Also see 2.3, 2.3.4.1.

<sup>6</sup> See, for example, the *Metiso* case discussed in 1.2.3.

<sup>7</sup> In chapter 1 the *Metiso* case, amongst others, served as an example of questions raised regarding the validity of the requirements for customary law adoptions. See 1.2.3. Also see the discussions in 1.2.2 and 1.2.4.

<sup>8</sup> See 1.2.2-1.2.3 for these case law examples dealing with succession and maintenance issues respectively.

<sup>9</sup> It was explained that common law *de facto* adoptions are not legally recognised. Despite what may be perceived as a quite desperate plea (for example, see the content of the letter written by the "adopted" child as discussed in 1.2.2) in the *Flynn* case, the court still decided against recognising common law *de facto* adoptions. Still, in the *Metiso* case expert evidence was led that customary

customary law were promulgated under the *Constitution* to advance women's and children's rights,<sup>10</sup> but customary law adoptions were excluded from legislative protection.<sup>11</sup>

Suppose the uncertainties concerning the legal implications of customary law adoptions were not to be addressed. In that case the customary and common law could not be regarded as true equals for purposes of adoption,<sup>12</sup> especially since the legal requirements and consequences of adoptions under the *Children's Act* are clear.<sup>13</sup> Yet the *Constitution* recognises customary law as a legal system equal to common law.<sup>14</sup>

Consequently, in this thesis specific objectives were identified to address the study's central research question; in other words, objectives aimed at determining the legal implications of customary law adoptions in South Africa were identified.<sup>15</sup> The first objective of this study was to review and contextualise the history and development of customary and common law adoptions in South Africa. Understanding the context in which customary law adoptions operate as opposed to common law adoptions was deemed necessary before attempting to reform customary law adoptions through the amendment of the *Children's Act*, for example, because without the relevant context, the requirements and content of customary law adoptions cannot be fully appreciated

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law adoptions are the same as common law *de facto* adoptions. Also, in the *Mxhosana* case, for example, the court referred to customary law adoptions as "*de facto*". See 1.2.2. Chapter 1 also illustrated the possibility of courts indirectly interpreting customary law adoptions as *de facto*, though attaching legal consequences for limited purposes such as maintenance claims. See 1.2.3.

<sup>10</sup> Examples of legislation dealing with customary law were provided in 1.1.

<sup>11</sup> Also see 4.2.2.

<sup>12</sup> For example, see the discussion in 1.2.4.

<sup>13</sup> See 1.2.4, but also see chapter 4, that focuses on the relevant adoption regulations as per the *Children's Act*.

<sup>14</sup> See 1.1.

<sup>15</sup> The objectives of the study are identified in 1.4. For the most part the objectives align with the outline of the study provided in 1.7. The status of customary law adoptions was discussed throughout the thesis; however, it received particular attention in the chapter conceptualising customary law adoptions, namely chapter 3. See 3.7.

by those who do not practise adoptions under customary law.<sup>16</sup> As a result, the regulation of customary law adoptions would result in mere paper law.<sup>17</sup>

The second objective of this study was to determine the requirements and content of customary law adoptions in the "right"<sup>18</sup> context, as far as it is possible to be "right" in such matters. The requirements, content, and various legal consequences such as the status, of customary law adoptions would become clear through an analysis of customary law adoption cases.<sup>19</sup> The conceptualisation of customary law adoptions would possibly identify a need to regulate customary law adoptions through the *Children's Act*.<sup>20</sup> Depending on the analysis of customary law adoptions in the appropriate context, it would be possible to decide whether a call for legislative reform is necessary.

This study's third objective was to determine whether customary and common law adoptions enjoy equal status in the law. As previously stated,<sup>21</sup> the actual status of customary law adoptions was part of the inspiration for this study. Consequently, the actual status of customary law adoptions was considered throughout, particularly in the context of their being regarded as *de facto*.<sup>22</sup> A determination that customary law adoptions, in reality, lack equal status with common law adoptions would especially justify an argument for regulating customary law adoptions.

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<sup>16</sup> The importance of giving due consideration to the persons who are expected to adhere to specific laws was reiterated by means of a saying by Spiller in chapter 2. See 2.1.

<sup>17</sup> As also explained in 2.1, 4.2.4.1.

<sup>18</sup> Or "appropriate" context. The difficulties related to writing about customary law are acknowledged in 1.3.2. Reference is made to a "special burden of responsibility" which rests on customary law researchers. The limitations of this study are described in 1.6. One such limitation is the pluralistic nature of customary law. "Customary law" refers to the legal systems of various African communities in South Africa. Therefore, referring to the "right context" above should not be interpreted to mean that the context provided in this study is all that there is to say about the milieu within which customary law adoptions operate. Also see 2.4.2.1. The focus in chapter 2 is on certain African values and the African extended family, and the purposes for, or motives behind, customary law adoptions were considered in chapter 3. See 3.2.

<sup>19</sup> Seeing that adoptions under customary law have been decided on a case-by-case basis. See 1.1.

<sup>20</sup> Also see 1.7.

