Tanzania's Law on Child Adoption, with a Special Focus on Adoptions with an International Element

In the Best Interest of the Child?

Dissertation

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Declaration

I, Florencia Evarest Kimario, declare that I have not previously submitted this thesis at the University of Bayreuth or any other university for the award of the degree of *Dr. iuris* or any other similar award. I further declare that all sources used, referred to or quoted, have been duly acknowledged.

Florencia Evarest Kimario

Bayreuth, 02.12.2021

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Dedication

To all children without parental care, in Tanzania and elsewhere, may this work inspire solutions to your plight.

To mama, because you were always there for me, no matter what. I miss you.

Abstract

This study presents an exploration of the socio-legal foundations and traditions that govern alternative child care in a society bound by plural legal orders. It traces the problem of children without parental care in Mainland Tanzania to depict its magnitude and causes. Recognising the alleged weakening of the customary-law-regulated traditional child care system, the study looks at the formal alternative child care solutions under state law. The research presented is centred on child adoption as the most long-standing statutory measure offering a permanent family-based solution to the problem. Further, considering the prevalent socio-cultural and economic situation in Tanzania that defines the leading type of adopters, the study is designed to concentrate on adoptions by non-resident Tanzanians and resident non-Tanzanians. These two types of adoptions are categorised in this study as child adoptions with an international element.

The examination of the law and practice of child adoption generally, and of adoptions with an international element in particular, is guided by the question 'What is in the best interests of the child?'. The best interests of the child principle serves as a yardstick against which the capacity of the legal, policy, and institutional framework to manage child adoptions is measured in the study. Together with this framework, an evaluation of the child adoption practice, specifically regarding adherence to the law and protection of children in adoption, is made. Recognising the central role that 'street-level bureaucrats' play in the adoption process, the study also considers the effects on the process of their workplace dilemmas and coping mechanisms. Lastly, based on statistics of registered adoptions, the potential of child adoption as a solution to the problem of children without parental care and protection in Tanzania is reflected on.

To conclude the study, answers are given to the main research questions based on the research findings. Hoping for a better way forward, ways to improve child adoption law and practice in Tanzania are recommended.

Chapter 1: Introduction

> "…the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding"[1]

1.1 Subject of the Study

The United Nations Convention on the Rights of the Child, 1989[2] and the African Charter on the Rights and Welfare of the Child, 1990[3], which are fundamental international and African regional legal instruments on the rights of the child, agree that the family provides the best environment for a child to grow up in. However, both these instruments do not end with the family environment requirement but emphasise an atmosphere of happiness, love and understanding. Tanzania, the locale of this study, has ratified[4] and domesticated these two instruments under the Law of the Child Act, 2009.[5] Tanzania, therefore, is bound to ensure that children within its territory grow up in a family environment that offers happiness, love and understanding. To fully comprehend this duty, it is imperative to understand what a family is.

'Family' is a term that is becoming increasingly difficult to define. This is because of its constant evolution and different views in different parts of the world concerning who belongs to the family. Time, place, and culture are, therefore, significant variables in defining the word family. In 1994, a group of family law experts authored an article that attempted to deconstruct the concept of family, specific to the 'contemporary' Eastern and Southern African region.[6] They used the metaphor of 'parting the long grass', which translates the need to dive deep into African society to understand what constitutes the African family. The authors wielded family function as a tool with which to part the long grass and

[1] Preamble statement (No.4) to the African Charter on the Rights and Welfare of the Child: ACRWC (11 July 1990); A similar preamble statement (No.6) is found in the Convention on the Rights of the Child: *UNCRC* (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989); and preamble statement (No. 1) in the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (29 May 1993).
[2] United Nations, Convention on the Rights of the Child, 1989.
[3] African Charter on the Rights and Welfare of the Child, 1990.
[4] Tanzania ratified the UNCRC on 10th June 1991 according to the UN depositary information available at https://treaties.un.org/ and the ACRWC on 16th March 2003 according to the ratification table available at https://www.acerwc.africa/ratifications-table/.
[5] Law of the Child Act, 2009 Act No. 21 of 2009, [CAP. 13 R.E. 2019].
[6] Bart Rwezaura, Alice Armstrong, Welshman Ncube, Julie Stewart, Puleng Letuka, Priscilla Musanya, Isabel Casimiro, Mothokoa Mamashela, "Parting the Long Grass: Revealing and Reconceptualising the African Family", The Journal of Legal Pluralism and Unofficial Law 27(35) (1995): pp. 25–73.

reconceptualise the ever-transforming African family.[7] They looked at the specific cultural and historical contexts as well as the internal and external definitions of the family. In doing so, they acknowledged that the family remains the smallest unit of society in many cultures.[8] However, divergent formations, structures, sizes and functions of the family create various family forms that differ considerably from both Western conventional and African traditional concepts.[9] These variations influence how family membership is defined. Further, depending on the purpose and context of the definition, family membership also varies.[10]

In most African cultures, family refers to a relationship based on blood ties formed from common descent.[11] This definition, the authors found, relies heavily on the pre-capitalist and subsistence agricultural economy era, and excludes modern conceptualisations of the family. They established that, in the contemporary world, definitions of the family should not be limited by kinship ties but also consider residence links.[12] Today, various other factors such as marital, artificial, and legal links that are diverse and evolving come into play. Along with the numerous considerations, law, without a doubt, stands as a significant component in the conceptualisation of family. Perceptions of the family can differ considerably, depending on the constitutive, regulatory, and enforceable roles of law and the influence of lawmakers, interpreters, and implementers.[13] This applies not only to formal state law, but also to informal traditional and religious laws in the African context.[14] Family, therefore, in the legal context of African societies is characterised by conceptual pluralities. This is because plural systems of law define relationships, links, rights, and obligations that constitute a family and its membership.

