

Adoption: Statutory and customary law aspects from a Namibian perspective

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Introduction

Article 14(3) of the Namibian Constitution states that the family is the “natural and fundamental group unit of society and is entitled to protection by society and the State”. Article 15 of the Constitution provides that –

[c]hildren shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.

In addition to these provisions, Article 144 of the Namibian Constitution reads as follows:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Namibia has ratified some of the international agreements on child welfare and is bound to enact legislation that adequately safeguards the welfare of children.¹ In particular, Namibia is a signatory to the Convention on the Rights of the Child (CRC). Article 20 therein provides that, for the best interests of a child to be cared for and protected, such care and protection includes adoption or if necessary, placement in suitable institutions for the care of such children.²

According to the Hague Convention on Inter-country Adoption of 1993, to which Namibia is up to now not a signatory, children who are permanently or temporarily deprived of family life are entitled to protection from the state and alternative care must be assured for such children, including adoption and fostering.³

1 See the contribution by Oliver C Ruppel elsewhere in this volume, on the protection of children’s rights under international law from a Namibian perspective.

2 Goran & Alfredson (1997:279).

3 Article 20(1) of the CRC.

There are an estimated 80 adoptions per year in Namibia, and 14,000 children were estimated to be in foster care as at February 2009.⁴ There are 250,000 registered orphans and other vulnerable children (OVC) in Namibia.⁵ These figures indicate that the rate of adoption in Namibia is far lower than that in other parts of the world. The reason for this lies in the plurality of the Namibian law and in the different perceptions of each type of law when it comes to adoption.

This article is concerned with laws that govern adoption in Namibia. Attention will be paid to statutory and customary law.

Adoption under statutory law

Adoption was already practised under Roman law. It was regulated under the so-called *Institutiones*, the Institutes of Roman law.⁶ Yet, as a means of creating a legal relationship between a child and its parents, adoption was unknown under Roman–Dutch law until 1923.⁷ Current legislation that provides for the adoption of children in Namibia is the Children's Act,⁸ which in South Africa had been repealed by the Child Care Act.⁹

To date, the most significant provision on adoption in Namibia is section 71(2) of the Children's Act, which stipulates as follows:¹⁰

- (2) Save as provided in section seventy-two, a children's court to which application for an order of adoption of a child is made shall not grant the application unless the court is satisfied –
- (a) that the applicant is or that both applicants are qualified to adopt the child; and
 - (b) that the applicant is or that both applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child and possessed of adequate means to maintain and educate the child; and
 - (c) that the proposed adoption will serve the interests and conduce to the welfare of the child; and
 - (d) that consent to the adoption has been given –
 - (i) by both parents of the child, or, if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be; or

4 MGECW (2009a).

5 MGECW (2009b:58).

6 *Institutiones* 1.11.

7 See Himonga (2007:193).

8 No. 33 of 1960, at section 71.

9 No. 74 of 1983.

10 In view of Article 140 of the Namibian Constitution, which provides, inter alia, that “all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended”, the words “South Africa”, “South African Citizen” and “South Africa Citizenship Act” in section 71 should be read as *Namibia*, *Namibian Citizen*, and *Namibian Citizenship Act (No. 14 of 1990)*, respectively.

- (ii) if both parents are dead, or, in the case of an illegitimate child, if the mother is dead, by the guardian of the child; or
 - (iii) if one parent is dead, by the surviving parent and by any guardian of the child who may have been appointed by the deceased parent; or
 - (iv) if one parent has deserted the child, by the other parent; or
 - (v) if one parent is as a result of mental disorder or defect incompetent to give consent to the adoption of the child or has in terms of section three hundred and thirty-five of the Criminal Procedure Act, 1955 (Act 56 of 1955), been declared an habitual criminal, by the other parent; or
 - (vi) if one parent is dead and the surviving parent has deserted the child or is as a result of mental disorder or defect incompetent to give consent to the adoption of the child or has in terms of section three hundred and thirty-five of the Criminal Procedure Act, 1955, been declared an habitual criminal, by any guardian of the child who may have been appointed by the deceased parent; and
- (e) that the child, if over the age of ten years, consents to the adoption; and
- (f) in the case of a child born of any person who is a South African citizen, that the applicant or one of the applicants is a South African citizen resident in the Republic: Provided that the provisions of this paragraph shall not apply –
- (i) where the applicant or one of the applicants is a South African citizen or a relative of the child and is resident outside the Republic; or
 - (ii) where the applicant is not a South African citizen or both applicants are not South African citizens but the applicant has or the applicants have the necessary residential qualifications for the grant to him or them under the South African Citizenship Act, 1949 (Act 44 of 1949), of a certificate or certificates of naturalization as a South African citizen or South African citizens and has or have made application for such a certificate or certificates, and the Minister has approved of the adoption.