<sup>21</sup> Earlier in this paragraph.

<sup>22</sup> See 1.2.4, 3.3.3, 3.7, 4.2.2. The meaning of "actual status" for the purposes of the study is also provided in 1.2.4.

The last objective of this study was to analyse the *Children's Act* as the most appropriate provider for customary law adoptions. Even if it were found that a call for legislative reform was not necessary in the light of the second and third objectives listed, the *Children's Act* would in any event have had to be considered because, as explained in chapter 3, by explicitly determining that the *Children's Act* must apply to all children in South Africa the 2020 *Children's Amendment Bill* threatens to abolish valid customary law adoptions without considering their context.<sup>23</sup> Therefore, this study would have been incomplete without considering the *Children's Act* as it pertains to customary law adoptions.<sup>24</sup>

The legal implications of customary law adoptions in South Africa are described below, after which the main findings of this study pertaining to the *Children's Act* are presented and relevant recommendations are made.

## ***5.2 Main findings: The legal implications of customary law adoptions in South Africa***

### *5.2.1 Contextualising adoption laws in South Africa*

The Roman family and adoptions under Roman law resemble the African family and adoptions under customary law to an extent, but several differences exist.<sup>25</sup> For example, unlike Roman adoption laws,<sup>26</sup> customary law adoptions have developed in South Africa.<sup>27</sup> Despite previous segregation policies influencing customary law adoptions in South Africa, various forms of customary law adoption continued to develop.<sup>28</sup> Customary law adoptions cannot be considered to be strictly family-centred any more, as they no longer closely resemble the Roman law *adoptio*.<sup>29</sup> This study

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<sup>23</sup> See 3.7-3.8.

<sup>24</sup> Which is done in chapter 4.

<sup>25</sup> See 2.2.4. Also see the discussion of the Roman and African extended family in chapter 2 in general.

<sup>26</sup> Which influence in the South African law is limited to its influence on New Zealand adoption legislation. See 2.2.1.

<sup>27</sup> Customary law is a living legal system. See the explanations provided in 1.3.2.1 and the assumption made in 1.4.1.

<sup>28</sup> See 2.2.2, 3.4. Explanations and examples of the effect of racial segregation are provided in chapter 2. See 2.3-2.4.

<sup>29</sup> See the discussions in 3.2. *Adoptio* is explained in 2.2.3. Also see 2.5.

finds that adoptions under customary law can be considered an established practice of customary law.<sup>30</sup>

On the other hand, due to adoptions not being recognised in Roman-Dutch law,<sup>31</sup> common law adoption legislation was enacted in South Africa.<sup>32</sup> Before the *Children's Act*, four pieces of legislation provided for common law adoptions in South Africa.<sup>33</sup> Common law adoptions have always been legal only if made by a court order.<sup>34</sup> According to the pre-*Children's Act* common law adoption legislation, adoptive parent(s) were expected to be fit and proper to look after and maintain their adopted child(ren),<sup>35</sup> and an adopted child became his or her adoptive parent's intestate heir under the adoption legislation that took effect in 1987.<sup>36</sup> Ultimately, adoption had to serve the child's interests and be conducive to the child's welfare, and it was unlawful to give or receive consideration for an adopted child.<sup>37</sup> Men and women could adopt, and boys and girls could be adopted,<sup>38</sup> although age-wise the definition of a child changed over the years. For example, a child was first regarded as someone below sixteen years old and later below eighteen years old.<sup>39</sup> Adopted children would be given their adoptive parents' surnames and regarded as the adoptive parents' children born in wedlock.<sup>40</sup> Unmarried mothers had to consent to their children's adoption,<sup>41</sup> but in 1987 the *Children's Status Act* determined that when a girl-child became a mother, her parent(s) or guardian(s) had to consent to adoption.<sup>42</sup> Apart from the parent(s)' or guardian(s)' consent, a child over ten also had to consent to her or his adoption.<sup>43</sup>

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<sup>30</sup> Also see the conclusion drawn in 2.2.4.

<sup>31</sup> South African common law comprises Roman-Dutch law. See the explanation in 1.3.4.

<sup>32</sup> For example, see 2.3.1.

<sup>33</sup> The pieces of legislation are discussed from 2.3.4.1-2.3.4.4. The 1923 *Adoption of Children Act* came into operation on 1 January 1924. See 2.3.4.1.

<sup>34</sup> See the legal consequences and processes prescribed by common law adoption legislation as discussed in chapter 2 (2.3.4).

<sup>35</sup> See 2.3.4.1-2.3.4.4. Also see 2.3.4.4 specifically.

<sup>36</sup> See 2.3.4.4.

<sup>37</sup> See 2.3.4.1-2.3.4.4.

<sup>38</sup> Subject to certain conditions. See, for example, 2.3.4.1.

<sup>39</sup> See 2.3.4.1-2.3.4.4.

<sup>40</sup> See 2.3.4.1-2.3.4.4.

<sup>41</sup> Again, see 2.3.4.1-2.3.4.3.