However, the authors of the above-mentioned article found that, in the African legal pluralistic setting, despite acknowledging the role of informal laws in creating and regulating the family, formal law may have the upper hand in influencing how people define the family.[15] In Tanzania, family is a legal field whose legal regulation is among the most

[7] The authors used family function as a framework for conceptualising the family, *ibid.*, at p. 29.
[8] *Ibid.*, at p. 26.
[9] *Ibid.*
[10] *Ibid.*, at p. 28.
[11] *Ibid.*
[12] *Ibid.*, at p. 29.
[13] *Ibid.*, at pp. 29-30.
[14] See the discussion on the interplay between formal and informal law in the definition of the family, *ibid.*, at pp. 30-31.
[15] The authors arrive at this conclusion through considering the central role of state law in providing a wider framework for forming, ordering, and enforcing familial relations, *ibid.*, at pp. 31-32.

pluralistic.[16] For the purpose of setting the scene for this study, this part concentrates on state law which, apart from providing the framework for the operation of other systems of law, is the primary focus in relation to the subject of the study, child adoption with an international element. Several legislations, in one way or another, govern the family in Tanzania. In this study, the Law of the Child Act, 2009, takes centre stage. Section 3 of the Act defines the term family inclusively as meaning the "parental father, mother and children, adopted or blood-related and other close relatives including grandfather, grandmother, uncles, aunts, cousins, nephews and nieces who live in a household". This definition combines both the kinship and residence links approach to the conceptualisation of a family. Also, it adds a legal link to family formation, which is child adoption. In adoption, family membership is a purely legal creation that does not depend on biological ties. Section 2 of the Adoption of Children Regulations, 2012 defines child adoption as a measure that provides permanent family care for a child deprived of his or her family environment. Thus, it is a type of family formation that opens up membership of a family to a child in need of family care and protection.

A group of family law scholars has maintained that a child is a family member, irrespective of how that family is defined.[17] Therefore, the question arises as to when a child is deprived of the environment which family membership guarantees. To address this question, family environment is construed here as the surroundings in which the family cares for and protects its children.[18] In the ordinary course of life, children born into a family may be forced to live outside that family environment for diverse reasons. These may include loss of parents due to war or diseases such as HIV/AIDS, parents' physical or mental disability, breakdown of the family, a decline in the family economy, abuse, neglect, abandonment, or exposure to significant harm within the family.[19] Articles 20 and 25 of the UNCRC and ACRWC respectively require states to ensure the provision of an alternative family environment for children who for any reason are permanently or temporarily deprived of their family

[16] A reference to legal pluralism in family regulation can be found in the provisions of the Judicature and Application of Laws Act (JALA) [Cap. 358 R.E. 2019] and Law of Marriage Act, 1971.

[17] Explained in detail through the contributions in the book that defines an African child, childhood, and child rights in the context of law, culture and tradition in Eastern and Southern Africa. Welshman Ncube (ed.), *Law, culture, tradition and children's rights in Eastern and Southern Africa* (Dartmouth: Ashgate, 1998).

[18] The meaning of a 'family environment' is considered in chapter 2 on the conceptualisation of care and child adoption. It is also discussed by Ulrike Wanitzek in "Child Adoption and Foster Care in the Context of Legal Pluralism: Case Studies from Ghana", in E. Alber, J. Martin, C. Notermans (eds.), *Child fostering in West Africa: New perspectives on theory and practices* (Boston: Brill, 2013), at p. 226.

[19] Wanitzek provides a list of grounds on which children may be without parental care in her article; Ulrike Wanitzek, "Legal pluralism under the influence of globalisation: a case study of child adoption in Tanzania", in A. Peters; L. Koechlin; T. Förster; G.F. Zinkernagel (eds.), *Non-state actors as standard setters* (Cambridge: Cambridge University Press, 2009), at p. 468; Section 16 of the Law of the Child Act, 2009 defines a child in need of care and protection and provides a comprehensive list of ways in which children may be deprived of their family environment.

environment or in their own best interests cannot remain in it. Among the listed alternatives is child adoption, a measure that provides a family to a child who is permanently deprived of his or her family environment or can never return to it.[20]

The global community devised child adoption to ensure that a child without the care of his or her birth parents can grow up in a stable family-based environment.[21] The Tanzanian society, for instance, through traditional care arrangements, has practised child adoption since time immemorial.[22] In the past, depending on the reasons why a child was deprived of his or her family environment, members of the extended family or community usually adopted him or her through child care arrangements based on customary law.[23] These arrangements prevailed until formal regulation of child adoption was introduced in Tanganyika (now Tanzania mainland) by the British in 1942.[24] The English Adoption of Children Act of 1926, which introduced statutory child adoption in England, formed the basis for formal adoption law in Tanganyika.[25] The adoption law in Tanganyika continued to reflect developments in the English law of adoption, which led to the Adoption Ordinance of 1953.[26] Since then, and for a long time, the same adoption law applied in Tanzania, save only for minor amendments.[27] However, the Law of the Child Act, enacted in 2009, marked the end of the long service of the English-based law of adoption. Section 160(1) of the Act repealed the Adoption of Children Act, 1953.