In Namibia, the Children's Act has remained in force since 1960 and was last amended in 1977. This raised the question whether adoption laws in Namibia are responsive to the realities of current social development and globalisation. The old Act is a remnant of colonial days; thus, child law needs to be updated and brought in line with Namibia's international obligations and societal needs. For this reason, Namibia has been in the process of amending its laws pertaining to children's rights, especially by means of the Children's Status Act¹¹ and the recent Child Care and Protection Bill.¹²

The Children's Status Act covers aspects of adoption in section 13(7), as follows:

Unless the children's court orders otherwise, the written consent of both parents is required for –

- (a) the adoption of the child, subject to the provisions for dispensing with any required consent contained in the law on adoption; or
- (b) the removal of a child from Namibia for a period longer than one year.

11 No. 6 of 2006.

12 MGECW (2009b).

Although the Children's Status Act has not yet become operational, section 13 can be understood as an amendment of section 71(2) of the Children's Act.

The provisions of section 71(2)(f) of the Children's Act seem to suggest that Namibian citizenship is a prerequisite for the adoption of children born to a Namibian parent. However, in a ruling delivered in 2004, the High Court of Namibia held that it is unconstitutional to adopt a blanket rule preventing foreigners from adopting children in Namibia.¹³ In the 2004 case, two German nationals intended to adopt a child they had fostered for years, who was born to a Namibian citizen. The applicants were informed that, due to an exclusion clause in section 71(2)(f) of the Children's Act, they could not adopt the child in question. In arriving at its decision, the Court took into account the provisions of the CRC, as follows:¹⁴

This case sits alongside the Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Namibia is a party to both of these international agreements, meaning that they are by virtue of Article 144 of the Namibian Constitution "part of the law of Namibia". Both of these agreements state that inter-country adoption may be considered as an alternative means of providing care for the child – if the child cannot be cared for in the country of origin in any suitable manner. The African Charter calls inter-country adoption a "last resort". Both agreements require governments to take measures (a) to ensure that the safeguards and standards for inter-country adoption are equivalent to those for national adoption; (b) to ensure that placement in inter-country adoption does not result in trafficking or improper financial gain for anyone involved; and (c) to promote bilateral or multilateral arrangements to regulate inter-country adoption.

In another recent Namibian case *the Namibian* reported the following:¹⁵

[A] Canadian teacher ... adopted a Namibian baby after the baby's biological mother chose her as the child's adoptive parent. The baby's biological mother decided before the baby's birth that she wanted to give the girl up for adoption, the court was informed. The adoptive mother is a 43-year-old primary school teacher living in the Vancouver area in British Columbia in Canada. The biological mother is 25 years old. She also has an older child who is living with a relative because she is not in a financial position to take care of the child, the court was informed. The adoptive mother informed the court in an affidavit that she approached an adoption agency in Canada to assist her in her wish to adopt a Namibian baby. A Canadian friend of hers who worked in Namibia for a while had also adopted a Namibian child, she stated. The adoption agency later informed her that the biological mother of a child had chosen her as the child's adoptive parent. After the baby was born in late July, she travelled to Namibia to proceed with the adoption process. The baby was placed in her care when she was nine days old and has been staying with her in an apartment in Windhoek since then, she stated. She is planning to fly back to Canada with the baby on September 28. A social worker from the Canadian adoption agency and a Namibian social worker, Waldi Kubirske, wrote glowing reports on the adoptive mother in which they recommended that her adoption of the

13 *Detmold & Another v Minister of Health and Social Services & Others*, 2004 NR 174 (HC).

14 Hubbard & Coomer (2009).

15 Menges (2009).

child should be approved. The Ministry of Gender Equality and Child Welfare's Permanent Secretary, Sirkka Ausiku, however[,] also wrote a letter to Magistrate Horn on August 11 in which she informed the Magistrate that the proposed adoption was not endorsed by the Ministry. She recommended that the Ministry should instead be given a chance to look for prospective adoptive parents for the baby in Namibia.

