IN THE BEST INTERESTS OF *WHOSE* CHILD?:AN EXAMINATION OF AFRICAN CUSTOMARY LAW IN MATTERS RELATING TO CHILDREN SWITCHED AT BIRTH

By

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DECLARATION

I, Samukelisiwe Petunia Jali, registration number 211559334, hereby declare that the dissertation titled **"In the best interests of *whose* child?: An Examination of African Customary Law in Matters Related to Children Switched at Birth"** is the result of my own research and that it has not been submitted in full or in part for any other degree or to any other university

14 August 2018

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Signature Date

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I dedicate this entire work, in fact this Masters degree to You, Yahweh. Thank You for making my darkest night shine so bright. Your Word really is truth and it stands forever. You truly order the steps of a good man. You turned that which was meant for harm to work for my good. I recognise that none of this would have been possible without Your undeserved and unmerited favour.

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[1] Vashawn Mitchell, *Give All I Have*, The Secret Place 2016 Universal Music Group.

ABSTRACT

Children switched at birth present not only emotional trauma but also a legal battle for all parties concerned. Thus the story of M and Z (an African boy and girl) switched at birth in OR Tambo Hospital on August 2, 2010 elucidates this challenge aptly. This challenge plays itself within the contested legal systems being the Common law system (Western Law) and African customary law, which bears different consequences for the same event of children being switched at birth. Therefore, the research interrogates the rules of African family law, particularly those related to children and their parenthood. Equally important is African laws approach to the legal status of the parents' vis-à-vis the children switched at birth, as well as the compatibility of this approach with the Constitution and the Children's Act. An analysis of similar cases of children switched at birth suggests that family mediation, a practice mandatory amongst African societies, must be used in such matters rather than lengthy court battles. Consequently, the benefits of family mediation and parenting co-ordination are discussed emphasizing the use of parenting agreements in resolving conflicts in matters relating to children switched at birth.

LIST OF ABBREVIATIONS

DHA	Department of Home Affairs
UNCRC	United Nations Convention on the Rights of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
BAA	Black Administrations Act
RSCA	Reform of Customary Law of Succession & Regulation of Related Matters Act
UNCRC	United Nations Convention on the Rights of Child

Chapter One

Introduction

Background

> "It is not a matter where anyone can say they have won. It is a matter which must, at the end of the day, benefit the children."[2]

Switched at birth is an American movie directed by Waris Hussein.[3] It is based on the true story of Kimberley Mays and Arlena Twigg who were switched shortly after their birth in Florida.[4] Whilst one would hope that this story would remain fictional, it recently became a reality in South Africa in August 2010.[5]

M and Z (an African boy and a girl) respectively were born in OR Tambo hospital.[6] As a result of staff negligence they were switched at birth and the error was discovered eighteen months after the incident when the mother of M (hereinafter referred to as NN) approached the maintenance court in respect of her child.[7] During this time a paternity test was performed on M and his alleged father LZ. It was discovered that not only was LZ not the biological father of M but MZ too was not his mother. NN then sought further information from OR Tambo Hospital and an investigation which confirmed that her child was switched at birth was undertaken. She, in fact, was mother to the girl (hereinafter referred to as Z) who was living with NS. NS was also under the false impression that

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[2] 'Babies switched at birth will not be returned to their biological family' Independent Online 17 November 2015, available at https://www.independent.co.uk/life-style/health-and-families/health-news/babies-switched-at-birth-will-not-be-returned-to-their-biological-family-a6738261.html, accessed on 15 November 2016.

[3] 'Switched at birth' IMDb Online 28 April 1991, available at https://www.imdb.com/title/tt0103017/, accessed on 12 February 2018.

[4] 'Seen but not heard: The revelatory silence of switched at birth,' The New Yorker Online 24 September 2012, available at https://www.newyorker.com/magazine/2012/09/24/seen-but-not-heard, accessed on 6 June 2017.

[5] Unreported case of Centre for Child Law (Applicant) and Respondents respectively NN, NS, Presiding Officer of the Children's Court in the District of Boksburg, MEC of Health in Gauteng, OR Tambo Memorial Hospital Chief Executive Officer and LZ (NPD) case number 32043/2014 of 17 November 2015.

[6] *Ibid*.

[7] Unreported case of Centre for Child Law (Applicant) and Respondents respectively NN, NS, Presiding Officer of the Children's Court in the District of Boksburg, MEC of Health in Gauteng, OR Tambo Memorial Hospital Chief Executive Officer and LZ (NPD) case number 32043/2014 of 17 November 2015.

she was raising her own biological child. In 2014, NN approached the court to have her biological child returned to her.[8]

Arguably, a baby switch causes not only emotional trauma but also results usually in a legal battle for all the parties concerned. The primary purpose of this study is to determine the rules of African family law, particularly those related to children and parenthood.[9] Equally important is the African law approach to the legal status of the parent's vis-à-vis the children switched at birth as well as the compatibility of this approach with the Constitution and the Children's Act. This process of evaluating how the system of African law can be used "aimed to harness interest in this neglected area of law."[10] Lastly, this study purposefully argues that family mediation which is a practice mandatory amongst African or indigenous societies, should be used in these matters rather than lengthy court battles. Consequently, the benefits of family mediation and parenting co-ordination are discussed in Chapter four emphasises the use of parenting agreements in resolving conflicts in matters relating to children switched at birth.[11]

The aim of this study therefore is to provide insight into the experience of parents and children alike who have been switched at birth. Parents, scholars and professional practitioners will thus gain knowledge of the areas of conflict that might arise as a result of one of the parents wishing to regain care over their biological child. The study canvasses the need for biological parents to play a meaningful role in the upbringing of their biological children. Thus, this study further examines the factors used by the courts to determine who the rights and responsibilities are to be awarded to in respect of each child and whether African family law plays any significant role in reaching this decision. This study advocates (insofar as African children are involved) returning the switched children to their biological parents or blood relatives. This must be done in such a manner that the parties affected by a baby switch acknowledge each other as

[8] *OR Tambo* (note 7 above).
[9] South Africa has an essentially dualist system of law and Roman Dutch law will not be discussed herein.
[10] N Ntlama, 'The slippery slope of customary law in South Africa's new dispensation,' *College of Law and Management Studies eNewsletter*, Vol 9(1), March 2016.
[11] J Foot, 'What's best for babies switched at birth? The role of the court, rights of non-biological parents and mandatory mediation of the custodial agreements,' (1999) *Whittier Law Review* at 315-337.

part of the extended family and share parental responsibilities and rights through parental co-ordination and parental agreements.[12]

1.1 Literature Review

In all matters involving children, the best interests of the child are paramount.[13] This is the legal position of children in South Africa. The move away from parental authority to a more child-centered approach of parental rights and responsibilities as seen in the Children's Act 38 of 2005 (hereinafter referred to as the Children's Act) is evidence of such. According to section 18(2) of the Children's Act, parental rights and responsibilities are made up of four elements, namely:

(a) To care for the child.
(b) To maintain contact with the child.
(c) To act as guardian for the child.
(d) To contribute to the maintenance of the child.

These rights and responsibilities are acquired automatically primarily through biology. Natural mothers acquire full parental rights and responsibilities by virtue of giving birth as conferred by section 19 of the Children's Act.[14] The automatic acquisition of rights to fathers is, however, more complex. A married father automatically acquires full parental rights and responsibilities on the birth of the child if he is married to the child's mother or was married to her at any time between the conception and birth or after the child's

[12] *Ibid* 317.
[13] Section 7 of the Children's Act 38 of 2005.
[14] The Children's Act, section 19: Parental responsibilities and rights of mothers
1) The biological mother of the child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.
2) If;
a) The biological mother is an unmarried child who does not have guardianship in respect of the child; and
b) The biological father of the child does not have guardianship in respect of the child,
The guardian of the child's biological mother is also the guardian of the child.
3) This section does not apply in respect of a child who is the subject of a surrogacy agreement.

birth. An unmarried biological father acquires full parental rights by fulfilling the conditions set out in section 21 of the Children's Act.[15]

The position is significantly different for children switched at birth. Though each of the parents may have parental rights and responsibilities over their own biological children, what then of the child that is currently in their care? Do they have any right to that child? If so, on what grounds are these rights based on? An order from the High Court, as the upper guardian of children, is needed to regulate the legal responsibilities and rights between the parents and children in this matter. This order shall give clarity on who has rights to each child and what those rights may entail. Changes to legislation may also be considered as an option to solve this legal dilemma of children switched at birth. However, this will not be canvassed in this study as it is limited to the expeditious resolution of the *OR Tambo* case dealt with by the court in this instance.

1.1.1 African Law

The discussion brings African customary law to the fore. The definition of African customary law is contained in the Recognition of Customary Marriages Act 120 of 1998 (hereinafter referred to as the "Customary Marriages Act"). [16] In this Act "customary law" is defined as "the customs and usages traditionally observed among the indigenous

[15] The Children's Act section 21: Parental responsibilities and rights of unmarried fathers

1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-
    a) If at the time of the child's birth he is living with the mother in a permanent life partnership; or
    b) If he, regardless of whether he has lived or is living with the mother-
        i) Consents to being identified or successfully applies in terms of section 26 to be identified as the child's father in terms of customary law;
        ii) Contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
        iii) Contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

[16] Recognition of Customary Marriages Act 120 of 1998. A similar definition is contained in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 9 of 2009. For criticisms against this definition see JC Bekker & C Rautenbach 'Nature and sphere of African customary law.'(eds) (2014) 18-24.

African peoples of South Africa and which form the culture of those peoples."[17] Prior to the existence of this Act various descriptions of African law were provided by anthropologists and legal scholars. Matthews argues that the expression "customary law is generally used in two senses."[18] The first is in relation to an indigenous system of law existing amongst various African communities and the second to legislation that applies to Africans as a special grouping.[19]

Bekker defines customary law as an "established system of immemorial rules which evolve from the way of life and natural wants of the people."[20] He distinguishes living customary law as a "non-specialized system of law that governs the conduct of the community and that is binding upon the members of the traditional community in which it is found."[21] Perhaps the most accurate definition of African law emanates from Hamnett who defines African law as a "set of norms to which actors in a social situation abstract from practice and which they invest with binding authority."[22] He correctly reasons that African law is not ascertained by asking what judges and lawyers say is law but rather what the participants in the dispute regard the rights and duties that apply to them are.[23] From the above interpretations of what African law is, it is clear that the common thread amongst all these descriptions is that African law is a set of social rules agreed to by all the participants which will govern their conduct in the present and also possibly in the future.