This study examines child adoption as provided for under the Law of the Child Act, 2009, particularly in cases with an international element. These include adoptions by non-resident

[20] The ACRWC does not list child adoption under Article 25 but instead provides for it separately under Article 24.

[21] See the historical background to child adoption and its laws as explicated in United Nations Department of Economic and Social Affairs, Population Division, *Child Adoption*: *Trends and Policies* (New York: United Nations, 2009), at pp. 5-31.

[22] See Barthazar A. Rwezaura, Ulrike Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", Journal of African Law 32(2) (1988), at pp. 124–63.

[23] Wanitzek, "Legal pluralism under the influence of globalisation: a case study of child adoption in Tanzania", above footnote 19, at pp. 466-468.

[24] Adoption of Infants Ordinance, 1942 (Ordinance No. 5 of 1942); applied together with Adoption of Infants Rules, 1942 (GN 321 of 1942); as explained in Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at pp. 124 and 126.

[25] Lowe, Nigel V. and Douglas, Gillian, *Bromley's Family Law* (Oxford: Univ. Press, 2007), at p. 818; and in Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 126.

[26] Adoption Ordinance, 1953, Ordinance No. 42 of 1953 [R.L. CAP. 335] which according to section 5 of the Second Schedule to the Ordinance must be read together with Adoption of Infants Rules, 1942 as explained in Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 126.

[27] For instance, some amendments were effected in 1962 and 1968 by GN No. 478 of 1962 and Act No. 4 of 1968, as explained in fn. 3 in Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 124; also see Wanitzek, "Legal pluralism under the influence of globalisation: a case study of child adoption in Tanzania", above footnote 19, at p. 474. In 2002 the Ordinance was renamed the Adoption of Children Act, 1953 [Cap. 335 R.E. 2002].

Tanzanians and resident non-Tanzanians as specified in sections 62 and 74 of the Act. The study uses a socio-legal approach to investigate the capacity of the current legal, policy, and institutional framework to regulate child adoption by these two groups of adopters. While taking stock of the existing legal pluralistic setting and child protection issues, the study uses the best interests of the child principle as a yardstick against which the effectiveness of the framework is measured.

1.2 Background to the Study

First and foremost, as already stated, Tanzania (then Tanganyika) is one of the countries which had a modern child adoption law quite early during or after the Second World War (WWII).[28] Subject to amendments from time to time, the English-based adoption legislation operated in Tanzania from 1942-2009. Despite this long period, there was remarkably low use of the law. The UN Department of Economic and Social Affairs reported Tanzania to be among the countries with the lowest child adoption rates in the world.[29] In answering the question 'how common is adoption', the Department used three different indicators to measure the outcomes. All three indicators showed formal adoption to be relatively uncommon in Tanzania.[30] First, in adoptions of children below 18 years, Tanzania had the rate of one adoption for every million persons under 18. Second, in adoptions of children under five years of age, the country had the rate of less than two children for every million children within the age group. Lastly, calculating the adoption ratio to get the number of adoptions in every 100,000 live births, the Department found Tanzania to have a ratio of about one adoption per 100,000 live births. Considering these research findings and other comparisons drawn with countries such as China, Russia and the USA, the report concluded that generally, the number of children adopted was lower than those in foster care or institutions.[31] This report motivated the decision to study child adoption in Tanzania from a socio-legal perspective, to find out, among others, why the formal law of child adoption is not utilised.

In the late 1980s, Rwezaura and Wanitzek researched the law and practice of child adoption in Tanzania.[32] The study examined the formal law of child adoption based on the Adoption of Children Act, 1953 and critically analysed its practice. The resultant article provided not only

[28] United Nations Department of Economic and Social Affairs (DESA), Population Division, *Child Adoption*: *Trends and Policies* (New York: United Nations, 2009), at p. 15.
[29] *Ibid.*, at pp. 66-68.
[30] See *ibid.*, at p. 68.
[31] *Ibid.*, at p. 66.
[32] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22.

a legal but also a social perspective regarding child adoption practice. It discussed, among others, the social classification of Tanzanian society and how socialisation of the given classes influenced preferences for formal child adoption. The article also portrayed existing legal pluralism (including customary and religious laws), which determined how different clusters of society members arranged for the care of their children. These aspects sparked the present author's interest in this subject. Specifically, Rwezaura and Wanitzek unveiled motivations for child adoption among people of different descent or belonging to different ethnic groups in Tanzanian society, inspiring further research.[33] This study is focused on two groups, resident non-Tanzanians and non-resident Tanzanians, whose child adoption practices depicted in the article raised questions that justified further research.[34] Also, in their concluding remarks in the article, the authors called for a comprehensive law of the child. The Parliament of Tanzania enacted the said law in 2009.