<sup>42</sup> See 2.3.4.4. Overall, see the discussions of the pre-*Children's Act* common law adoption legislation in 2.3.4.

<sup>43</sup> See 2.3.4.1-2.3.4.4.

Furthermore, despite not explicitly excluding intercultural or interracial adoptions since 1924,<sup>44</sup> news reports considered in this study show that legal adoptions across cultural and racial lines were unlikely.<sup>45</sup> The prohibition became official in common law adoption legislation in 1960.<sup>46</sup> The common law adoption legislation made no mention of customary law adoptions.<sup>47</sup> As a result, in pre-constitutional times customary law adoptions had to operate unofficially.<sup>48</sup>

Customary law adoptions operate in the light of traditional African values.<sup>49</sup> It became apparent that some values influence perceptions about intercultural or interracial adoptions. For example, the ancestors might be angered by the "cross-pollination of rituals" and moving a child away from the geographic area of the family to which they "belong" may be against certain African beliefs.<sup>50</sup> It has been stated that "adoption is not *ubuntu*" and on the other hand that customary law adoption is indeed a "practical application" of *ubuntu*.<sup>51</sup> However, it also became evident that adoption under the *Children's Act* is not regarded as *ubuntu*, as opposed to adoption or similar practices under customary law.<sup>52</sup> Customary law adoptions also operate in the context of the workings of the African extended family. It is not easy to pinpoint the exact nature of the African extended family (or, for that matter, the nature of a family in any context)<sup>53</sup> or the exact content of certain African values, but doing this was not the point. Instead, the focus was on showing the importance of values and family for customary law adoption.<sup>54</sup> What is certain is that African children "belong", usually to their father's family, but where the parents are unmarried, to their mother's family.<sup>55</sup> Although children have the rights to be maintained, to inherit, and to succeed within their

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<sup>44</sup> The year in which the first common law adoption legislation took effect. See 2.3.4.1.

<sup>45</sup> See, for example, 2.3.4.3.

<sup>46</sup> See 2.3.4.3.

<sup>47</sup> Again, see the discussion of common law adoption legislation in chapter 2.

<sup>48</sup> But not "illegitimately". See the rationale in 1.2.4. Also see the discussion of the influence of segregation policies on the African extended family in 2.4.3.

<sup>49</sup> See the discussion of certain African values in 2.4.2.

<sup>50</sup> See, for example, 2.4.2.2.

<sup>51</sup> In the context of a polygamous family. *Ubuntu* is discussed in 2.4.2.3.

<sup>52</sup> See the wording of the newspaper extract in 2.4.2.3.

<sup>53</sup> See the discussion in 2.4.3.

<sup>54</sup> Reiterated as a finding of the study later in this para.

<sup>55</sup> See 2.4.2.2, 2.4.3, 2.4.3.2-2.4.3.3.

families,<sup>56</sup> belonging to an African extended family is more than being classified based on blood, for example.<sup>57</sup> Connecting with one's family is important, and children's names are chosen carefully. Names are symbolic, and "naming ceremonies are associated with welcoming, acceptance and acknowledgement".<sup>58</sup> In the African family, one realises that one is part of something bigger than oneself. Every member must ensure the family's communal welfare per *ubuntu*.<sup>59</sup> However, despite all children having to belong to a family according to African values, the reality is that some children are indeed left orphaned or abandoned. Of course, this is not a problem peculiar to African communities.<sup>60</sup> The African extended family has also been impacted by historical factors<sup>61</sup> and forces such as the Covid19 pandemic.<sup>62</sup> Legal reform under the *Constitution* has also impacted customary law.<sup>63</sup>

Nevertheless, despite changes in the African extended family, many children form part of African extended families with African values directly influencing customary law adoptions.<sup>64</sup> This study finds that ignoring fundamental African values and the workings of the African family when considering reforming customary law adoptions will understandably lead to disregard.<sup>65</sup> Also, addressing issues in a "non-Western way" does not mean that a child's interests are not considered in customary law adoptions.<sup>66</sup> Official disregard for African values and the workings of the African family in the past has resulted in customary law adoptions being viewed as "informal", "unofficial", or "*de facto*", and continuing such disregard will affect the status of customary law

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<sup>56</sup> However, see the discussion pertaining to the difference between traditional inheritance and succession rules, and the law reform that took place under the *Constitution* in 2.4.3.3. Also see the discussion in the same para pertaining to the view that maintenance payments, in the common law sense, are foreign to customary law. In the *Kewana* case, as explained in 3.3.1, the capacity to financially maintain a child was an important factor in determining the adopted parent.

<sup>57</sup> See the explanation in 2.4.3.3.

<sup>58</sup> See 2.4.3.3.

<sup>59</sup> See, for example, 2.4.3.

<sup>60</sup> See the discussion in 3.1.

<sup>61</sup> Such as segregation and apartheid. See 2.4.3.

<sup>62</sup> See 2.4.3, 3.1.

<sup>63</sup> See, for example, the discussion in 2.4.