[17] Section 1, Recognition of Customary Marriages Act 120 of 1998.
[18] CWT Rammutla, *The Official Version of Customary Law vis-à-vis the Living Hananwa Family Law* (unpublished LLD thesis, UNISA, 2013) 10.
[19] *Ibid* see also Z Matthews, *Bantu Law and Western Civilisation in South Africa: A study in the clash of cultures* (unpublished LLM thesis, Yale University, 1934) 19-20.
[20] JC Bekker, *Seymour's Customary Law in Southern Africa* 5ed (1989) 11.
[21] *Ibid* 26.
[22] I Hamnett, *Chieftainship and Legitimacy: an anthropological study of executive law in Lesotho* (1975) at 14.
[23] T P Moyo, *The Relevance of Culture and Religion to the Understanding of Children's Rights in South Africa* (LLM thesis, UCT, 2007) 36.

Chanock argues that the concept "customary", as commonly used to describe African law, has always been a source of confusion.[24] He conceives of the term's usage as one based on the distinction between law made by the state and immemorial practices. He notes that what made customary law valid was its long standing historical sameness. Put differently, that what was regarded customary was subject to constant change and adaptation and any newly asserted custom was regarded as the one that was "invented tradition." Thus, the friction caused in what is now referred to as the official customary law versus living customary law debate began.

The bone of contention lies within the fact that customs and ultimately, customary law, are invented as a response to circumstances. Consequently, if its validity is contingent on its long-standing sameness, a custom would be regarded invalid if it were later adapted to suit the changing needs of the community. It is for this reason that the concept "African law" is preferred for the purposes of this study. African law herein refers to indigenous law existing amongst the various African communities. It is law that is generated by and developed by the society in which it is found. Furthermore, African law is not static as it adapts to the evolving African values and culture. Here, Anyebe's definition finds favour, as he acutely describes it as "an expression of the ideals and aspirations of a given people."[25]

Contrary to Myburgh's submission, African law does not fall solely within the jurisdiction of anthropologists.[26] One, however, cannot fault this sentiment because it is a telling mark of African laws subordinate status in the history of South African jurisprudence.[27]

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[24] T Chanock, 'Law, State and Culture: thinking about customary law after apartheid' (unpublished paper presented at the Conference of the Association of Australia and the Pacific Annual Meeting Deakin University 30 November – 3 December 1990 at 56.

[25] A.P Anyebe, *Customary Law: The War Without Arms* (1985) 7-8. Channock also argues that the knowledge of customary law has been corralled off from legal knowledge and was an area that anthropologists rather than lawyers often claimed expertise. For more discussion on this see R Gordon 'The white man's burden: ersatz customary law and internal pacification in South Africa' (1989) 2 *Journal of Historical Sociology* 41.

[26] G J Van Niekerk, *The interaction of Indigenous law and Western law in South Africa: A historical and comparative perspective* (LLD thesis, UNISA, 1995) 13.

[27] Hamnett (note 22 above) 16.

Below is a short history of African law in South African jurisprudence, its recognition as a system of law and finally its application by the judiciary.

1.1.2 Recognition of African Law: Official v Living

The introduction of the Black Administration Act 38 of 1927 (hereinafter referred to as the Black Administration Act, alternatively, the BAA) was significant in South African law. The purpose of this Act was to regulate the administration of all judicial and substantive matters concerning African individuals. It was not, however, a cause for celebration amongst the African South Africans. This is because it was through this Act that African private law was accommodated as a separate recognised system of law applicable to Africans as long as it was not deemed to be in conflict with the European sense of morality or justice.[28] The Act's deceptive nature was evident since its inception as it became apparent that it was a weapon intended to perpetuate the discrimination against the majority of the population by entrenching a uniform system of indirect rule.[29] This was achieved by using state appointed traditional leaders who, as agents of the state, furthered the states agenda over those they were appointed to rule.[30]

Meierhenrich describes the law of this time as that which was characterised by its ability to serve as an effective method of control – promising the betterment of the apartheid governments standing in the internal community by providing it with a modicum of legitimacy and sincere belief of appropriateness.[31] Based on Meierhenhich's reasoning it is submitted that perhaps the most objectionable effect of the BAA was its subsequent

[28] Section 31 of the Black Administration Act 38 of 1927.
[29] N Ntlama, 'The Application of section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Dispensation' *PER/PELJ* 2012 (15) 1 at 24.
[30] V Ehrenreich- Risner, *The effect of apartheid's tribal authorities on chieftaincy and the Zulu people: separate development in Mtunzini District 1950-1970* (paper presented at a History and African Studies Seminar at the University of KwaZulu Natal 27 February 2013).
[31] Meirhenrich, *Legacies of Law*: Long –run Consequences of Legal Development in South Africa (2008) 605-608. See also Dlamini at 1992 Legal Studies Forum 133 who demonstrates how the recognition of customary law was not born of any great concern towards the administration of justice amongst the African population but rather as a need to facilitate more effective means of asserting power over the population.

manipulation of African traditional authority as seen by withholding sovereignty from tribal authorities and vesting it in the local Bantu Commissioner. The office which made the final decision on all areas of law pertaining African people was that of the Governor-General.[32] Traditional leaders who would not accept this structure where assassinated and replaced with acquiescent appointed *amakhosi*.[33] The result of this compromised the integrity of African law and ultimately led to the distrust of African law by those who were subjected to it.[34]

The democratic dispensation brought with it new hope when many of the provisions of the BAA were declared unconstitutional upon the introduction of the Interim Constitution.[35] It was during this time that a constitutionally elected assembly drew up the final Constitution which provided for the right to culture, which, in Professor Bennett's opinion forms the foundation of the recognition and application of African law.[36] The preamble of the Constitution acknowledges that there were divisions of the past, borne from the apartheid regime, which must be healed. It orders the Constitution to heal those divisions and lay the foundations for an open and democratic society. Sibanda, in "When is the Past not the Past?" highlights three factors which contributed to the recognition of African law in the final Constitution and they are noted as follows:

> "(a) Its incorporation into the nations system of law satisfied the need to incorporate a legal system rooted in African traditions and customs;
> (b)The African population which constituted the majority of the South African population, identified and conducted their lives in accordance with African law, further that;
> (c) An African legal system that could be part of the states' administration was already in existence."[37]

[32] I M Rautenbach, *Constitutional Law* 6th ed (2013) 103.
[33] *Ibid* 30 at 2.
[34] Chanock (note 24 above) 59.
[35] Interim Constitution Act 2000 of 1993.
[36] TW Bennet, *Sourcebook of African Customary Law*, (1991) 365.
[37] S Sibanda, 'When is the past not the past? Reflections on customary law under South Africa's constitutional dispensation' *Human Rights Brief* (2010) 17(3).

Due to African law's connection to the culture of the people whose conduct it seeks to govern, it is subject to constant change.[38] Rammutla correctly states that because of the "causal link between the changing circumstances of the community and African law itself, in order to understand the phenomenon of living African law one must study the effects of the changing circumstances of society on the rule of African law."[39] Whilst this continual invention as characterised in African law must be viewed positively (as it is indicative of genuine responses to needs felt), it is important to note that it also creates difficulty for those seeking to rely on a rule of African law. This is because they bear the onus of proving its existence for the purpose of enforceability. It is with this complexity in mind that the subject of the judicial application of African law is explored.

1.1.3 The Judicial Application of African Law

In 1988, section 1(1) of the Law of Evidence Amendment Act 44 of 1988 authorised all courts to take judicial notice of African law.[40] Under this section African law could be applied in any court insofar as it could be ascertained readily and with sufficient certainty. Chanock explains that the subsequent advent of the BAA was the first part of liberalism. It promised, he elaborates, white superiority which acknowledged the possibility of many blacks being admitted into the upper echelon of the civilized.[41] As briefly highlighted above, the BAA was less than generous in its administration of justice amongst the black majority because it gave the state the power to make laws in all aspects regulating African people. This limited the court's ability to intervene in the affairs of African individuals thus limiting their access to justice.[42] It was only the advent

[38] *Ibid* 2.
[39] Rammutla (note 18 above) 15.
[40] South Africa's legal system can be described as dualistic as it has two distinct legal systems. One is based on Western tradition (which is a combination of Roman-Dutch law and English law) and the other is based on African traditions).
[41] Chanock (note 24 above) 61.
[42] 'Black Native Administrative Act' available at http://www.sahistory.org.za/dated-event/black-native-administration-act-1927-comes-effect-act-effect-gave-state-power-make-laws accessed on 15 December 2017.

of democracy and liberation of the black majority which brought about new terms in which the law should apply.

The Constitution as evident in its preamble concretises its status as the supreme law of the land. It states, amongst other things, that it intends to heal the divisions of the past and establish "a society based on democratic values, social justice and fundamental human rights."[43] Section 211(3), read together with sections 30, 31 and 39(2) of the final Constitution recognises African law as a primary source of law in South Africa sharing equal status with the common law. It provides that the court must apply African law when it is applicable subject to the Constitution and any legislation specifically dealing with it.[44] These provisions, with subsequent illuminating remarks from Constitutional Court bench are evidence of the Constitutions' commitment to cultural diversity. Sachs J in *Christian Education South Africa v Minister of Education* noted that:

> "The presence of section 31 of the Bill of Rights may be understood as a product of the two-stage negotiation process resulting in the adoption of the final Constitution, in which one of the concerns was how the community rights could be protected in a non-racial parliamentary democracy based on universal suffrage, majority rule and individual rights. Constitutional Principle (CP) XI declared that the diversity of language and culture should be acknowledged and protected and conditions for their promotion encouraged."[45]

One cannot speak of the judicial application of African law without mentioning the most controversial case to this end - the case of *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* (hereinafter referred to as the *Bhe case*). The court in this case held that section 23 of the BAA and its regulations regarding male

[43] Ntlama (note 29 above) 15.
[44] Constitution of the Republic of South Africa, 1996.
[45] 2000(10) *BCLR* 1051 at para 24. See also Ntlama (note 25 above) 20.

primogeniture as it applied in African law was unconstitutional.[46] The basis of the court's reasoning was that the rule of male primogeniture discriminated unfairly against women and children born out of wedlock.[47] The court in this regard considered the idea of developing new rules of African law in order to harmonise it with the Constitution and suggested that in the interim, a temporary regime was to be adopted to regulate intestate estates of African persons until the legislature was able to provide a more amicable solution.