The aforementioned situation seems to be complicated –¹⁶

... by inadequate procedures in the Children's Act which currently governs adoption. Because private social workers can make reports to the courts recommending adoptions without channelling these through the Ministry of Gender Equality and Child Welfare, the Ministry is faced with completed adoptions without previously having a chance to see if local options for the child were properly considered. Furthermore, this law does not give the Ministry any right to appeal an order of adoption. Ministerial consent was previously required for the limited exceptions to the prohibitions on adoption by foreigners, but this safeguard fell away when the Detmold case invalidated that provision in its entirety. Yet the regulations issued under the Act give the Ministry, in its role as the Registrar of adoptions, a duty to ensure that the correct rules and procedures have been followed in respect of all adoption orders. So the existing procedures for inter-country adoption have large gaps, which can (as in the present case) leave the Ministry in the position of being expected to register an inter-country adoption even where it is not clear to the Ministry that local alternatives have been exhausted.

The question of adoption of a Namibian child by a non-Namibian has led to some frustration as to what exactly would happen to the adoption application, as the previous law on inter-country adoption had been declared unconstitutional. This left a void in the law, which then resulted in the delays that led to litigation.¹⁷ The case of the Canadian teacher has been the source of widespread controversy amongst Namibians, with some viewing adoption as the facilitation of the export of Namibian human capital, where others simply call it *baby-shopping*.¹⁸

Although rich foreigners have been adopting children from poorer countries for decades,¹⁹ it seems that African adoptions are indeed a part of growing trend.²⁰ But who should be able to adopt a child in Namibia is so far not easy to determine.²¹

On a similar note, on 12 June 2009, after the United States (US) pop star Madonna's bid to adopt a baby in Malawi was initially rejected by a lower court, Malawi's Supreme Court ruled in the singer's favour, according to a Reuters report, and overturned the earlier ruling. Although it was stated that the decision to grant Madonna the right to adopt a second Malawian child had been warmly received by many in the southern African

16 Hubbard & Coomer (2009).

17 (ibid.).

18 (ibid.).

19 For example, Mia Farrow and Angelina Jolie.

20 Jacobson (2009).

21 MGECW (2009a).

state,²² this decision has created a prominent but questionable precedent. In the three-judge panel's ruling, Chief Justice Lovemore Munlo said that the singer's commitment to helping disadvantaged children should have been taken into account when deciding the matter. The Supreme Court ruling further stated that the earlier decision had been based on outdated interpretations of old laws:

In this global village a man can have more than one place at which he resides The matter of residence should be determined at the time of application of the adoption. In this case, Madonna was in Malawi not by chance but by intention. She is looking after several orphans whose welfare depends on her. She can therefore not be described as a sojourner. . . . Every child has the right to love.

It is highly questionable whether this is the correct legal approach to deal with this type of subject matter. One may argue this case in favour of or against the concept of cultural nationalism versus Western imperialism.²³ In the end, it is the socio-economic conditions in Africa that produce thousands of orphans and other vulnerable children, a sad reality which needs to be addressed and improved. It is, however, not the right approach to make the African child a marketable export commodity, especially since adoption has become a major issue in many industrialised Western societies. Child-bearing postponement among two-career couples in Europe and the US brought about changes in the participation of women in the labour force, and a rising incidence of infertility, which led to an increase in the number of couples and individuals seeking to adopt babies. Birth control and abortion practices and societal acceptance of single motherhood have also contributed to a sharp decrease in the birth rate in the northern hemisphere.²⁴

Moreover, adoption in the industrialised parts of the 'more developed' world is conceived as an important route of parenthood for gays and lesbians.²⁵ Notwithstanding that a revision of the traditional notions of *parenthood*, as some argue, does not seem appropriate for the societal fabric in Namibia, it seems more than necessary to give due consideration to language, religion and culture when matching prospective parents with children. With the HIV/AIDS pandemic affecting Namibia, some see inter-county adoption as a way of providing for the best interest of OVC.²⁶ The response of the authors of this article is that foreigners who wish to adopt a Namibian child should generally be required to reside in Namibia for a minimum of three years before such adoption can be finalised.²⁷

Adoption under customary law

Article 66(1) of the Namibian Constitution states the following:

22 Tenthani (2009).

23 See Ngugi (2009).

24 Berry (1993).

25 Bonthuys & Albertyn (2007:150).

26 MGECW (2009a).

27 This is in line with, for example, the 1997 Ugandan Children Act.

... the customary law ... of Namibia in force on the date of Independence shall remain valid to the extent to which such customary law ... does not conflict with this Constitution or any other statutory law.