The Law of the Child Act, 2009 provides comprehensive coverage of the law and rights of the Tanzanian child. The Act and its framework of Regulations provide for child adoption law and procedure. The enactment of a child adoption law that reflects Tanzanian socio-cultural values rather than colonial ones further spurred the present author's interest in socio-legal research on child adoption. A study on how the new law addresses some of the issues raised in Rwezaura and Wanitzek's work on the previous Act seemed crucial. This study, therefore, examines the law, policy, procedure, institutions, and practice relating to child adoption based on the legal framework established under the Law of the Child Act, 2009. The study makes specific reference to adoptions by resident non-Tanzanians and non-resident Tanzanians, for whom the new law has provisions that are articulated more comprehensively than under the Adoption of Children Act, 1953.

Lastly, the present author elected to focus on child adoption by resident non-Tanzanians and non-resident Tanzanians because they have at least three advantages over resident Tanzanians. First, these two groups of people are not affected by the socio-economic situation prevalent in the country in the same way as resident Tanzanians. Second, because of their exposure to foreign culture, specifically Western culture, they are more disposed to use the formal law of child adoption for providing care and protection for children in need. Third, a more significant percentage of resident non-Tanzanians are not subjects of customary law. An exception is those married to Tanzanian spouses who are subjects of customary law. The

[33] See *ibid.*, at pp. 134-142.

[34] See the discussion on how immigration and welfare laws of other countries have affected child adoption practices. Also, on how the judges in Tanzania have determined child adoption in the best interest of the child in cases with an international element; *ibid.*, at pp. 143-147.

Tanzanian spouses may, to some extent, expose their non-Tanzanian spouses to the law's influence. Also, while a considerable number of non-resident Tanzanians may still be subjects of customary law due to their continuing relations with their family back home, they are only so to different extents and in different ways compared to resident Tanzanians. Hence, these two groups of adopters are not affected by the interpretative and practical complications arising from legal pluralism in child adoption in the same way as resident Tanzanians. However, they are subject to international law, the laws of their countries of origin or domicile, and to the regulations of the foreign national and international institutions involved in the adoption process. Thus, the multiplicity of legal systems complied with in the adoption procedure may still challenge the promotion and protection of the child's best interests. Hence, the decision to carry out this study. The above factors pushed and pulled the study towards the subject of child adoption law and practice, with a special focus on adoptions by resident non-Tanzanians and non-resident Tanzanians.

1.3 The Research Problem

The Law of the Child Act, 2009, is the first comprehensive law of the child in Tanzania. However, despite its recent and extensive enactment, some legal and practical issues remain a challenge regarding the provision of a family environment for children deprived of their own. This study mainly considers the challenges posed in child adoption. In this part, the researcher describes the main issues that prompted the study and lists the questions the study sought to answer.

1.3.1 Statement of the Problem

All countries in the world, irrespective of their economic affluence, have their share of children deprived of their family environment. For Tanzania, a third-world country in sub-Saharan Africa, the number of such children is on a steady increase. For the longest time, kinship and community-based care were the solution to the plight of these children. Unfortunately, due to the prevailing socio-economic conditions in the country, the informal care net is now threadbare. As part of the solution, the state has devised formal measures of alternative child care, including care by relatives, fit persons, foster parents, and residential child care facilities. In addition, for children who cannot remain in or return to their birth families, the state provides formal child adoption as an option that offers a permanent solution to their situation. However, even with the available range of formal care options, Tanzania still has a large number of children deprived of family care.

Law of the Child Act, 2009, provides for and regulates alternative child care in the country. Child adoption is among the formal care measures provided under the Act, for which it attempts comprehensive provision. It adds legal options in respect of child adoption that did not exist in the previous law. These additions include child adoption by non-resident Tanzanians under section 62 of the Act.[35] Also, for adoptions by resident non-Tanzanians, which existed in the previous law, the Act offers more explicit cover under section 74.

This study provides a limited situational analysis of formal alternative child care measures in Tanzania's law and practice. The specific focus of the research is on regulation of the two child adoption categories provided under sections 62 and 74 of the Act. The legal, policy and institutional frameworks established to regulate the two types of child adoption are critically examined in the study. At the same time, primarily due to the international element in the selected child adoptions, the study considers the effects of legal pluralism and examines the resulting child protection issues. Considering the role the best interest of the child principle is required to play under the provisions of the Law of the Child Act, 2009 and the Adoption of Children Regulations, 2012, the law and practice of child adoption are measured against the principle's dictates.

1.3.2 Research Questions

The study seeks to answer the following questions:

1. whether the existing legal, policy, and institutional framework has the capacity to adequately manage child adoptions with an international element;
2. whether the legal process for child adoptions by non-resident Tanzanians and resident non-Tanzanians is in the best interest of the child;
3. whether the law and practice in respect of child adoption guarantee sufficient protection to the child in the adoption process; and
4. whether child adoption, especially by non-resident Tanzanians and resident non-Tanzanians, can help to alleviate the problem of children deprived of parental care in Tanzania.