The "solution" as provided for by the legislature was the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (hereinafter referred to as RSCA). The RSCA read together with the Intestate Succession Act 81 of 1987 provides that the surviving spouse and all the deceased's children are all entitled to inherit from the deceased's estate. This position is substantially different from the concept of who may inherit in terms of the African family structure. Sibanda argues that these statutes have gone a long way from reforming African law to now closely resembling their common law counterpart. He further adds that there is now little procedural difference between common law and African law when it comes to succession.[48] Ntlama, in her analysis of the Constitutional Court judgment of *Shilubana v Nwamitwa*, correctly points out that though the Court "appears to have developed the customary law of succession of women to traditional leadership roles by enforcing the right to gender equality; it did so without considering the implications this would have on the identity of the particular indigenous society."[49] Whilst women empowerment is encouraged, it is, in fact, to be celebrated. It is presumptuous to assume that African law would not have arrived at the same conclusion had the concept of women empowerment not been allowed to develop

[46] 2005 (1) SA 580 (CC). Sibanda, 'When is the past not the past? Reflections on customary law under South Africa's constitutional dispensation' *Human Rights Brief* (2010) 17(3) at 5, correctly points out the core challenge facing the development of African customary law in both its legislation and application in the judiciary. He notes that it is not the idea of its reform that is questionable but rather the legislatures alternatively the Courts tendency to substitute common law rules to resolve a dispute geminating from customary law and terming this substitution a reform of customary law.

[47] The customary law rule of primogeniture dictates that the eldest male descendant stood to inherit the estate of their deceased male relative to the exclusion of all females including the wife.

[48] Sibanda, (note 37 above) 5.

[49] N Ntlama, 'An Analysis of the Constitutional Court judgment of *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC)', (2009) *Stell LR* 333-356 11.

organically. This alone denotes the obscurity of a noble idea being rejected because it is too far removed from the reality that which currently persists in African law.

The court in *S v Acheson* described the South Africa's legal system as "a mirror reflecting the natural soul, the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government."[50] It is contended that whilst this may be true on paper, South Africa's essentially dualist legal system has remained unequal throughout the constitutional era. In legislation this is evident from the repugnancy provision and the consequences of mutual exclusivity of civil and African marriages. It remains that whilst African law is now formally recognised as a system of law equal to that of the common law, the reality, as pointed out by Sibanda is that "African customary law was and is still subordinated to the position of a tolerated but unloved stepchild." The remnant of this lowly position is seconded by Ntlama who points out that "the application of the Bill of Rights as entrenched in section 8(3) of the Constitution limits the development of the values of the new constitutional dispensation to common law".[51] Ntlama regards the notable exclusion of African law in this provision as a reminder of its former status of being regarded as nothing more than the poor cousin of common law.[52] Whilst the development and empowerment of women cannot be faulted, it remains presumptuous to assume that African law would not have developed to this extent on its own. This stance by the court, whilst not being altogether incorrect, creates the unnecessary likelihood of the development being rejected because it is unfamiliar in the lives of those it seeks to govern. It is evident that no opportunity was granted to African law to develop its own mechanism to solve a newly exposed deficit in its own law.

[50] 1991 2 SA 805.
[51] Ntlama (note 29 above) 32.
[52] T Nhlapo, in '*Judicial function of traditional leaders: A contribution to restorative justice?*' (Unpublished paper presented at the conference of Association of Law Reform Agencies of Eastern and Southern Africa Vineyard Hotel Cape Town 14-17 March 2005) likens the unequal relationship between common law and African customary law with that of an older brother (in reference to the former) and the poor cousin (describing the latter).

This continued subordinate position is perpetuated by the judiciary's tendency to use common law rules to resolve African law disputes. Ntlama submits that the court's failure to ascertain the "genuine rules of customary law" as they are practiced in the community in which they are alleged to exist and to apply them to resolve African disputes has contributed to the "marginalisation and neglect of customary law as a legal science."[53] It is agreed that a rule cannot, in the absence of a thorough investigation confirming its practice and the context in which it exists, be declared inconsistent with the Constitution. The establishment of the authenticity of a rule thus precedes the test of constitutionality. Lesetedi JA, in the Botswana case of *Ramantele* also recognised and acknowledged that given the adaptability of African law to changing circumstances, it would prove difficult to "ascertain a firm and inflexible rule of African law for the purpose of deciding upon its constitutionality or enforceability".[54] It is clear that those wishing to rely upon an African law rule must first prove that the rule does in fact exist. Furthermore, it must be established that the rule is not repugnant to the Constitution or any legislation specifically dealing with African law.[55] Where the rule is found lacking in this regard, it should be developed or struck down to the extent of its inconsistency with the Constitution.

The court's use of common law rules to resolve African law disputes is a failure by the bench to acknowledge and thus give due respect to the liberation struggle for which many fought and died to bring Africans (and ultimately their law) into recognition. This includes, but is not limited to, respecting the identity, values and laws of Bantu ethnicities.[56] The judiciary's uncommitted attitude to ascertaining the "living African law" as it applies in its respective indigenous societies, in favour of the "official law"

[53] Ntlama (note 10 above).
[54] *Ramantele v Mmusi and Others* (CACEB- 104- 12) 2013 BWCA (3 September 2013). See also C Rautenbach, 'A family home, five sisters and the rule of ultimogeniture: Comparing notes on judicial approaches to customary law in South Africa and Botswana. 'African Human Rights Law Journal, Vol 16n1.Pretoria 2016.
[55] The court in *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) at para 54 laid down evidentiary rules for proving customary law. These rules include the calling of individuals living under customary law, advisors of traditional leaders and customary law experts.
[56] The Preamble declares that the Constitution is intended to honour those who suffered for justice and freedom in the land and give respect to those who have worked to build and develop the country by acknowledging all those who live in it, united in diversity.

developed during apartheid has divorced African law from its subjects and has put African law's survival at risk. The added harm to this growing problem is the court's tendency to term the substitution of African law with common law as a reform of African law.[57] This indirect discrimination of African law has not only threatened the development of African law but has alienated a source of law which can "amass a wealth of experience and resource in judicial reasoning."[58]

In the light of the constitutional court's recent decisions relating to African law, one wonders why, if it is that African law is so highly regarded, that its contribution to the general framework of the law is met with such resistance. This resistance, Ntlama reasons, begs the question of whether the Constitution has recognised "customary law out of genuine respect for indigenous cultures" or whether such recognition was merely intended to placate the African nation into believing that the constitutional dispensation has transformed the constitutional court in the resolution of African law disputes.[59] Ntlama correctly concludes that the Constitution, as the supreme law of the Republic, is tasked with the protection of African law rules.[60] Sachs J endorses this view in *Christian Education* by arguing that:

> "CP X11 stated that collective rights of self-determination, in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations should be recognised and protected…(they) go on to emphasize the protection to be given to the members of communities united by a shared language, culture or religion."[61]

Sibanda proposes that the most suitable way of remedying the injustice done to African, law is to engage it on its own terms rather than replacing it with laws that are culturally disconnected from those who are subject to it.[62] This position finds favour with Ntlama

[57] Sibanda (note 37 above) 6.
[58] Ntlama (note 10 above).
[59] Ntlama (note 29 above) 26.
[60] Ntlama (note 29 above) 27.
[61] *Christian Education* (note 45 above) at paras 22 and 23.
[62] Sibanda (note 37 above) 5.

who adds that the "values of customary law need to be recognised and developed within their context in the framework of the new constitutional dispensation."[63] Chanock also endorses this view and argues that closing off avenues for the development and expression of customs closes off an important way of democratising the legal system.[64]

It is argued that the result of understanding African law within the community in which an African law rule is alleged to apply, will have the effect of marrying official African law to the daily practices of those subject to it. To do this, the legislature and consequently, the judiciary, must then abandon their preference for the certainty apparently offered by the historical version of African law (alternatively the elusive stability of the common law) in favour of the continually changing custom when faced with disputes related to Africans. The recent Constitutional Court case of *Mayelane v Ngwenyama* provides affirmation of this by providing guidelines for the future interpretation of African law. It also supports the position that "African law must be understood on its own terms and not through the lens of common law."[65] This position will indeed find acceptance from African law advocates who have argued for nothing less since the inception of the recognition of African law in the South African Constitution.[66]

In a report submitted by Professor Thandabantu Nhlapo, *"Report on Appropriate Rituals"* in respect to the North Gauteng case of children switched at birth, he advises a non-prescriptive approach in dealing with rituals that must be performed by the parties involved.[67] This approach is one in which the communities themselves are allowed to decide what customs and rituals are appropriate for them. Professor Nhlapo argues that although the best interests of the child standard is often at times seen as a trump over customary law, it is a generalisation to assume that in African law a child's best interests are irrelevant. He argues rather that the presumption is that the best interests of the child will usually be served by "belonging." Moyo agrees with this presumption by similarly adding that family life and African law specifically involve a balancing of

[63] Ntlama (note 49 above) 35.
[64] Chanock (note 24 above) 57.
[65] Rautenbach (note 54 above) 172.
[66] 2013 (4) SA 415 (CC).
[67] *OR Tambo* (note 5 above).

competing interests whereby a child's best interests are of primary importance but are not paramount.[68]

Conflicts of law are inevitable given the type of dual system of law which operates in South Africa. The African customary law rules outlined in the preceding pages have only been briefly dealt with by the general law of the land. Apart from the landmark decision in the *Bhe* case (which argued the unconstitutionality of primogeniture as applied in African law) the courts have not shown any willingness to develop African customary family law. As such, there is limited literature available on African family law and children's rights pertaining to this particular aspect of the law.