<sup>64</sup> See 2.4.3. For example, *ilobolo*, which has also been described in a "religious" light, is part of marriage and adoption negotiations. See 2.4.2.2. Also see 5.2.2 below. The definition of *iLobolo* as per legislation is included in 1.2.3 (in a fn).

<sup>65</sup> See 2.4.2.1-2.4.2.3

<sup>66</sup> See 2.4.3, 4.2.1. Though the child's best interests were not a focal issue in this study. Also see 5.2.2 below and the relevant para in this study referred to there.

adoptions altogether, but more about the status of customary law adoptions later.<sup>67</sup> First, other findings on customary law adoptions are discussed.

### *5.2.2 Conceptualising customary law adoptions in South African law*

As already stated,<sup>68</sup> the fact that a child belongs to an African extended family does not mean the child's interests are overlooked.<sup>69</sup> However, it has been made clear from the start that the evaluation of the best interests of children customarily adopted falls outside the scope of this thesis.<sup>70</sup> Instead, it has been explained why establishing the true motive behind adoption under any law is no easy task.<sup>71</sup> Issues surrounding categorising adoptions as being, for example, "child or family-centred" only have also been highlighted. Motives behind adoptions were found to be not necessarily exclusive of one another.<sup>72</sup> If customary law adoptions were traditionally focussed only on continuing a family about to go extinct,<sup>73</sup> this research has shown that customary law has developed.<sup>74</sup> Again, this study finds that customary law adoptions must not be blindly dismissed for supposedly being "family-centred" only.<sup>75</sup>

Before this study was undertaken, certain requirements for customary law adoptions were already apparent in the descriptions in the available sources.<sup>76</sup> First, there must be an agreement between the families; second, there must be due publicity of the adoption; and third, the adoption must be reported to a traditional leader. However, it is safe to say that the specifics surrounding these requirements were vague; for example, specifics regarding who consents to a customary law adoption.<sup>77</sup>

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<sup>67</sup> In 5.2.3.

<sup>68</sup> In 5.2.1.

<sup>69</sup> See 3.2.

<sup>70</sup> See 1.4.

<sup>71</sup> See 3.2.

<sup>72</sup> See the discussion in 3.2.

<sup>73</sup> As with Roman law *adoptio*. See 1.2.1, 2.2.3.

<sup>74</sup> See the discussion of forms of customary law in 3.4.

<sup>75</sup> As opposed to being child-centred. See 2.2.3-2.2.4, 3.2. Also see 5.2.1 above. Also, despite the court's stating that (Xhosa) customary law adoptions are not in conflict with the *Bill of Rights* (see the discussion of, including some critique against, the *Maneli* case in 3.7) further research on the best interests of the child is recommended. Also see 5.3 below.

<sup>76</sup> As per 3.3.

<sup>77</sup> See the discussion regarding the consent of biological parents, other relatives and the child, in 3.3.1.1-3.3.1.2.

Furthermore, as opposed to the first and second requirements, it was unclear whether reporting to a traditional leader was essential for a valid customary law adoption. Some of these specifics became clearer after analysing the available customary law adoption cases.<sup>78</sup>

A finding on the general opposed to the generic requirement(s) of any valid customary law adoption could, therefore, be made:

- Agreement and due publicity are the two generic requirements for all valid customary law adoptions,<sup>79</sup> whilst,
- reporting a customary law adoption is a relative requirement only.<sup>80</sup>

In other words, for customary law adoptions to be valid, any so-called "customary law adoption" must adhere to the generic requirements identified, including *umlanjwane yingane kaninalume*<sup>81</sup> and levirate practices such as *ukungena*.<sup>82</sup>

Pertaining to the so-called "forms" of customary law adoptions, the peculiarity of categorising "forms" of customary law adoptions was considered.<sup>83</sup> These "forms" might better be explained as examples of customary law adoptions as they exist in case law.<sup>84</sup> Nevertheless, the "forms" (or examples) of customary law adoptions described prove that customary law allows women to adopt, for example.<sup>85</sup> One "form" of customary law adoption which has received a fair amount of attention from the courts and academics is *o e gapa le namane* or "step-parent adoption". *O e gapa le namane* is agreed upon during the *ilobolo* negotiations and serves as an example of the close links between customary law adoption and marriage negotiations.<sup>86</sup> However, several uncertainties persisted, including which other possible "forms" of customary

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<sup>78</sup> In chapter 3 specifically. See the discussions in 3.3.1-3.3.3.

<sup>79</sup> For example, see 3.3.

<sup>80</sup> See the discussion in 3.3.3.

<sup>81</sup> Explained in 3.4.2.

<sup>82</sup> Levirate practices are discussed in 3.6.

<sup>83</sup> See 3.4.

<sup>84</sup> As argued in 3.4.

<sup>85</sup> See 3.4 for the forms of customary law adoptions listed by Mokotong.

<sup>86</sup> Also see 3.4.1.

law adoptions exist,<sup>87</sup> leading to the comprehensive conceptualisation of customary law adoptions through the analysis of case law.<sup>88</sup>

As a result of the analysis of customary law adoption cases, several legal consequences of customary law adoptions were determined. This is not to say that these are the only possible legal consequences of customary law adoptions, bearing in mind the research methodology chosen,<sup>89</sup> but the hope is humbly stated that this makes an overall positive contribution to written research on customary law adoptions.