Customary law refers to the laws of the indigenous people of Namibia. The term also refers to the manner in which people conduct their affairs, whether these concern adoption, marriage, divorce, dispute resolution, the bequest of property (inheritance), succession, or the allocation and occupation of different land tenure systems, among other things.²⁸

The majority of indigenous Namibians still live in accordance with their customary laws. Namibia gave the same recognition to these laws as that accorded to common law. Thus, Article 66 of the Constitution makes Namibia a hybrid legal system governed by legal pluralism.²⁹

Moreover, both the Namibian Constitution and the CRC recognise the right of indigenous populations to practise their own culture. Article 19 of the Constitution provides as follows:

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

Article 30 of the CRC stipulates that –

[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

It is, however, clear that this recognition does not derogate from the fundamental rights enshrined in these two instruments, and that customary law has to be measured against norms laid down in both the CRC and Chapter 3 of the Constitution.

In spite of significant difference to the statutory law, the term *adoption* can also be applied to a related institution in customary law.³⁰ For example, foster care, which in Africa is common practice, is similar to adoption in the sense that a child is placed from one family into the other. However, unlike adoption, foster care is not necessarily permanent. Under customary law, foster care arrangements are actually so common that they are not in any sense formal, bearing little or even no legal implications.³¹ In most cases of foster

28 Hinz (2003:9).

29 Griffiths (1986:4).

30 See Bennett (2004:319).

31 (ibid:321).

care, there is the intention that the child will eventually return to his or her own parents, so there is no severing of relationships with the biological family. The child retains his or her original legal status, family name, and rights and duties acquired at birth, and acquires no legal rights in the home of the foster parent. Conversely, the foster parent has no legal rights or duties towards the child under customary law.

Under statutory adoption, the adoptive parents take the place of the biological parents. It is as though, by operation of law, that the 'new' parents become the 'real' parents of the child. Under customary law, although the 'adoptive parents' assume the role of primary caregivers, strictly speaking, they do not become the parents of the child. Of course, this has legal consequences for the child.³²

In terms of statutory adoption, children who have been formally adopted in accordance with the Children's Act inherit from their adoptive parents in the same way as biological children do. The situation is quite different under customary law, however. Under the latter system, it is argued that children belong to their parents (especially to their mothers);³³ therefore, they should not be allowed to inherit from their 'adoptive' parents. In more modern times it has also been argued that allowing informally adopted children to inherit from their adoptive parents appears to condone – and, indeed, promote – informal adoption, which could sometimes be detrimental to the child. Instances where adoption under customary law is not in the best interest of the child have become more rampant. For example, they can be seen where a child whose biological parents are deceased is adopted (informally) by another family member whose intention is really to use the child as a token through which to receive the social grant that the Government gives for OVC. In some cases, these grants do not reach the child, but end up in their supposed caregiver's pockets.

Moreover, in the past, the nature of the extended family was such that it was possible to absorb all OVC, but now there are simply too many. The result is an extremely fluid environment that leaves children more vulnerable to being sent from pillar to post, with no one really taking responsibility for them. Conversely, the extended family set-up is an integral part of Namibia's societal structure, and it has become the norm that, when one passes on, one's children are left to one's closest relatives. This is what is known as *kinship care*, that is, the full-time care of a child by a relative or another member of the extended family (or even by a close family friend). Kinship care is often informal and unregulated by the state.

The 'best interests of the child' principle is notoriously vague and indeterminate. Thus, the way in which the principle is interpreted and applied may well be influenced by cultural norms and the social and economic circumstances in which a particular child lives. In view of this, Bennett concludes as follows:³⁴

32 (ibid.).

33 This is the position as practised by matrilineal societies.

34 Bennett (1999:108).

Groups may pursue their right to culture and at the same time defer to the child's interest by arguing that children develop fully only under the protective umbrella of their own origin Hence it is alleged, for the sake of the child's sense of identity, that it must grow up in the social milieu from which it came; short-term gains of financial security and education should be subordinate to the child's long-term psychological well-being.

One may be of the opinion that adoption under customary law brings about a considerable degree of uncertainty.³⁵ In addition to that it has, for example, long been uncertain whether statutory provisions governing the procedure and effect of adoption override customary law. However, in the South African case of *Kewana v Santam Insurance Co. Ltd*, it was held that the Children's Act of 1960 – which still governs adoption in Namibia today – did not affect customary law.³⁶ In this case, an unmarried woman had assumed full responsibility for a related child and had marked the occasion by slaughtering a sheep and a goat. The court found that this ceremony constituted a valid adoption under customary law.³⁷ As becomes clear from the case, in customary law 'adoption' is a private arrangement. The child in question is usually the offspring of one's kin. Nevertheless, children given up for adoption become the adoptive parent's child in as far as the formalities under customary law are observed. Another related issue is that, if payment is made to compensate the natural parents for rearing the child, it raises the question of whether or not customary adoption infringes on the prohibition on trafficking in children.