1.2 Aims and Objectives

This study seeks to interrogate the principle of the best interests of the child in relation to African children switched at birth. Emanating from this, the following three questions are addressed: how are parental rights acquired and terminated in African law? How would the issue of children switched at birth best be solved using African values and rules? And whether this proposed resolution is compatible with the Constitution and the Children's Act?[69]

These questions are answered with the following conclusions in mind:

(a) the rules of official African law are corrupt, inauthentic and lacking in authority or illegitimate,[70]
(b) living African law would find in favour of lineage (epistemology) and naturally require that the children be returned to their biological parents and finally that,
(c) the use of African dispute resolution is preferable in resolving matters of the African children switched at birth.[71]

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[68] Moyo (note 23 above) 42.
[69] Customary law, African law, African indigenous law, native law and black law are used interchangeably.
[70] Costa 1998 *SAJHR* 525, 534. Id at 440 also points out that the oral tradition of African law makes it difficult to find credible jurisprudential sources and materials which have remained uncorrupted.
[71] Biological parent: refers to a child's birth parent as a result of a contribution of biological material (Children's Act Commentary). Parent: in relation to a child, includes the adoptive parent of a child, but excludes-

1.3 Methodology

The methodology employed in this work was that of desk-top research. Therefore legislation and case law *inter alia* is utilised as its core sources for its literature. These were evaluated critically in order to present recommendations in a clear and logical manner.

There was no collection of data or interviews performed in this work. This research analyses South African legislation that is relevant and generally applicable to African customary law and children. It examines how these instruments regulate the acquisition of parental rights and responsibilities of children switched at birth. This was done in order to provide guidelines on how the courts should apply and interpret African customary law in relation to African children switched at birth.

1.4 The Theoretical Framework

The thesis relied mainly on legislation and case law associated with children's rights, and the core principles of African customary law. The researcher undertook a doctrinal legal research method. This method involved finding the law, analysing it and surmising the logical reasoning behind it.[72] It used a mixture of rights based approach and normative approach as its theoretical framework. Thus, the Children's Act and African customary law literature served as the conceptual basis for this work.

(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 fertilization; and
(c) a parent whose parental responsibilities and rights in respect of a child have been terminated.

[72] Legal Research Methodology, available at http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/09._research_methodology/02._legal_research/et/8149_et_et.pdf, accessed on 26 November 2018.

The rights based approach is embedded in universal norms and standards. It focuses on process and outcome, emphasizes realizing rights, and recognizes individual and group rights as claims towards legal and moral duty bearers. It empowers individuals to claim their rights and focuses on structural causes and their manifestations.[73] As such, it lends itself to some level of generality. As the research focuses on the lives, traditions and law of a specific grouping, African customary law is the point of departure for the use of this approach. This ultimately results in yielding different results than that achieved if should one opt to use the best interests of the child principle, as contained in the Children's Act.

The normative approach is equally valuable to this work in that it places an emphasis on building communities.[74] The recognition of customary law as a primary source of law in South Africa and the focus on the development and advancement of African customary law justified the use of the normative approach herein.

1.5 An Overview of the Chapter Breakdown

This study is structured so that the first Chapter introduces the issues that the study deals with and the background which these issues are based upon. The second Chapter discusses the construction of a family in African societies and the parent/child relationship in African law. The third Chapter discusses the paramountcy principle in the Children's Act emphasising its judicial constitutional interpretation. It determines the compatibility of the African law approach to children's rights with the Constitution and the Children's Act. It also considers the possibility of reconciliation between the African law approach to children's rights and the paramountcy principle. Chapter four concludes this study by recommending on how family mediation as used in African law can be utilised as an alternative to a lengthy court battle to solve custody disputes of African children switched at birth.

[73] J Kirkemann Boesen & T Martin , '*Applying a rights based approach: An inspirational guide for civil society,*' The Danish Institute for Human Rights, 2007 p9.
[74] *Ibid.*

1.6 Conclusion

This study argues for consideration and accurate application of African law in judicial reasoning which is necessary towards achieving what is in the best interests of the African child born in a culturally and religiously diverse South Africa. It was argued that doing so would consequentially affirm African laws legitimacy as a primary source of law for Africans in South Africa. This study shall be of use to those that are affected by this traumatic experience in the following respects:

- Parents awarded care will receive insight on the importance of involving the non-care giving parents in the lives of the child;
- Counselors will understand the possible strain (legal and otherwise) each parent is under and therefore become better equipped to assist the parents and children alike in accepting the courts' decision- whichever that might be;
- The court will gain insight of the African laws position in matters involving children thereby interpreting and applying it correctly in instances where parties chose to be bound by it;
- The growth of the debate on the application of African law will be advanced to reflect the realities of the majority of those subject to it in South Africa.

Chapter Two

African Law and Children's Rights: Are they consistent?

2.1 Introduction

> "The development of customary law in this matter is consonant with promoting the best interest of the minor child as envisaged in section 28(2) of the Constitution of the Republic of South Africa Act No 108 of 1996."[75]

African law as described in Chapter One of this study is indigenous law that exists amongst various African communities and is generated and developed by the society in which it exists. Chapter two deals with African family law and children's rights in particular. It discusses the meaning of parenthood, adoptions and appropriate rituals using the lens of African law. The rationale for doing so is to draw a conclusion on whether African law is consistent with children's rights as articulated in section 28 of the Constitution. Alternatively, if the interests of children as understood in African law are so materially different from section 28 that the two could be regarded as foes.

The primary purpose of this Chapter two, therefore, is to analyse how parental rights are acquired and terminated in African family law. The Chapter further emphasizes the importance African family law places on lineage.

2.2 Parenthood – the African Child's Reality

A parent, is defined as "one who has begotten or born offspring."[76] This definition, however, is limited in that it only caters for biological parents. In contrast, the African society's definition contains an expansive notion which states that a parent, most

[75] *Maneli v Maneli* 2010 (7) BCLR 703 (GSJ) at para 25.
[76] Oxford Concise Dictionary. See also RT Nhlapo, 'Biological and social parenthood in African perspective: the movement of children in Swazi family law' in J. Eekelaar and P Sarcevic, *Parenthood in Modern Society* (1993) 35.

particularly in African families, goes beyond biological ties.[77] These parent-child relationships include any one of the following circumstances: adoption, fostering, ritual co-parenthood and step parenthood.[78] Nhlapo marks the sole characteristic of these relationships as the "movement of children within or without a kinship group to be placed, temporarily or permanently with someone other than the biological parent."[79]

The word "parent" then, in most African societies, ascribes to it a more extended meaning than that of a nuclear family. This is because the family is often a unit that consists of "up to three generations of kin. Thus, a child in these circumstances may grow up regarding many individuals as mother, father and the likes."[80] It is in this regard, therefore, that Moyo asserts that concepts such as aunt, uncle and cousin do not necessarily exist in African families.[81] This family structure amongst African societies is loosely described by Esther N Goody in her work on the Gonja of northern Ghana as pro-parenthood.[82] Pro-parenthood, most commonly referred to as social parenting, relates to those "pro- parental institutions where the roles of parenthood are split, delegated or transferred while the link between the child and the biological parent remains intact."[83] This definition of social parenting must be differentiated from that of a non-biological, nurturing or psychological parent all of which refer to people who have no blood relation to the child but have raised the child and served as the child's guardian.

It is important to note at this juncture that while African societies favour social parenting as described formally, social parenting in the context of a non-biological parent who has no blood relation to the child is frowned upon. This is mostly a result of the fact that the

[77] Moyo (note 23 above) 40.
[78] EN Goody, 'Kinship fostering in Gonja: deprivation or advantage?' in Mayer (ed) *Socialization: The Approach from Social Anthropology London* (1970) 331.
[79] RT Nhlapo, 'Biological and social parenthood in African perspective: the movement of children in Swazi family law' in J. Eekelaar and P Sarcevic, *Parenthood in Modern Society* (1993) 35-50.
[80] A Campbell, 'Conceiving Parents Through Law' (2007) 21(2) *International Journal of Law, Policy and Family* 242- 273.
[81] Moyo (note 23 above) 40.
[82] Goody (note 75 above) 335.
[83] *Ibid* 335.

practice of "living African law" varies from one traditional society to the next.[84] Many diverse ethnic groups exist in South Africa and, therefore, there are many indigenous laws. Pieterse accepts this concept and argues that the judiciary's tendency to view all African law as largely similar promotes an idea of homogeneous ethnic groupings of black people in South Africa which, in his view, is vague and inaccurate.[85] Furthermore, it is argued that such a view manipulates and justifies the "segregationist" policies of previous governments.[86]

As such, the only form of parent-child relationships that is deemed most acceptable and which commonly exist amongst African societies, are those which take place within the extended family. Formal adoptions are a form of legally acquired "biological" parenthood since they involve the extinction of parental rights on the part of the biological parent and the alienation of them permanently to the adoptive parent.[87] These adoptions, though prevalent in contemporary South African society, commonly take their form from legislation, *inter alia*, the Children's Act. This, however, does not mean that adoptions that are not formalised in accordance with the prescribed formalities (as dictated to by the Children's Act) cannot be recognised in our law.

2.3 The Existence and Recognition of African Adoptions

As mentioned earlier, different African ethnic groups exist in South Africa and there is, therefore, a variety of laws with very similar manifestations. This is evident in the case of *Maneli v Maneli*.[88] Here, the court explained that "customary law adoption is widely practiced by Xhosas in the Eastern and Western Cape Provinces of the Republic of South Africa."[89] Briefly, the couple in these proceedings decided to adopt in terms of African law an eight month old female child whose biological parents were deceased. Xhosa traditional rites and rituals were performed to proclaim and signify to the world

[84] M Pieterse, 'It's a black thing: Upholding culture and customary law in a society founded on non-racialism' 2001 *SAJHR* 364.
[85] *Ibid 364*.
[86] *Ibid* 367.
[87] Bennet (note 36 above) 365; SM Poulter, *Family Law and Litigation in Basotho Society* (1976) 237.
[88] *Maneli* (note 72 above) 5.
[89] *Maneli* (note 72 above) 9.

that the adoptive parents have formally accepted parental responsibility for the minor child. Following the breakdown of the parties' marital relationship, a dispute in respect of the maintenance of the minor child arose. The court was called to decide whether the adoptive father had a legal duty to maintain the child since the couple in the duration of their marriage and subsequent customary adoption of the child had not regulated the adoption in terms of legislation. In short, the court found that "a child adopted in accordance with Xhosa customary law should be deemed to be legally adopted in terms of the common law and the Constitution of the Republic of South Africa," thus finding the adoptive father liable for maintenance.[90] Further in *Kewana v Santam Insurance Co Ltd* the court found that a duty of support derived from an African law adoption was enforceable and that the child was entitled to compensation for a loss of support resulting from the negligent killing of the child's adoptive father.[91] The court's willingness to accept and recognise the existence of African law adoptions was also seen in the case of *Metiso v Padongelukfonds*.[92] The court held that an African law adoption was valid for the purposes of the children's claim for loss of support against the Road Accident Fund.