Repeating the analysis and reasoning that led to each identified legal consequence of customary law adoptions identified in this study is unnecessary. Consequently, they can be presented as a list. The legal consequences determined may be categorised as those from which a need for regulation could be identified and those from which such a need does not necessarily arise or "general" legal consequences. The latter category is listed first.

#### 5.2.2.1 General legal consequences

- A customary law adoption confers *ilobolo* rights in an adopted daughter on the adoptive parent(s).<sup>90</sup>
- A customary law adoption confers an obligation on the adoptive parent(s) or the family of an adopted son to deliver *ilobolo* for the adopted son's first marriage.<sup>91</sup>
- A customary law adoption agreed upon during *ilobolo* negotiations<sup>92</sup> does not amount to the buying and selling of a child.<sup>93</sup>

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<sup>87</sup> Outside those identified by Mokotong. Such as whether step-parent adoption (or *o e gapa le namane*) makes provision for a step-mother's adopting her husband's child born from a previous marriage. Also see 3.4, 3.4.1.

<sup>88</sup> In chapter 3.

<sup>89</sup> See 1.5. Again, for the limitations of this study, see 1.6. The difficulty in determining living customary law was highlighted in the *Bhe* case. See 1.3.2.1.

<sup>90</sup> See the discussion in 3.3.2.

<sup>91</sup> Again, see the discussion in 3.3.2.

<sup>92</sup> Such as in cases of *o e gapa le namane*.

<sup>93</sup> As argued in 3.4.1.

- A customary law adoption confers the adoptive parent(s)' surname on the adoptive child (if it is not already the same);<sup>94</sup>
- Customary law adoption confers an obligation on the adoptive parent(s) to maintain their adopted child;<sup>95</sup>
- Customary law adoption entitles the adopted child to be recognised as an intestate heir of their adoptive parent(s);<sup>96</sup>
- Customary law adoption entitles the adopted child to succeed in their adoptive family;<sup>97</sup>
- Customary law adoptions change the status of the people involved, such as the child, parent(s), guardian(s), and family.<sup>98</sup>

#### 5.2.2.2 Legal consequences where a need for regulation has been identified

As already stated,<sup>99</sup> customary law adoptions change the status of relevant people, such as the child and others. However:

- A customary law adoption may change a child's (and other relevant people's)<sup>100</sup> status without the child's (married or unmarried) biological mother's consent;<sup>101</sup>
- A customary law adoption may change a child's (and other relevant people's) status without their (unmarried) biological father's consent;<sup>102</sup>
- A customary law adoption may change a child's (and other relevant people's) status without such a child being consulted;<sup>103</sup>

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<sup>94</sup> See 3.3.2.

<sup>95</sup> See, amongst others, 3.4.2.

<sup>96</sup> Again see, amongst others, 3.4.2.

<sup>97</sup> See the discussion of the Seleka-Barolong matter in 3.5.

<sup>98</sup> See 1.3.6, 1.3.9.1.

<sup>99</sup> In 5.2.2.1.

<sup>100</sup> Such as the biological and the adoptive parent(s) or guardian(s) and their families.

<sup>101</sup> See the discussion in 3.3.1.1. Husbands-to-be and their families usually have *locus standi* in customary law adoptions, while a view that mothers and their families do not have *locus standi*, persists. "*Locus standi*" is explained in 1.2.3.

<sup>102</sup> Whether it is necessary to obtain consent from unmarried fathers could not be conclusively determined. Again, see the discussion in 3.3.1.1.

<sup>103</sup> Child participation in customary law adoptions is questionable, as discussed in 3.3.1.2. However, also see 5.3.3 below.

- A customary law adoption may change a child's (and other relevant people's) status by being inferred.<sup>104</sup>

Consequently, a need for the regulation of customary law adoptions was identified.

The findings pertaining to the actual status of customary law adoptions as a legal implication are discussed next.

### 5.2.3 *The actual status of customary law adoptions in South African law*

Their contextualisation and conceptualisation established the existence and legitimacy of customary law adoptions, and various legal consequences could be identified.<sup>105</sup> Therefore, one should, and rightly so, be careful to accept that one could allege that a customary law adoption occurred where no such adoption took place. The *Mxhosana* case illustrated that one should not think it is possible to prove a customary law adoption by merely submitting proof of residing with the supposed adopter, for example.<sup>106</sup> In another case, the *Maswanganye* case, it was shown that sharing a surname with someone does not necessarily mean that a customary law adoption took place.<sup>107</sup> The validity requirements for a customary law adoption must be proven.<sup>108</sup> Indeed, customary law adoptions deserve their rightful place in South African law, especially in the light of customary law's constitutional recognition.<sup>109</sup>

However, the contextualisation and conceptualisation of customary law adoption also proved that various factors led to such adoptions being viewed and interpreted as "*de facto*".<sup>110</sup> As a result, adopted children are treated differently before the law. For example, a *de facto* "adopted" child may be considered an intestate heir in the *de facto* adoptive family in customary law, whereas that is not the case for *de facto* "adopted"

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<sup>104</sup> For example, in cases of *o e gapa le namane* (depending on the child's age) where the adopter did not expressly consent to the adoption. See the discussion in 3.4.1.