1.4 Purpose of the Study

This study aims to critically analyse the legal, policy, and institutional framework in respect of child adoption in Tanzania in order to determine its capacity to handle child adoption in conformity with the principle of the child's best interests. It intends to generate knowledge

[35] Section 4(5) of the Adoption of Children Act, 1953, allowed child adoption only by persons resident in Tanzania.

which could motivate changes in implementing the best interests of the child principle in terms of its interpretation, determination, and application. In doing so, the author hopes that concerned institutions would be better informed and placed to ensure robust child protection in the child adoption process. Lastly, the study seeks to lay a foundation for an enhanced formulation of law and policy on child adoption in Tanzania to improve child adoption practices in the country. As an outcome of the study, the law in respect of formal child adoption could be used suitably to address the problem of children deprived of their family environment in Tanzania.

1.5 Scope of the Study

The study investigates the legal, policy and institutional framework on child adoption in Tanzania Mainland, with a focus on child adoption by non-resident Tanzanians and resident non-Tanzanians. While it examines the entire formal child adoption law and procedure, it focuses on adoptions by the two groups of persons mentioned. The primary law under study is the Law of the Child Act, 2009 and the Regulations made under it. In connection with the law, and to a limited extent, the study explores national policies and other instruments, such as guidelines, strategies and plans relating to child welfare in so far as they impact child adoption. The study also investigates the factors, circumstances, and processes involved in child adoption in Tanzania. The study considers these aspects through the lens of enacted child protection laws and procedures. In doing so, it also deals to some extent with the prevailing situation regarding alternative child care, in order to lay a foundation for understanding child adoption practices in the country. The focus of the study is on formal (statutory) rather than informal (traditional) alternative child care arrangements.

The study examines compliance with the best interests of the child principle in child adoption practices. It does so by considering international, regional, and national legal provisions on the principle and their interpretation and application in child adoption practice. It investigates conformity with the principle as far as it relates to administrative and judicial decisions in child adoption.

This study is based in Tanzania Mainland. Any references to Tanzania Zanzibar and its laws are mainly for comparison or clarification, or for drawing lessons. The author conducted qualitative field and desk research using interviews and documentary analysis on child adoption law and practice, and was less concerned with gathering quantitative data relating to child adoptions in Tanzania. Therefore, as far as the study refers to statistical data on child adoption, it does so only for the purpose of understanding child adoption trends and practices in the country. Sampling processes were also qualitative rather than quantitative, as the

emphasis was not on the number of research participants but on their roles and characteristics, which were essential for answering the research questions. Hence, the data collected and analysed is not statistically representative of the phenomena discussed in this study; rather, it is descriptive and explanatory.

Psychosocial and emotional aspects of child adoption experienced pre- or post-adoption are not within the scope of the subject covered by this study. Any references to these aspects are limited to understanding the social life and culture of members of the adoption triad, research participants, and Tanzanians at large. Also, a full exploration of Tanzanian culture and traditions relating to child welfare was not within the purview of the study due to time, finance, and human resource constraints. Therefore, the study only makes general references to these facets without any specific focus on ethnic groups in Tanzania. Mainly, it uses the theories of legal pluralism and street-level bureaucracy to draw inferences regarding cultural practices and effects.

1.6 Research Methodology

This section describes how the study was designed to obtain valid and reliable answers to the research questions and attain the research objectives. It attempts to provide a comprehensive description of the research procedure by answering the how and why of the adopted research strategy and technique. In a nutshell, this part seeks to ensure that the reader understands how the researcher obtained the research findings, and interpreted, analysed, presented and discussed them in this study.

1.6.1 Area of Research

The research for this study took place in Mainland Tanzania. The researcher selected three cities as the central research locations: Dar es Salaam, Dodoma, and Arusha. These cities were selected, first, because they host the headquarters of most of the governmental, intergovernmental, and non-governmental institutions or organisations operating in the subject area of the study. Dar es Salaam has been for a long time the centre of government business. This has only recently changed when Dodoma officially became the capital city and the government's centre.[36] As a result, the government ministries key to this study were moved to Dodoma. These include the Ministry of Health, Community Development, Gender, Elderly and Children, the Ministry of Home Affairs and the Ministry of Constitutional and Legal Affairs. On this ground, Dodoma was identified as one of the research sites. However, Dar es Salaam still hosts the principal offices of most public and private authorities related to

[36] For more information, see Kenneth Karuri, *After Four Decades, Tanzania Government Finally Moves to Capital*, Bloomberg (14th June 2018).

this study. Arusha, nick-named 'Geneva of Africa', on the other hand, headquarters many international organisations. This was one of the reasons for selecting Arusha as a research site because it has a higher number of foreign residents than other regions. The presence of non-Tanzanians in a place may affect the number of adoptions by 'foreigners'.[37] Whether this is reflected in the field will be reported in the following chapters. High Court Registries in both Dar es Salaam and Arusha favoured them as research areas for this study.

Second, Dar es Salaam is the most thriving commercial city in Tanzania. It hosts many businesses, from the biggest to the smallest. This makes it the largest city in Tanzania in terms of population, which is extremely diverse. Most investors, foreign and local, settle in Dar es Salaam. Due to its status as the former centre of government business, the city also hosts most of the political elite. In addition, the state established Tanzania's first university in Dar es Salaam, which means that the academic elite is concentrated in the city as well. In short, Dar es Salaam assembles high profile people in Tanzania who are the most likely to take part in child adoption with an international element.[38] This population has the highest probability of containing non-Tanzanians working or living in Tanzania.