Whilst the development and application of African law with regard to adoptions have been observed, the question that remains to be answered is, what gives effect to a customary adoption. The court stated in the *Maneli* case that the adoption of the minor child was done after the performance of Xhosa traditional rites and rituals. This suggests that it is possible to put into effect a customary adoption through the performance of appropriate rituals that satisfy the requirements of African law as prescribed by the society in which they exist and are applied.

[90] *Maneli* (note 72 above) 12.
[91] 1993 (4) SA 771 (Tka).
[92] 2001 (3) SA 1142 (T).

2.4 Appropriate Rituals

The Constitution of South Africa promotes cultural diversity in the nation. It does this by guaranteeing the rights to culture and cultural observances.[93] As mentioned previously, these rights are recognised or conferred to the "extent that they are consistent with the bill of rights."[94] The African law recognised by the Constitution as an equal component with others in the South African legal system, is the "living African law" of communities as manifested in their daily practices as opposed to the official African law developed during the apartheid era.[95] This requirement thus makes it crucial that the court or any tribunal purporting to apply African law ascertain the content of African rules by leaning towards textbooks, cases and expert opinions. The South African Law Commission Report on Conflict on Laws also suggests that assessors from communities in which a rule is alleged to apply be appointed for this purpose.[96]

Legislation constitutes appropriate rituals to be performed to put into effect an African adoption as seen in section 3(1)(b) of the Customary Marriages Act, and refrains from prescribing detailed procedural observances whenever an African law criterion has to be fulfilled. This section of the Customary Marriages Act merely prescribes that "the marriage be negotiated and entered into or celebrated in accordance with African law." This circumvents prescribing uniform rules for all indigenous ethic groups and thus gives room to each community and ethnicity to marry according to their own rules. It is Nhlapo's submission that this non-prescriptive approach found in legislation provides a good example of how one could resolve the issue of appropriate rituals to be performed to put into effect an African adoption. In the absence of any guidelines as to what

[93] Section 15(3), section 30, section 31, section 211 of the Constitution of the Republic of South Africa, 1996.
[94] Section 39(3) of the Constitution of the Republic of South Africa, 1996. See also (note 25 above) 16.
[95] *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC). The legal system of the country is dual in its nature, consisting of Roman Dutch law and African South African law. Both of these systems of law are at the mercy of the Bill of Rights which dictates that when interpreting them (African law or common law); the court must promote the spirit, purport and objects of the Bill of Rights.
[96] South African Law Commission *Report on Conflict of Law* (Project 90) September (1999).

constitutes the necessary appropriate rituals required to put into effect such an adoption, one is left with no other alternative but to concede and accept Nhlapo's argument. Nhlapo's argument is also in line with the reasoning of the *Alexkor* judgement which held that the African law recognised by the Constitution is the living African law of communities as revealed by their day to day practices.[97] Thus, Nhlapo argues that the most significant aspect of African family law is the communal or group ethic which pervades kinship and that this attitude continues to underpin contemporary African law (regardless of their origins) in the needs of pre-industrial society.[98] Nhlapo uses the idea of a marriage as an alliance between two kinship groups for the purposes of realising goals beyond the immediate interests of the particular wife and husband.[99] As such, African law continues to exhibit a marked loyalty to the communal ethic and group solidarity.

One applauds the development of African law in this respect, as it dismisses the ideology that African law has remained static since its conception. Whilst it appears at first glance that the "paramountcy principle" in the Children's Act trumps African law where the rules of affiliation, custody and guardianship are concerned, this is not the case. In African law, the "best interests of the child" are not treated as irrelevant or subservient to any other competing interests. Rather, there is a presumption (due to the communitarian nature of African societies) that the child's individual interests are inherently linked to the interests of the family and society at large and that these interests are best served by a sense of "belonging."[100] African law, when viewed through this lens, is not at war with children's rights but rather better contextualises human relationships by adopting a family-based approach to an otherwise individualistic principle.[101] This understanding of African family law in relation to how it interprets children's rights thus answers the question of whether African law is compatible to

[97] Alexkor (note 92 above).
[98] RT Nhlapo, 'Family law and women's rights: friends or foes?*'Acta Juridica* 1991: 135-146.
[99] *Ibid* 138.
[100] Nhlapo (note 76 above) 35.
[101] A Moyo, 'Reconceptualising the paramountcy principle: Beyond the individualistic construction of the best interests of the child*'* 2012 *AHRLJ* 142.

children's rights. When viewed through the lens described, African law is indeed consistent with children's rights.

2.5 Conclusion

It is thus evident that African society extends the meaning of parenthood beyond the scope of the European nuclear family. Furthermore, the assimilation of children into the family is a grave concern in African family law. Though African family law commonly exercises social parenting, this is mostly limited to where the "roles of parenthood are split, delegated or transferred whilst maintaining the link between the biological parent and child."[102] As seen above, this rule is not without exception as African adoptions do exist and have been acknowledged by the courts. As the African law interpretation of children's rights has been dealt with extensively in this Chapter, the next Chapter explores the constitutional interpretation and framework of the same.

[102] Goody (note 75 above) 333.

Chapter Three

The Best Interests of the Child: The Constitutional Framework

3.1 Introduction

> "It is important to avoid an unfortunate but prevalent tendency to put customary law and the constitutional principle of equality on a collision course, i.e. to say that for the one to live, the other must die, or to use a less dramatic metaphor, if customs triumphs, equality must fail [or vice versa]. I think this is a profoundly mistaken view. Our Bill of Rights is not based on a hierarchy of rights, nor is it an assemblage of categorically defined rights sealed off from each other. Rather it contemplates the interdependence of mutually supportive rights."[103]

This Chapter discusses the history of the rights of children in the South African context. To this end, section 28 of the Constitution and its subsequent domestication into national legislation are evaluated. Thus, the scope of this Chapter entails the interpretation and application of the best interests of the child standard using the Constitution and the Children's Act as its yardstick. It also examines whether this interpretation of children's rights as articulated in the Constitution, may be amalgamated with African law's interpretation of the same to reach consensus.

3.2 The Interpretation of Section 28

Section 28 of the South African Constitution sets out a montage of rights which provides for the protection of children.[104] This section, *inter alia*, gives children the right to a

[103] Investigating Directorate: Serious Economic Offences v Hyuandai Motor Distributors (Pty) Ltd; in re Hyuandai Motor Distributors (Pty) Ltd and Others v Smit NO and Others (2000) ZACC 12, 2001 (1) SA 545 (CC) 2000 (10) BCLR 1078 (CC) at para 21.

[104] Johan de Waal & Iain Currie, Bill of Rights Handbook 6th ed. (2013) 599.

name and nationality at birth. It also provides for the right to family or parental care.[105] In 2005, the legislature enacted new legislation in the form of the Children's Act 38 of 2005, which set out the rights of children and the rights and responsibilities of parents and other duty bearers in respect to those rights.[106] Thus, when interpreting children's rights it is important to strike a balance between a child's need for autonomy and his or her need for protection. Consequently, parental rights are derived from children's need for protection and thus decrease as the child gets older.[107] This principle is aptly provided for by the existence of section 36 of the Constitution. This section encapsulates the tension present in the rights contained in the Bill of Rights which

[105] Section 28(1)(a)-(b). Care: in relation to a child, includes, where appropriate-
(a) within available means, providing the child with:
- a suitable place to live
- living conditions that are conducive to the child's health, well-being and development; and
- the necessary financial support
(b) safeguarding and promoting the well-being of the child
(c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
(d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in chapter 2 of the Children's Act
(e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development
(f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development
(g) guiding the behaviour of the child in a humane manner
(h) maintaining a sound relationship with the child
(i) accommodating any special needs that the child may have, and
generally, ensuring that the best interests of the child is the paramount concern in all matters concerning the child.

[106] Parental rights and responsibilities: includes the responsibility and the right to care for the child, to maintain contact with the child, to act as guardian of the child and to contribute to the maintenance of the child. Other legislation governing children and their rights include the South African Schools Act 84 of 1996; the Criminal Law Amendment Act 32 of 2007 and the Child Justice Act 75 of 2008.