<sup>105</sup> See chapters 2 and 3, and 5.2.1-5.2.2 above.

<sup>106</sup> See 3.7.

<sup>107</sup> See the discussion in 3.3.2.

<sup>108</sup> As discussed in 3.3.

<sup>109</sup> See the discussion of ss 39(2) and 211(3) of the *Constitution* in 3.7.

<sup>110</sup> As stated in 5.2.1 above. Also refer to chapters 2 and 3 of this study. Community members themselves and the courts have been treating and interpreting customary law adoptions the same as *de facto* adoptions in common law. Also see the discussion in 3.7.

children under common law.<sup>111</sup> Though the differentiation seems to place *de facto* adopted children under customary law in a better position than those in common law, it is, in fact, obviously detrimental to the status of customary law adoptions when those adopted are described as having been "informally" or "unofficially" adopted.<sup>112</sup> For example, conceptualising customary law adoptions has established that reporting a customary law adoption is a relative requirement instead of a generic validity requirement required for all customary law adoptions.<sup>113</sup> If customary law adoptions are not reported, they have no official record. The lack of the record-keeping of customary law adoptions leads to practical problems that further subvert the status of customary adoptions. Such practical problems include the reluctance of the Department of Home Affairs to register customary law adoptions. Parties must go to a court after a valid adoption before they can enforce their rights.<sup>114</sup> A lack of record-keeping also makes children "adopted" under customary law more vulnerable to crimes like human trafficking.<sup>115</sup>

Furthermore, when one's rights exist in theory but are extremely difficult to enforce in practice, they can be considered mere illusions. Customary law is afforded equal status with common law on the books, yet this study has proven that customary law adoptions do not really enjoy the same status as common law adoptions. Therefore, as another legal consequence, this study finds that customary law adoptions lacks equal status with common law adoptions as regulated in the *Children's Act*.

The determination that the actual status of customary law adoptions in South Africa is subverted further justifies the call to regulate such adoptions. True to the constitutional imperative in section 211(3), regulation would ensure that customary law would be applied when applicable.<sup>116</sup>

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<sup>111</sup> For elaborative discussion, see 1.2.2, 3.7.

<sup>112</sup> Also see 3.7.

<sup>113</sup> See 3.3.3 and 5.2.2 above.

<sup>114</sup> See the discussion in 3.3.3.

<sup>115</sup> See the discussion in 3.7. The *Children's Act* aims to protect children from human trafficking (in an adoption context). For example, see the discussion in 4.2.4.14-4.2.4.15.

<sup>116</sup> For example, in cases of a conflict of laws. See the discussion in 3.7.

The findings on the *Children's Act* as the suitable vehicle to provide for customary law adoptions having been discussed, the relevant recommendations flow from the discussion.<sup>117</sup>

### **5.3 *The Children's Act and recommendations*<sup>118</sup> for its development**

#### *5.3.1 The Children's Act's purpose and preamble*

There seems to be no sufficient reason why children adopted under customary law should still be excluded from the *Children's Act*. Despite the Act being drafted under the *Constitution* and catering for children widely,<sup>119</sup> customary law adoptions were excluded from the *Children's Act*.<sup>120</sup> The Act's suitability to provide for customary law adoptions was established in chapter 4.<sup>121</sup> For example, the description of the purpose of the *Children's Act* refers to "making new provision for the adoption of children" and generally emphasises the importance of family.<sup>122</sup> The preamble to the *Children's Act* also clarifies the state's commitment to protecting children<sup>123</sup> and acknowledges the importance of family and community.<sup>124</sup>

However, the failure of the *Children's Act* to regard African values and the workings of the African family more directly leads to the conclusion that it might as well have stated that it makes "new provision for the" *common law* "adoption of children".<sup>125</sup> The previous legislation also catered only for common law adoptions,<sup>126</sup> which is why the

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<sup>117</sup> Hence including the entire discussion under one heading, 5.3.

<sup>118</sup> Or matters for consideration.

<sup>119</sup> There is a view that the *Children's Act* codified South African child law. See 1.2.1, 4.2, 5.1.

<sup>120</sup> As argued in 4.1. Chapter 15 of the *Children's Act* caters for common law adoptions (though it does not explicitly set out to provide for common law adoptions only, this is a fair assumption to make; see 1.1, the assumption made in 1.4.1 and the discussions of past common law adoption legislation in chapter 2), ensuring that common law adoptions enjoy the full protection of the law (again, see 4.1). When a child is adopted under the *Children's Act*, various role players must ensure the child's best interests (see 4.2.2). Accordingly, as explained in 4.2.3, it has been stated that the *Children's Act* is "reminiscent of ... provisions in the Constitution".

<sup>121</sup> See the discussion in chapter 4.