Third, the touristic nature of Dar es Salaam and Arusha also played a part in deciding to choose these cities. Touristic arrivals in Tanzania are most likely to pass through the Julius Nyerere International Airport in Dar es Salaam or the Kilimanjaro International Airport, which is very close to Arusha. This makes the two cities default destinations for many tourists. Dar es Salaam acts as a point of transit to other touristic places, such as Bagamoyo and Zanzibar, while Arusha is the centre for a considerable percentage of touristic attractions in Tanzania. It is thus 'a must go to' for most tourists. Tourism was a factor in selecting sites for field research because of its potential to influence the transit or settlement of a large number of non-Tanzanians. Residence is a prerequisite for child adoption by non-Tanzanians. Touristic visits may expose them to a level of socio-economic interaction that, for different reasons, may lead them to adopt children in Tanzania.[39]

The field research for this study did not cover the entire regions of Dar es Salaam, Arusha and Dodoma, but only selected districts. These included Kinondoni, Ilala and Temeke districts for Dar es Salaam, and Arusha Town for Arusha. These are the earliest formed districts in these regions with local government structures that have operated for a long time; hence, they have

[37] Section 74 of the Law of the Child Act, 2009 [Cap. 13 R.E. 2019] uses this terminology when referring to non-Tanzanians.

[38] Rwezaura, Wanitzek, in "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, found that the elite among people of African descent and non-Africans were the most likely to use the formal law of child adoption during the periods investigated by them.

[39] For a brief discussion of the role of tourists in alternative child care practice in Arusha, see part 3.6.4.

more experience than districts that were formed later. For Dar es Salaam, this was the main reason for selecting these three districts rather than Ubungo and Kigamboni, which are relatively new. Arusha Town was selected since it is the centre of the region and likely to have had more experience of child adoption than the other districts.

1.6.2 Research Design

'Design' here refers to the framework of research methods and techniques which provides a coherent plan that the researcher utilised to address the research questions through data collection, interpretation, analysis, and discussion. This is a socio-legal study that uses a qualitative research design with a descriptive approach. The research methods and approaches were selected after considering how best they could tackle the research questions and remain realistic in terms of the available time and financial resources.[40] The researcher also considered the list of research design aspects that Lewis considers key. These include research questions, research settings and populations (sampling), data collection time frames, data collection methods, and negotiation of research relationships (access and ethics).[41] In the course of the study, these aspects were not fixed at any time before and during the actual research but remained flexible and changing consonant with experiences in the field.[42]

Since this is a qualitative study, it uses "people's own written or spoken words and observable behaviour" to investigate the law, policies, institutional setup and practice in respect of child adoption with an international element in Tanzania.[43] However, being socio-legal in nature, it is also based on a considerable degree of documentary analysis, largely of relevant legal instruments. The study, therefore, combines the examination and analysis of legal and other documents with knowledge of practice gathered through field research. It unveils the general strengths and weaknesses of the law on child adoption and its implementation, while specifically measuring it against the dictates of the best interests of the child principle. In addition, the study considers compliance with ratified and domesticated international and regional legal instruments on the law and rights of the child. On the institutional front, it focuses mainly on the functioning of social welfare institutions and courts and their legal and

[40] Advice on good methodological practice provided by Jane Lewis, "Design Issues", in Ritchie, Jane and Lewis, Jane (eds.), *Qualitative research practice: A guide for social science students and researchers* (Los Angeles, California: SAGE, 2003), at p. 47; Also available in an updated edition, Jane Ritchie, Jane Lewis (eds.), *Qualitative research practice*: *A guide for social science students and researchers* (London: SAGE, 2014). In this study, reference is made to the earlier edition of 2003.

[41] Lewis, "Design Issues", above footnote 40, at pp. 47-48 and explained in detail in the chapter.

[42] Flexibility is a fundamental characteristic of qualitative research as stated in Steven J. Taylor, Robert Bogdan, Marjorie DeVault, *Introduction to qualitative research methods*: *A guidebook and resource* (Hoboken, New Jersey: Wiley, 2016), at p. 29; and also by Lewis, "Design Issues", above footnote 40, at p. 47.

[43] For a description of what qualitative methodology entails, see Taylor, Bogdan, DeVault, *Introduction to qualitative research methods*, above footnote 42, at p. 7.

technical challenges in matters of child adoption practice. The study also considers the need for the child to be sufficiently protected pre and post child adoption. In all this, the study takes into account legal pluralism and street-level bureaucracy in a way that allows an exploration of how these affect child adoption law and practice in Tanzania. In this way, the research design caters to the research questions.

1.6.3 Research Approaches, Methods and Instruments

This part elaborates further on the research design aspects mentioned above. It provides detailed information regarding research approaches, methods and instruments employed in this study.

1.6.3.1 Research Approaches

This study is mainly qualitative. It describes the law and procedure through which child adoption is carried out in Tanzania in order to be able to answer the research questions. Data collection that reliably and validly produced the required information necessitated desk research typical for legal researchers, coupled with field research standard in most social science fields. The researcher, therefore, gathered information through exploration of documentary sources at the desk and in the field, combined with live interaction with selected respondents in the field.