After all, it is important to note that, on the one hand, the traditional African value system still focuses on the interests of the family group or household, and treats the child as a member of that household; in such cases, the individual child's interests are often subsumed under those of the family or household as an integral part of the social structure. On the other hand, customary law affects children in the context of the shift from a small-scale, largely rural and communal society to an urban, industrialised and individualistic society. This shift in the social order has been accompanied by the dislocation of the extended family and corresponding shrinkage of the network of kin available for the care and protection of a child.

Conclusion and recommendations

It should be the legislators' aim to ensure a balance between –

- the ideal that the child should, as far as possible, be kept within his/her community of origin, and
- the ideal that a child should grow up in a loving, stable and permanent family environment instead of an institution.

Therefore, a workable adoption policy for Namibia should provide that, before a Namibian child is adopted abroad, it must have been impossible to place the child in an

35 Wanitzek (2008).

36 1993 (4) SA 771 (Tka), at 776.

37 Bennett (2004:320).

adoptive home domestically within the given time frame, despite having made all the required efforts, within reason, to do so.

As stated earlier, Namibia is not yet a signatory to the Hague Convention on Inter-country Adoption. The principal purpose of this Convention is for signatory states – ³⁸

... to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect for his or her fundamental rights.

In order to safeguard children's rights more effectively, Namibia should strongly consider acceding to the Convention. In doing so, however, Namibia would be required by Article 4 of the Convention to establish a central authority dealing with inter-country adoptions. Adoption, be it within the family, within the community, within the country, or beyond it, inevitably carries a variety of risks for the child. Such risks include abuse, exploitation, sale and trafficking. Therefore, legislation and monitoring measures need to be put in place to curb such consequences. This requires careful screening and background checks of the adoptive parents in regard to their criminal record, income tax assessments, occupation history, and so on.

As has recently been stated by two of the contributors to the current volume, –³⁹

... the Hague Convention does not encourage inter-country adoption – quite the contrary, it says that inter-country adoption should take place only if authorities have determined that this would be in the child's best interests, and possibilities for placement of the child within the country of origin have been given due consideration. The Hague Convention also provides mechanisms to ensure that an inter-country adoption will be recognised in the country to which the child is going, so that the adopted child does not end up stateless in some foreign country. It also provides for cooperation between authorities in both the sending and receiving countries, to provide for proper monitoring and control. ... Similarly[,] if not carefully handled and regulated, inter-country adoption can lead to baby-buying, where parents desperate for a child are prepared to pay enormous sums of money to "baby brokers" who can source a child for them. This is a form of child trafficking which must be guarded against – Namibian children should not be made available to the highest bidders. There is no doubt that these problems will threaten Namibia. ... The forthcoming Child Care and Protection Act should repair those flaws and make the process clearer and smoother for all concerned, with the focus securely on the best interests of the child.

Notwithstanding the fact that legal dualism – also with regard to the issue of adoption – has value to it,⁴⁰ it can also cause legal uncertainty and loopholes. To introduce a sense of modernity to the legal aspects of adoption in Namibia, the onus will be on the Namibian Government, and the legislature in particular, to introduce a contemporary law to meet the needs of its people. This can be made possible by attaching a greater degree

38 Article 1(a), Hague Convention on Inter-country Adoption.

39 Hubbard & Coomer (2009).

40 Bennett (2004:27).

of importance and recognition to the fact that (formal) adoption as we now know it is premised on a Western ideology where the family consists only of one's immediate kin, i.e. mother, father and brothers. But also in the traditional African family structure, laws need to more actively cater for all notions of caring for children by others, ranging from foster care to adoption and everything in between. In light of the above, the following questions need to be addressed:

- To what extent should customary law affecting children be directly or indirectly incorporated into the proposed new legislation?
- If the decision is not to incorporate detailed customary law provisions, to what extent should the fundamental principles underpinning such a statute be made sensitive to and compatible with existing principles of customary law?
- Lastly, and perhaps most importantly, how can the 'best interests of the child' be rendered as optimally compatible with traditional African values as possible, bearing in mind the increasing impact of the ideology of individualism on traditional societies?

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