<sup>122</sup> See 4.2.1, 4.2.4.1.

<sup>123</sup> See 4.2.1.

<sup>124</sup> Again, see 4.2.1. The Act also provides for paying damages in terms of customary law, for example. See 4.2.4.5. So-called "open adoptions" allowed by the *Children's Act* further point to its suitability. See 3.2, 4.2.4.6.

<sup>125</sup> Own words added in italics.

<sup>126</sup> As discussed in chapter 2. Also see 4.3.

recognition of customary law adoptions has been provided only on a case-by-case basis outside the scope of the *Children's Act*.<sup>127</sup>

**Recommendation:** Considering the above, it is recommended that the Purpose of the *Children's Act* must provide for customary law adoptions in South Africa.<sup>128</sup> For example, its statement of purpose can be improved by including the following: "to make new provision for the adoption of children, *including providing for the recognition of customary law adoptions*".<sup>129</sup>

Alternatively, the *Children's Act* should distinguish between social parentage or fostering in customary law and customary law adoption.<sup>130</sup> The distinction could be drawn, for instance, by including in the Act the determined validity requirements of customary law adoptions<sup>131</sup> and clearly stating the legal consequences of adoption as opposed to social parentage or fostering. The statement of the purpose of the *Children's Act* must be clear in this regard, too. For example, the purpose could include the words: "to provide for foster care, *including fostering practices in customary law*".<sup>132</sup>

### 5.3.2 Interpretation: Section 1 of the *Children's Act*

Section 1 leaves enough scope for the African extended family, recognising family members not merely on the basis of the bloodline, for example, but classifying the members as "uncle", "aunt", or "cousin".<sup>133</sup> In the African extended family, members are divided into broader categories.<sup>134</sup>

**Recommendation:** It is recommended that consideration should be given to adding a phrase to section 1 of the *Children's Act*, to make provision for relatives differently

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<sup>127</sup> See, especially, chapters 1 and 3.

<sup>128</sup> Also see 4.2.1.

<sup>129</sup> The recommended wording is italicised. Also see 4.2.1.

<sup>130</sup> Also see 4.2.4.1. However, foster care in customary law was not a focus in this thesis. For a brief discussion, see 1.3.6.

<sup>131</sup> Along with making record-keeping a requirement. Also see 5.2.2-5.2.3 above.

<sup>132</sup> The recommended wording is italicised. Also see 4.2.1, 4.2.4.1.

<sup>133</sup> See 4.2.1 and the relevant discussions in chapter 2.

<sup>134</sup> See 4.2.2 and the relevant discussions in chapter 2.

described in customary law.<sup>135</sup> For example: "(c) a grandparent, brother, sister, uncle, aunt or cousin of the child, *while being cognisant that family members may be described differently in customary law.*"<sup>136</sup>

Section 1 of the *Children's Act* also includes a description of traditional authorities, which fact is welcomed. However, the Act does not specify the role of traditional authorities in an adoption context. The challenges arising from not reporting customary law adoptions to traditional authorities, specifically from not keeping records of customary law adoptions, have been discussed. Otherwise put, the importance of record-keeping has been shown.<sup>137</sup>

**Recommendation:** In making record-keeping obligatory for customary law adoptions, it is recommended that a further obligation<sup>138</sup> be put on traditional authorities to ensure that communities are made aware as far as possible of the importance of record-keeping.<sup>139</sup> The recommendation pertaining to the validity requirements of customary law adoptions follows below.<sup>140</sup>

### *5.3.3 General principles in the Children's Act, including the best interests of the child*

In line with customary law, which focuses on conciliation, the *Children's Act* confirms the importance of the views of family members on an adoption. However, it has been shown the *locus standi* of women and their families in customary law adoption matters is at best doubtful.<sup>141</sup> On the other hand, though the views of members of the extended family might be considered important in customary law, including those of a father's family, unnecessary delays in the adoption process should be avoided, especially where

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<sup>135</sup> Also see 4.2.2-4.2.3.

<sup>136</sup> The recommended wording is italicised. However, also see 5.3.3 below.

<sup>137</sup> See 3.3.3 and 5.2.2 above.

<sup>138</sup> For example, through other legislation regulating traditional authorities. Regulations in terms of the *Children's Act* may also be made. See 4.2.4.16.

<sup>139</sup> Not all communities have traditional leaders. See 3.3.3. Also see 3.7, where it is explained that the *Children's Amendment Bill* was not referred to the National House of Traditional Leaders. Also see 4.2.2.

<sup>140</sup> In 5.3.4.2.