[107] The responsibilities and rights mentioned herein are contact and guardianship. Contact: in relation to a child, means-
(a) maintain a personal relationship with the child, and
(b) if the child is with someone else-
- communication on a regular basis with the child in person, including-
- visiting or being visited by the child
- communication on a regular basis with the child in any manner, including-
- through the post or any other form of communication
Guardian: a parent or other person who has guardianship of a child who, administers and safeguards the child's property interests, assists or represents the child in administrative, contractual and other legal matters and gives alternatively refuses to give consent required by law in respect of the child.

provides that "individual constitutional provisions may not be interpreted in isolation but in light of the Constitution as a whole."[108]

In 1995 South Africa ratified the United Nations Convention on the Rights of the Child subsequent to which in the year 2000, it ratified the African Charter on the Rights and Welfare of the Child. These international instruments were then domesticated into national law by the Children's Act. This fact notwithstanding, Skelton asserts that the Constitutional Court has found that some "post-constitutional statutes" have failed to measure up to the standard as set out by section 28.[109] The Constitutional Court has thus stressed that section 28 and, indeed, domestic legislation and policies alike must be interpreted in such a way that is seen to be an expansive response to South Africa's obligations. This is consistent with the international instruments such as the United Nations Convention on the Rights of Child to which it is a party.[110]

3.3 The Judicial Application of the Children's Act and Section 28 of the Constitution

As discussed in Chapter one of this study, the best interest of the child is an established common law principle that is articulated in our Constitution and national legislation. International law also obliges state parties to adhere to this principle in matters where children are involved.[111] Whenever the best interests of the child are to be applied, many factors, as contained in the Children's Act, are considered.[112] Over the years the

[108] C Rautenbach, 'A family home, five sisters and the rule of ultimogeniture: Comparing notes on judicial approaches to customary law in South Africa and Botswana' (2016) *African Human Rights Law Journal* 16.
[109] This is evident in Centre for Child Law v Minister of Justice and Constitutional Development 2009 (6) SA 632 (CC) where the court held section 51 of the Criminal Procedure Amendment Act infringed children's rights to detention as a measure of last resort and for the shortest period of time as guaranteed by section 28(1)(g) of the Constitution.
[110] *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) 29.
[111] Article 3(1) of the CRC, 1987 describes the best interests of the child as a primary consideration. The ARCWC in article 4(1) places a higher onus in that it states that the best interests of the child must be the primary consideration. The South African Constitution however has raised the bar to that of paramountcy
[112] Section 7(1) a-n of the Children's Act 38 of 2005.

judiciary has developed guidelines on how the best interests of the child are to be applied in practice.

In *French v French* the court set out four categories which must be considered when deciding where a child should be placed in keeping with the best interests of the child standard and these categories are:

> "(a) The preservation of the child's sense of security.
>
> (b) The suitability of the care giving parent.[113]
>
> (c) The material considerations of both parents.
>
> (d) The wishes of the child." [114]

It is notable, therefore, that whom the child should stay with is located within an important and complicated lacuna within family law. The legal mantra on the best interests of the child, as contained in the abovementioned international instruments and family legislation, is the overriding standard in deciding this issue. As previously discussed, all matters concerning the awarding of parental rights and responsibilities are within the High Courts' and Children's Courts' domain and such decisions are made in the light of this standard.

In South Africa, such rights are generally automatically acquired by parents by virtue of biology.[115] Below is a brief comparative study of a history of cases bearing markedly

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[113] This is to be established by enquiring into the fitness of the parents character, religion, language and the fitness of the parent to guide the moral, cultural and religious development of the child.

[114] 1971 (4) SA 298.

[115] As conferred by the operation of section 19. The only exception (though not relevant in this case) being where the mother is a child herself. Further unmarried fathers do not automatically acquire full parental rights and responsibilities and only do so in terms of section 21 of the Children's Act which provides that unmarried biological fathers acquire full parental rights and responsibilities in the following circumstances:

a) If at the time of the child's birth he is living with the mother in a permanent life partnership; or
b) If regardless of whether he has lived or is living with the mother-
    i) Consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law
    ii) Contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

similar facts with the exclusion of the race and culture of the children involved. In the two South African cases, an analysis is made on how the court has previously dealt with the issue of children switched at birth prior to the promulgation of the Constitution and the Children's Act. The American case dealt with herein highlights the similarities and differences on the approach of the courts on the issue of the rights of all affected parties in cases of children who have been switched at birth.

A) South Africa

Petersen en 'n Ander v Kruger en 'n Ander[116]

In this matter, the children were negligently switched shortly after birth and the applicants sought the court to have their biological child returned to them. The court held that although the best interests of the child were most important, the rights of the parents may not be disregarded. It held that the personal characteristics of the applicants, their family life, their domestic circumstances and their morals and values constituted no threat to their biological child. The court further held that the child would not suffer any permanent damage because of granting the application which was subsequently successful.

Clinton- Parker v Administrator, Transvaal Dawkins v Administrator, Transvaal[117]

On the 17th day of February 1989, the plaintiffs were admitted to the maternity ward in Nigel Hospital and gave birth to boys. Because of the negligent conduct of the staff acting within the course and scope of their employment, the children were switched. Neither of the parents were aware of this fact until or about the 26th day of November 1990. They, amongst themselves, decided and agreed not to return the children to their natural parents and only approached the court for a claim of damages against the hospital.

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iii) Contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

[116] 1975 (4) SA 171 (C).

[117] 1996 (2) SA 37 (W). A valid case for civil damages based on delict or alternatively breach of contract exists in this matter but however exceeds the ambit of this work and will thus not be discussed.

B) United States of America

Twiggs v Mays[118]

During the month of July 1988, the Twiggs discovered that the child in their care, "Arlena" who subsequently passed because of a heart defect was not their biological daughter and that the Mays had gone home with their biological child, Kimberley. A series of blood tests confirmed that Kimberley Mays was in fact the Twiggs' biological daughter and the parties agreed to a visitation plan and schedule. Following a breakdown in the parties' relationship, the Twiggs sought to enforce visitation rights with Kimberley and have their legal status as parents recognised. The court found that it was in the child's best interest to maintain the legal status quo thereby Kimberley remained in the care of her psychological father.

3.3.1 A Synthesis of the Peterson, Clinton and Twiggs cases

It is important to juxtapose and analyse these three cases as they are the same as the current case before the North Gauteng High Court.[119] The rationale for doing so is to determine whether a similar conclusion will be reached. The *Petersen* case was decided prior to the final Constitution and the enactment of the Children's Act. This distinction is important for the reason that the paramountcy principle contained in both the Constitution and the Children's Act imposes a stricter requirement than that which applies in the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child (hereinafter referred to as UNCRC and ACRWC respectively) all of which were applicable during the time this case was decided.[120]

The above international instruments render the interests of the child a "primary" consideration in all matters concerning children. The use of the word primary as contained in the UNCRC and ACRWC suggests that the child's interests are ranked first

[118] 543 So.2d 241- 1989.
[119] *OR Tambo* (note 7 above).
[120] United Nations Convention on the Rights of the Child, 1989 and African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1990 respectively.

in the order of principal importance in matters concerning children whilst the ordinary meaning of the word paramount suggests that the interests of the child must be considered above anything else. In *Petersen* the court held that whilst the children's best interests were most important, the rights of the parents could not be disregarded. This balancing of the rights is indicative of the court's recognition that the rights of children switched at birth cannot be interpreted in isolation to the rights of the parents affected by this uncommon situation. Thus, the approach adopted in the *Petersen* case considers the primary interests of the child in a meaningful way without unduly obliterating the rights of the parents. Whilst the return of children switched at birth to their biological parents was not an issue before the court in the *Clinton* case, the court's omission to deal with it as the upper guardian of children and as a custodian of their rights furthered the rationale of the balancing of rights adopted by the court in the *Petersen* case. These two cases are in keeping with the principle that the rights of children switched at birth should not be interpreted in isolation but must give due recognition of other factors relevant in this regard.

The American case of *Twiggs,* however, is the most likely outcome of the present case before the North Gauteng High Court. In *Twiggs,* the best interests of the child were of paramount importance and little, if any, value was given to the rights of those who had birthed the child in question. Judgment in respect of the North Gauteng High Court case had not yet been handed down at the time this study was undertaken.[121] An order, however, dated 17 November 2015, ruled that the children were to remain in the care of their social parent.[122] The reasoning behind this order and the legal status of the parents (in respect of their biological child and the child in their care) will only be clear once judgment is released. However, it is evident that the child-centred approach to children's rights adopted by South African courts superimposes the best interests of the child over and above the parental rights and responsibilities of the biological parents of

[121] A number of attempts made by curator *ad litem* Ann Skelton (Centre for Child Law) to obtain judgment proved fruitless.

[122] Non-biological /psychological/social and nurturing parent: Refers to people who have no blood relation to the child but have raised the child and served as the child's guardian. 'The Medical Dictionary' available at *medical-dictionary.thefreedictionary.com/social+mother* accessed on 23 June 2016.

children switched at birth.[123]A child centred approach to children's rights as articulated above, is one which respects and values children. It involves considering the impact of decisions and processes involving children, whilst also seeking their input in relation to same.[124]

There are only two reported cases of children switched at birth in South Africa which have been mentioned briefly above.[125] It is worth noting that in both these cases the children were of Western descent. This is an important fact given the fact that the interpretation of children's rights jurisprudence (to its Western counterparts) could not be faulted. This new case, however, (as ordered on the 17th of November 2015) is a category of its own. The distinctive feature in this matter is that the parties involved are of African descent. This singlehandedly introduces an array of issues that fall squarely within the domain of African family law. Whilst much has been written on the topic of children's rights, little discussion has been led on the constitutional legitimacy of African law generally and children switched at birth in particular.[126]

In relation to the matter at hand, it follows then that NN acquired these rights concerning N as soon as she was born. Likewise, NS acquired same with Z as soon as he was born.[127] As these children were switched at birth, neither of these parents exercised these responsibilities and rights in respect to their own children. As such, they merely have *de facto* and not *de jure* rights and responsibilities to the child they currently live with. As argued in this study, it is the High Court (as the upper guardian of children) that needs to make an order to regulate the legal responsibilities and rights between the parents and children in this matter.

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[123] Heaton describes the child centred approach required in these individual cases as: "Everybody or person who has to determine the child's best interests in light of the individual child's position and the effect that the individual child's circumstances are having or will probably have on the child.'' (2009) 34(2) *Journal for Juridical Science* 9.

[124] R Sinclair, Participation in practice: Making it meaningful, effective and sustainable, Children and Society 2004(18) 2 108.

[125] Note 113 and 114 above.

[126] With the exclusion of the discussion of the rights of illegitimate children in intestate succession claims.

[127] In relation to the fathers of the children it is understood that neither of the fathers were married to the mothers at the time of their biological child's birth. It is further understood that neither was living with the mother in a permanent life partnership at the time of his biological child's birth. As such, both fathers' have no rights whatsoever to the child that resides with them as these children are not their *biological children* as required by section 21 of the Children's Act.

The High Court has the power to terminate, extend, suspend or restrict any or all parental rights and responsibilities. In the case of children switched at birth, it is arguably relatively easy for the court to simply grant parental rights and responsibilities to each parent in respect to the child currently in their care through the application of sections 23 and 24 of the Children's Act. This option, however, was excluded by the court for the following reasons: firstly, an order does not deal with issues emanating from intestate succession and secondly, it is doubtful that an order made under the Children's Act has any life-long effect. If one follows this reasoning, a mere declaration of parental responsibilities and rights would not fully protect the children involved.