A small portion of this study is quantitative. It uses an "alongside statistical enquiry" to accompany the qualitative research.[44] The researcher has thus collected, analysed, presented and discussed a small amount of statistical data relating to, among others, the number of registered adoptions, adoption petitions and orders, and the difference in numbers of non-Tanzanian as compared to Tanzanian adopters. For this data set, a quantitative documentary survey was conducted, and the data are presented in several figures in chapter six.

Explanations of the data collection methods that were utilised are given in part 1.6.3.2.

1.6.3.1.1 Field Research

Field research gathers primary data through direct interaction between the researcher and the subjects of research in the environment in which they naturally exist, live, work or play. In this study, field research did not consist only of the actual collection of data but entailed an extensive procedure. It included preparing the plans for field research and their actual execution; the whole process of travelling to and in the field; identifying data sources; organising access to the research settings and respondents by dealing with permits, ethical

[44] Jane Ritchie, "The Applications of Qualitative Methods to Social Research", in Ritchie, Jane and Lewis, Jane (eds.), *Qualitative research practice: A guide for social science students and researchers* (Los Angeles, California: SAGE, 2003), at pp. 40-42.

issues and gatekeepers; choosing the most suitable methods of data collection and adjusting them when the need arose; recording of data in the field through taking field notes, document scans and photocopies, and audio recording; and later, interpreting and analysing the data. In the parts below on fieldwork and data collection, the entire processes involved are described.

The field research for this study was carried out in three phases. The first phase was from December 2017 to March 2018; the second phase from December 2018 to March 2019; and the third and last phase in January 2020. In all three phases, the targeted research participants remained the same. In the third phase, which was purely follow-up research, the researcher communicated with only a few intended participants. The second research phase was more productive than the first, which mainly served as 'setting the scene' for research. The section below on methodological challenges explains the reasons.

1.6.3.1.2 Desk Research

Desk research in this study refers to exploring library and internet resources that were not field sources of data. At the desk, legal instruments, court judgements and orders, scholarly works, and various reports relating to the subject of the study were reviewed. Their themes included, but were not limited to, child care and protection, child adoption, the best interests of the child principle, legal pluralism, street-level bureaucracy, globalisation, and other topics pertinent to the study. The researcher accessed materials from physical and virtual libraries, as well as other internet resources. Various national and international, governmental and non-governmental, academic and non-academic, legal and non-legal websites were accessed to obtain information needed for the study.

Physical libraries that were accessible to the researcher without being in field research settings include the University of Bayreuth libraries, especially the central, law, business and economics, and Chair of African Legal Studies (former Law in Africa) libraries; the University of Dar es Salaam main and law libraries; the TGCL libraries in Dar es Salaam and Bayreuth, and the private library of Professor Ulrike Wanitzek.

1.6.3.2 Research Methods

The main research methods employed in this study were semi-structured interviews and documentary analysis. Interviews were held with personnel at the respective institutions and identified key informants (see Table 1-1 Data Sources below). As well, documents pertaining to child adoption were examined and analysed at the institutions visited. The researcher also undertook a partial quantitative survey of statistical data from the Adopted Children Register and court case files and registers on child adoption.

In a few research settings and with specific respondents, it became imperative for the researcher to use other data collection methods, such as written interviews, observation, and impromptu focused group discussions. The scenarios that called for this kind of flexibility in the field are explained briefly below under 'other methods'.

1.6.3.2.1 Semi-structured Interviews

Maintaining a reasonable degree of structure and avoiding rigidity in obtaining information from identified respondents led the researcher to settle for semi-structured interviews. This made it possible to introduce themes for discussion by using open-ended questions and then leaving the respondents to share their experience and knowledge. This type of interview also allowed for spontaneity because it was possible to follow up on relevant information the respondents mentioned during the interviews. The interviews allowed for almost free interaction between the researcher and respondents. The researcher only used minimal subtle probes and prompts to mine information from the interviewees.[45] This way, the interviewees were encouraged to provide their opinions and suggest solutions related to the research problem.

The language used in most of the interviews was Kiswahili, the national language of Tanzania. Code-mixing Kiswahili and English was ubiquitous when interviewing persons whose professions involved regular use of the English language, which is the official language or one of the official languages (such as academics, judges, magistrates, and lawyers). Research settings where the interview was conducted entirely in English involved participants who were non-Tanzanian.

Although taping of interviews would have been the best way of obtaining an utterly reliable recording of the interview proceedings, this was not a possibility in this study in most cases. The confidential nature of adoption and the political environment that prevailed at the time of field research impeded audio recording of public officers and persons responding in their professional capacity. Only two respondents gave their consent to an audio recording – a professor of law and a resident non-Tanzanian adopter. Therefore, the interview data collected and analysed in this study stems mainly from field notes. The researcher took notes as comprehensively as possible during the interviews, and later on the same day read and supplemented them with remembered bits and pieces left out in the notes taken during the

[45] See the 'miner metaphor' in Steinar Kvale, *Interviews*: *An introduction to qualitative research interviewing* (Thousand Oaks, CA: SAGE, 1996), at p. 3; as read in Robin Legard, Jill Keegan, Kit Ward, "In-depth Interviews", in Ritchie, Jane and Lewis, Jane (ed.), *Qualitative research practice: A guide for social science students and researchers* (Los Angeles, California: SAGE, 2003), at p. 139.

interview. As much as possible, the interviews were recorded in the interviewee's language and the interviewee's original words.