<sup>141</sup> Also see 5.2.2.2.

delays are detrimental to the child.<sup>142</sup> Consequently, there is a balance to be struck. The *Children's Act* requires the consent of a child's biological parents, irrespective of their marital status.<sup>143</sup>

**Recommendation:** It is recommended that the *Children's Act* should at least include explicit recognition of a mother's *locus standi* in matters of customary law adoptions.<sup>144</sup> Generally, a mother's consent should have been obtained when her child is to be adopted. As far as other family members are concerned, the Act may provide guidelines for considering the views of other members,<sup>145</sup> taking into account, for example, whether the member had a relationship with or contributed to maintaining the child at some stage.<sup>146</sup> Research would have to be conducted on whether children ten years old and older should be required to consent to their customary law adoption. As it currently stands, the age prescription in the Act seems rigid, stemming from past common law adoption legislation, which provided the same.<sup>147</sup> Although there is a modern tendency to consult children in certain matters, it could not be established whether this is so for customary law adoptions. In this instance, again, the child's best interests would need to be considered. If necessary, the age limit of ten years might have to be revised in consultation with community members,<sup>148</sup> reflecting the situation in customary law.<sup>149</sup>

#### 5.3.4 Chapter 15 of the Children's Act

##### 5.3.4.1 Customary law adoptions in terms of court orders

Adoption under the *Children's Act* is legal only when endorsed by a court, as opposed to the position in customary law.<sup>150</sup> However, as shown above,<sup>151</sup> a party involved in

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<sup>142</sup> See 4.2.3, which includes a limited discussion of the best interests of the child. For example, also see 4.2.4.11, where it is explained that an order for the rescission of an adoption order must be lodged within a "reasonable time".

<sup>143</sup> See 4.2.4.5.

<sup>144</sup> Which may also be done in the statement of the purpose of the Act. Also see 4.2.3.

<sup>145</sup> Including who such members are. Also see 5.3.2 above.

<sup>146</sup> See the discussion in 1.2.3, 2.4.3.3.

<sup>147</sup> See the relevant discussion in chapter 2 and in 5.2.1 above.

<sup>148</sup> Or traditional leaders.

<sup>149</sup> See the discussion in 2.4.3.3.

<sup>150</sup> See 4.2.4.1.

<sup>151</sup> Also see 5.2.3 above.

customary law adoption will in all probability need to approach a court to enforce its rights in any event. As such, the status of customary law adoptions is subverted.<sup>152</sup>

**Recommendation:** It is recommended that the *Children's Act* should provide that customary law adoptions, too, must be endorsed by court orders, provided that those already validly concluded are not regarded as invalid or informal.<sup>153</sup> It would consequently be clear that customary law adoptions are not to be "inferred".<sup>154</sup>

#### 5.3.4.2 Other recommendations and matters in need of consideration

**Recommendations:** Other recommendations, including matters in need of consideration, when deliberating legal reform of customary law adoptions, are:<sup>155</sup>

- The *Children's Act* must be clear on the position of spouses in polygynous customary marriages as adoptive parents.<sup>156</sup> Specifically, it should be made possible for more than two people to adopt simultaneously.<sup>157</sup>

It seems worth adding that the reason for excluding adoptive parents under customary law from the same scrutiny as those adopting a child under the *Children's Act* is unclear.<sup>158</sup>

- Adoptable children and prospective adoptive parents should also be included in the RACAP for customary law adoption. The practice of conducting customary law adoptions under the Act could be promoted in this way.<sup>159</sup>

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<sup>152</sup> Also see 5.2.3.

<sup>153</sup> In this regard, too, further research on the child's best interests might be necessary – especially considering the argument that legislation requiring a court order for customary law adoptions would result in mere paper law. See the arguments in 4.2.4.1. Nevertheless, after considering their actual status, I am comfortable to submit that court orders are necessary for valid customary law adoptions (also to avoid the parties having to approach the court after the fact).

<sup>154</sup> Also see 5.2.2.2 above.

<sup>155</sup> Bearing in mind the legal question and objectives of this study (also see 1.4, 5.1 above), it is not necessary to provide exactly how certain sections of the *Children's Act* should be amended.

<sup>156</sup> Again, see 4.2.4.3.

<sup>157</sup> See the discussion in 4.2.4.3. This recommendation of course depends on legal developments in South African marriage laws in general. The constitutionality of polygyny has not been tested by the courts.

<sup>158</sup> Also see 4.2.4.3, 4.2.4.9.

<sup>159</sup> Especially since the RACAP promotes children being brought up within their own culture or family. See 4.2.4.4.

- Consent from both biological parents, married or unmarried, should generally be required for customary law adoptions.<sup>160</sup>
- "Forms" of customary law adoptions should be mentioned in the *Children's Act* as examples instead of as an exclusive list.<sup>161</sup>
- As already stated, record-keeping should be imperative for customary law adoptions too.<sup>162</sup>

In conclusion, and as stated variously above,<sup>163</sup> customary law adoptions deserve their rightful place in South African law. This can be achieved only by including them under existing legislation such as the *Children's Act*.

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<sup>160</sup> Also see 5.2.2.2 above and the relevant discussion in chapter 3. In chapter 4, see 4.2.4.5. Conditions can be added. For example, see the discussion in 4.2.4.8.

<sup>161</sup> Also see 5.2.2 above. Levirate practices are also in need of proper consideration. See 3.6.

<sup>162</sup> Also see 5.2.3 above. Also see 4.2.4.12-4.2.4.13.

<sup>163</sup> In 5.2.3 above.

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