Another possibility the court could consider in this instance would be that of adoption. This option, whilst most feasible because it solves the legal problems mentioned above, was also disqualified by the court because it seemed likely that under the current law, children switched at birth would not necessarily qualify as "adoptable children."[128]Another difficulty present with the option of formal adoption proceedings is found in section 231 of the Children's Act (persons who may adopt a child). This section makes it difficult for couples to adopt jointly if they are not spouses, life partners or co-habitants. This leaves the court with only one option which is to make an order for the recognition of the de facto adoption of the children.

As discussed in Chapter one, a *de facto* adoption is one where (as explained in the *Flynn* case) the parties enjoy a close enough relationship such that they ought to be considered parent and child. The *Flynn* case also refers to a decision in the High Court of American Samoa *(Estate of Tuinanau Fuinaono (Deceased) PR Nos 13-86 and 23-86, 10 November 1992)* in which a de facto adoption is defined as one which exists when:

[128] According to section 280(3) a child is adoptable if:

a) The child is an option and has no guardian or caregiver who is willing to adopt the child;
b) The whereabouts of the child's parents or guardian cannot be established;
c) The child has been abandoned;
d) The child's parent or guardian has abused or deliberately neglected the child or has allowed the child to be abused or deliberately neglected; or
e) The child is in need of a permanent alternative parent.

> ".....a descendant performs parental duties towards a child in his household and the child performs filial obligations in rerum exactly equivalent to a formally adopted child."[129]

Another concept similar to that of a *de facto* adoption that US law recognises is known as an "equitable adoption." Foot recommends it in the case of children switched at birth and notes that:

> "If a person is willing is to assume responsibility for support of a child and wants to be recognised as the parent, then under certain circumstances that person may be considered a parent who is entitled to receive custody or visitation rights. The alternative of equitable adoption gives both parents an equal chance to gain custody of the child and allows for a compromise of joint custody of the children. Equitable adoption provides the psychological parent an opportunity to act as an equitably adoptive parent. Using the theory of equitable adoption gives both the biological and psychological parents an equal chance to seek custody and visitation rights. Putting them on equal footing allows the court to bypass all the parental rights problems and go straight to the pertinent issue: the best interests of the child."[130]

The option of *de facto* adoption is desirable in this instance not only for its convenience but also because there is nothing in the Children's Act that expressly precludes informal adoptions from being recognised. Further to this, the use of this option was not only suggested by the *curator ad litem*, Dr Ann Skelton from Centre of Child Law but was also endorsed and accepted by the court in this matter.[131] Applying this option ensures that all the parties have full parental responsibilities and rights in respect of the children that they have raised and also provides that each parent has the right of contact (section 18(2) of the Children's Act) in respect of their biological child. Section 33 of the Children's Act was used to resolve the issue of parental responsibilities and rights because this section does not require that parties have full parental responsibilities and

[129] 2009 (1) SA 584 (C) at para 44.
[130] Foot (note 11 above) 338.
[131] *OR Tambo* (note 7 above).

rights in respect of a child. Furthermore, paragraph 14 of the final order of the court ensures that the therapeutic support and integration programme provided by the Child and Adolescent Family Unit continues until the parties agree that the service should cease. This programme allows for the following phases of treatment:[132]

The first phase provides for trauma counselling and support through the shock of the news of the baby swap. In the second phase the two mothers are carefully introduced to each other to facilitate a support approach to the two mothers. The third phase slowly introduces the children to the different mothers and facilitates the building of new attachment bonds with their biological mothers. The fourth phase involves the following possible care and contact permutations which entail that if the mothers elect to keep their current psychological children, contact with their biological children needs to be facilitated and supervised. Moreover, if the mothers elect to return their current children in favour of having their biological children, contact with their psychological children needs to be facilitated and supervised. Lastly, in the case of a care or contact dispute, the High Court needs to make a finding regarding parental responsibilities and rights. The fifth and final phase of the programme provides on-going monitoring and treatment of the children to manage the care/contact experiences for any future emotional issues that might arise as the children grow older. In addition to this is the parental and family therapy required for the parents and family as the children grow older.

3.4 Possible Reconciliation: African Law Approach to Children's Rights and the Best Interests of the Child

The colonial conquest of South Africa by the Dutch and the British has had long term devastating effects on Africans. These more than three hundred and fifty years of oppression cannot be ignored. Apartheid emphasised the differences between Europeans and Africans and encouraged the supremacy of the formers values. It is common knowledge that the European culture is individualistic in its nature whilst the African culture is characterised by its communalistic and kinship orientation. This

[132] *OR Tambo* (note 7 above). The order was given on the 17th of November 2015 and judgment has to date not been provided for by the court.

practice is best evidenced in the concept of *ubuntu* which Ndima describes as "embracing all the notions of universal human interdependence which encourage collective survival."[133] Readers are thus cautioned to consider African law against this understanding and not perpetuate the stereotype eloquently described by Ndima as one that "associates the West with progress and Africa with stagnation."[134]

There are different conceptions of family between western and non-western countries and these have important implications in understanding children's rights. It has been said that when it comes to custody and various child related issues, western law conceptualises custody, which is access to the child, in terms of an individual's right over his child. African law, on the other hand, conceptualises custody in terms of familial and transgeneral rights.[135] The preamble of the ACRWC acknowledges this by noting the importance of traditions and cultural values and reflecting on the conceptions of children's rights. It recognises the virtues of African heritage, historical background and values of African civilization and inspires the characteristics of the rights and welfare of the child and jurisprudential concepts such as *ubuntu* to reconceptualise African jurisprudence in its indigenous perspective.[136]

The aim of this study was not to challenge the applicability of the best interests of the child standard in South Africa, but rather to canvass it from an African jurisprudence perspective to determine the best outcome in the current case of African children switched at birth. Put differently, the primary purpose of this study was to determine the correct approach to the legal status of the parents in relation to African children switched at birth. The importance of such an exercise cannot be overstated. Ndima warns against the danger of administering African law from a Western perspective and correctly concludes that doing so is the core contributor to its degeneration.[137]

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[133] D Ndima, 'Reconceiving African jurisprudence in a post-imperial society: the role of ubuntu in constitutional adjudication' XLVIII *CILSA* 2015 381.
[134] *Ibid* 383.
[135] A Armstrong, 'School and Sadza: Custody and the best interests of the child in Zimbabwe' in P Alston (ed) The Best Interests of the Child: Reconciling culture and Human Rights op cit note 5 at 158. See also Moyo (note 101 above).
[136] Note 98 above.
[137] See note 130 above at para 12.

It has been argued in Chapter two that the meaning of parenthood in African societies often consists of members of the extended family. Thus, in such circumstances, an African child may grow up referring to many people as father, mother, brother and the like. It has also been shown that the migration of children in African societies often takes place within the extended family whilst the link between the biological parent and the child is maintained. Of importance to note, therefore, is the fact that in indigenous societies, the father has very strong rights to his child. This is regardless of whether he chooses to exercise these rights or not. This is evidenced in African communities when siblings introduce the other sibling in a group setting by referring to them as *sende linye*.[138] This description emphasises the link between both individuals stemming from their paternal heritage as opposed to their maternal heritage as it is the father's lineage that is regarded to be of more importance than that of the mother.

In Southern African countries it is common for children to spend extended periods of time with extended family members such as grandparents, uncles, aunts and the like. This is the accepted inheritance of migrant labour. It is for this reason that custody disputes of African children switched at birth becomes even more complicated. The affiliation and movement of children both within the lineage and outside it is a matter of grave concern in African law. This study has provided suggestions on how the issue of African children switched at birth could be resolved within an African family. It has shown that though the term "parent" ascribes to it an extended meaning in African law, it relates to those institutions where the roles of parenthood are split, delegated or transferred whilst maintaining the link between the child and the biological parent.[139] Consequently, whilst African societies favour social parenting within the lineage, it is not easily accepted in instances where no blood relation exists.

The question to be addressed here is what it is that is in the best interest of an African child switched at birth. The distinction is made in this instance for two reasons. Now, being that the children whom this study is based upon are of African descent. Moreover, because of this fact, conflict of law is inevitable because of the type of dual system of

[138] *Sende linye* (a Zulu idiom) can be translated as the child of my fathers loins.
[139] Goody (note 75 above) 335.

law which operates in South Africa. In introducing this study, it was stated that the courts finding in relation to children of western descent could not be faulted given that the judiciary has not substantially dealt with African family law particularly in respect of children switched at birth. As such, it is apparent that the African law rules spoken of above have only been briefly touched upon by the general law of the land.

In the case of children switched at birth, two children are involved. Each of these children is with their own set of biological parents, who, through circumstance cannot be faulted for loving a child that is not their own. It would be unreasonable to disregard the love they have in respect to the child that they have raised. It can, however, be argued that this love was instilled by the incorrect assumption of having birthed the child. It follows then that these parents have a great interest vested in their own biological child. As such, it is submitted that although the best interests of the child are important, the rights of their biological parents should not be viewed as being subservient to those of the child. Doing so may have the effect of placing one child in a better position than the other. This may occur socially, financially or otherwise. Due to the communitarian nature of African societies, the child's individual rights are inherently linked to the interests of the family and society at large. This is not, however, to suggest that the child's interests are deemed subservient or irrelevant but rather that these interests are best served when the child's lineage is not easily interfered with by placing him or her in a family that they have no blood relation too. This is due to the fact that in African law it is by belonging that a child's best interests are best protected.[140] If one is to apply understanding of both the constitutional interpretation of children's rights and the African law's approach to the subject, it is easier to establish a possible cohesion between the two. At the heart of both interpretations of children's rights, it is submitted that the best interests of the child are indeed served.

[140] Moyo (note 98 above) 146.

3.5 Conclusion

The best interests of the child standard poses as the overarching theme in all matters and decisions related to children. This includes African children switched at birth. The African law recommendation of returning the switched children to their biological parents and social parenting the child they have grown to know as their own (in the form of extended family members) is not at opposite ends with the paramountcy principle. Chapter Four, therefore, provides recommendations on how the sensitive issue of African children switched at birth can best be solved using African dispute resolution.

Chapter Four

Conclusions and Recommendations

4.1 Introduction

> "It is important to avoid an unfortunate but prevalent tendency to put customary law and the constitutional principle of equality on a collision course, i.e. to say that for the one to live, the other must die, or to use a less dramatic metaphor, if customs triumphs, equality must fail [or vice versa]. I think this is a profoundly mistaken view. Our Bill of Rights is not based on a hierarchy of rights, nor is it an assemblage of categorically defined rights sealed off from each other. Rather it contemplates the interdependence of mutually supportive rights."[141]

The object of this study has been to determine what is in the best interests of an African child switched at birth. The prior Chapters discussed at length the definition of African law and the acquisition and termination of parental rights and responsibilities in African law. They have also examined whether African law is compatible with children's rights as articulated in section 28 of the Constitution and if not, whether a reconciliation between the two could be made.

Chapter Four concludes the study by proposing a means by which this dilemma of African children switched at birth may be resolved. The method proposed and discussed herein is that of African dispute resolution. The strengths and weaknesses of this proposed method are discussed in conjunction with the combined use of parental co-ordination using parental agreements.

4.2 The Use of African Dispute Resolution Mechanisms in African Family Law

Conflict resolution methods used in African societies are not only conciliatory in nature but are also therapeutic. At the heart of African law adjudication "lies the notion of

[141] A Sachs, 'Towards the Liberation and Revitalization of Customary Law' Pre-Dinner address at Southern African Society of Legal historians Conference on 'Law in Africa: New Perspectives on origins, foundations and transition'. Held at Roodevallei Country Lodge, Pretoria on 13-15 January 1999 at page 15.

reconciliation and restoration of harmony."[142] Disputants, in an interpersonal setting are educated through social learning which encourages them to resolve their differences with the assistance of people familiar to them such as one's own senior family members. These senior family members ordinarily consist of grandparents, elderly aunts and uncles from both sides of the family. The involvement of senior family members or patriarchs to the resolution of family disputes is indicative of the African culture's insistence on proper consultation. The role of senior family members or patriarchs in these processes "less to find the facts, state the rules of law and apply them to the facts but rather to set right a wrong in such a way as to restore harmony within the disturbed community."[143]This is aimed at not only at generating the different views of extended family generally considered as secondary mothers, fathers and siblings (as opposed to aunts, uncles and cousins), but also ensuring that authority has duly been recognised in matters of life-changing importance. Without claiming any conflict resolution expertise, it is submitted that the same can be traced into the foundations of African law. This is done to promote group solidarity in the form of a collective effort in seeking the wisest and most harmonious possible solution as opposed to seeking legal victory according to individual autonomy.

The African law procedure described above is inquisitorial and flexible in its nature. It is this flexibility of procedure that enables both the parties to feel that everything has been done to seek and attain justice. African dispute resolution therefore, does not seek to replace the courts in matters involving African children switched at birth but hopes to amalgamate the court's legal procedures with African family mediation, with the latter holding more weight than is currently the case.

Admittedly, the African law model is not without its complexities. Thus, it is conceded that the picture presented of African law and its functions and purposes in African societies looks overly romantic and presumptuous. Indeed, in the said scenario of

[142] Peri H Alkas JD & Wayne MD, 'HIV and Aids in Africa: African policies in response to AIDS in relation to various national legal traditions' (1996) 17(4) *Journal of Legal Medicine* 527-546.
[143] CRM Dlamini, 'The Role of Customary Law in Meeting Social Needs' 1991 *Acta Juridica* 82.

children switched at birth, there is a myriad of possibilities that cause a deeper convolution in resolving the matter. To begin with, this romantic representation of African law and those subject to it depends upon the agreement of the parties involved. These parties may actually opt for common law intervention through the courts and not necessarily African law intervention.[144] It further presumes that at any given point, parties caught in this abnormal situation have available and willing, senior family members willing to assist them in resolving this issue. Most important is the requirement that the said senior members are able and equally willing to act in the best interests of the child as the Courts and the Children's Act can–assuming they know what those best interests are.[145] This representation of the role of African law in sensitive situations involving African South Africans further assumes that the dependency of the courts on fact-finding and acting in accordance with the rules of law, means that the court cannot and will not treat the matter with sensitivity and empathy – which is a fallacy.[146] To conclude, perhaps the most devastating effect that this romantic tendency has had on African society, is its ability to perpetuate violence and abuse against women and children by not rightly and justly dealing with those violations "for the sake of peace, reconciliation and harmony."[147] Le Rous argues that generally African communities, rather than experience the necessary unrest that could be caused by advocacy related to violence against women and children, would prefer a false harmony within the communities.[148] Nevertheless, with all its impediments, it remains that the court should give due allowance to the parties family members and should not act independently of African family legal participation should it be available and fit to do so.[149]

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[144] Pieterse (note 81 above) 367.

[145] L Blutman, 'Conceptual confusion and methodological deficiencies. Some ways that theories on customary international law may fail,' (2014) 24(2) European Journal of International Law 529- 552.

[146] *OR Tambo* (note 7 above). The curator ad litem in this matter had a full counselling team at her disposal to help her and the court to better contextualize what would be in the best interests of children switched at birth. The presence of the CAFU team is evidence is evidence of the fact that the court concerns itself deeply with the emotions of all parties concerned.

[147] E le Rous, 'The role of African Christian churches in dealing with sexual violence against women: The case of the democratic Republic of Congo, Rwanda and Liberia,' (Phd thesis, Stellenbosch University, 2014) 61.

[148] *Ibid* 61.

[149] *Ibid* (note 26 above) 216.

It is accepted that the situation of children being switched at birth could lead to emotional turmoil for all the parties involved. This study does not favour litigation in resolving matters of such a familial nature. This is due to the emphasis the court places on the legal rules before it and the attempt to apply them to the facts at hand. It is for this reason that African dispute resolution is proposed as a means of negotiating a settlement between the parties that encompasses their underlying needs and attitudes over and above the facts and the application of the rule of law. This form of adjudication is not uncommon amongst African societies and is most likely to yield more stable results than an order of the court.[150]

4.3 Parental Co-Ordination and Parental Agreements

Parenting plans also commonly referred to as parenting agreements, facilitate a "structured approach to parents spending time with and caring for their child. It is an undertaking by parents to co-parent in the best interests of the child."[151] Whilst African dispute resolution is not uncommon amongst African societies, the same cannot be said for detailing agreements made between the parties in writing. This has always been a known weakness of African law.[152] The use of parenting agreements when engaging in African dispute resolution is thus important because it provides proof of what was agreed upon by the parties. It also prevents future misunderstandings or disputes emanating from what was agreed upon. These agreements will further provide for the mandatory referral to mediation should disputes arise as a result of the agreement.[153].

[150] PB Mkhize, '*A Comparative Analysis of the practice of family mediation with particular reference to African Customary mediation*,' (LLM thesis, University of Durban, KwaZulu Natal, 1997) 72.
[151] H Bosman- Safie & L Corrie, '*A Practical Approach to the Children's Act'* (2010) 53.
[152] C Rautenbach, 'Oral Law in Litigation in South Africa: Evidential Nightmare?' *PER/PELJ* 2017(20) 1.
[153] Sections 21(3)(a) and 33(2) read together with section 33(5) of the Children's Act 38 of 2005.

4.4 Conclusion

One cannot negate the importance of using African law to resolve highly sensitive African disputes such as African children switched at birth. This is simply because of the difficulty that common law and the Children's Act have in their ability to amalgamate the overwhelming importance African law places on lineage and their own fundamental principles which favour communalism over individuality. The use of African law in matters related to African children switched at birth will be helpful in the following respects:

- It will ensure that the identity of the African man, woman and ultimately child is preserved.
- In using African law inspired methods such as African dispute resolution ensures that the overwhelming importance African law places on lineage is catered for;
- Furthermore, it would provide an opportunity to develop its deficiency should it be found to be constitutionally lacking.

Children are an integral component in the African culture. This is emphasisized in the expression *akukho ndlovu yasindwa umboko wayo* which is a Zulu proverb meaning no burden or matter is too difficult for a parent regarding his own child. As such, allowing another "village" to raise one's child is not a matter to be taken lightly. It is disappointing that in the unreported case of Centre for Child Law (Applicant) and Respondents respectively NN, NS, Presiding Officer of the Children's Court in the District of Boksburg, MEC of Health in Gauteng, OR Tambo Memorial Hospital Chief Executive Officer and LZ (NPD) case number 32043/2014 of 17 November 2015, NN did not stick to her initial convictions to have her child returned to her as she instead opted to heed whatever decision was deemed suitable by the court. The decision taken by the court in this instance (not returning the children to their biological parents) did not resolve the maintenance issue pertaining her child. It remains unclear how she will be able to receive maintenance from LZ for a child now proven not to be his own. In fact, this is the very issue that she initially approached the court in the first instance. It is for these

reasons that African law proponents can argue that in disputes involving African individuals and their law, western interpretations of such law are not acceptable. In such instances, it is submitted that the development of African law must be given preference. It therefore seems appropriate to conclude:

"*With these developments, a new era, characterised by new intersections between customary law and human rights, has dawned on the African continent*."[154]

[154] C Himonga, 'African Customary Law and Children's Rights: Intersections and Domains in a New Era,' *Children's Rights in Africa: A legal Perspective*, Ashgate Publishing 2013 Chapter 5, 18.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

08 March 2018

Ms Samukelisiwe Petunia Jali (211559334)
School of Law
Howard College Campus

Dear Ms Jali,

Protocol reference number: HSS/0689/016M
New project title: In the best interests of *whose* child? An examination of African Customary Law in matters relating to children switched at birth

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 25 October 2018 has now been approved as follows:

- Change in Title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for period of 3 years from the date of original issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully

.....
Professor Shenuka Singh (Chair)

/ms

Cc Supervisor: Dr A Singh
Cc Academic Leader Research: Dr Donrich Thaldar
Cc School Administrator: Mr Pradeep Ramsewak

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