The researcher held interviews with assigned personnel from the public offices accessed by the study. In the case of individual key informants, the researcher approached those who fit the criteria of the sampling method used in this study. Key informants interviewed included law practitioners such as judges, court officials and advocates; experts on child adoption such as academics and social workers; and adopters. Ordinary citizens also participated by answering a few questions meant to gauge their awareness of child adoption law and practice (random selection at church, on the street and in WhatsApp groups in which the researcher was or still is a participant).

1.6.3.2.2 Documentary Analysis

The analysis of documents was another empirical research method used for this study. Reliable information regarding the nature of adoption in practice, adoption petition proceedings, and orders were retrievable from relevant documentary sources. The Adopted Children Register and child adoption court records, rulings and orders were the most frequently used sources. The researcher accessed these documents at the Registration, Insolvency and Trusteeship Agency (RITA) offices in Dar es Salaam, Resident Magistrates and High Courts' libraries, and court case files and registers in Dar es Salaam and Arusha. Children's statistical data was obtained from the National Bureau of Statistics (NBS); information on child care and protection from the Department of Social Welfare of the Ministry of Health, Community Development, Gender, Elderly and Children; legislative history and official versions of legal instruments relating to child adoption from the library of the Parliament of Tanzania (Hansards) and Office of the Attorney General law collection in Dodoma; and data on various topics from children's organisations and homes operating in Tanzania.

The researcher visited institutions hosting the documents mentioned above during field research (see part 1.6.4.4 on sampling and data sources below). However, some of the needed information that was not accessible during field research was later found online on the institutions' websites. Thus, for this study, documentary analysis was a data collection method that involved both field and desk research.

1.6.3.2.3 Quantitative Survey

As mentioned above, quantitative methods were applied to a smaller extent in order to complement the qualitative research on child adoption by collecting data about the same phenomenon and using the same participants. A simple statistical enquiry was carried out

alongside qualitative research among respondents who kept statistical records relating to child adoption. These included the Adopted Children Register at RITA offices, court registers of adoption petitions, social welfare department registers of foster care and child adoption applicants, National Bureau of Statistics publications, and records found in children's homes and other organisations. The quantitative survey was undertaken to collect data required to establish specific child adoption statistics. Ancillary to that was the need to check data recording and keeping capacities in these institutions. The statistical enquiry was directly connected with documentary analysis as most of the statistical data was extracted from documents.

1.6.3.2.4 Other Research Methods

During field research, circumstances necessitated employing other research methods that the field research plans did not envision. Since qualitative research should be flexible, this did not pose a problem but rather enriched the data collection process. Two methods that the researcher had to resort to are group discussions and observation. It was research settings involving social welfare officers that called for the use of these methods.

The researcher held impromptu group discussions with four to five social welfare officers in two instances. The first time was at the Department of Social Welfare offices in Dar es Salaam in March 2018, and the second was at the Kinondoni Municipal Council social welfare department offices in Dar es Salaam, in January-February 2019. The discussions occurred in the work settings of the social welfare officers when the researcher visited their offices for interviews. They took place pre and post the scheduled interview with the designated respondent. The topic of discussion was child adoption in Tanzania generally, and especially how the officers and other Tanzanians perceive it.

The research setting in the social welfare department offices in the Kinondoni Municipal Council in Dar es Salaam warranted the use of observation to collect data. The researcher visited these offices for two weeks, in which, among others, she conducted interviews, perused record files on child care and protection, and discussed child adoption issues with the officers. During this entire time, the social welfare officers carried on with their duties as usual. Even the interviews were interrupted at times with questions from fellow officers or clients. In the bustle of their work, the researcher sometimes had to sit unattended and was able to observe the goings-on. This gave her a first-rate ticket to observe street-level bureaucrats in action. The researcher took notes on the observed activities and behaviour of both the officers and their clients.

1.6.3.3 Research Instruments

To efficiently use the selected research methods to collect, measure and analyse data, it was necessary to identify and develop suitable research tools. Apart from the research methods that directly determine the tools to be used, other criteria were considered before selecting the research tools. These included available time, financial budget, human resources for research, and the capacity of the tools to collect valid and reliable data.

1.6.3.3.1 Interview Guides

Semi-structured interviews usually use pre-mapped interview guides to lead the researcher in the questions to be asked. The researcher, therefore, opted to develop interview guides for the study that slightly differed from one interviewee to another. The guides did not contain questions but rather themes in relation to which open-ended questions could be formulated and asked during the interviews. This way, the guides could provide a flexible structure in the interviews as required. The researcher included at the end of the guides a few questions intended to collect demographic data of the interviewees. These questions could be asked only after obtaining the interviewees' separate and specific consent. The relevance of such data was, for example, to establish the nationality or average age of adopters and adoptees.

1.6.3.3.2 Written Data Capture Forms

The researcher decided to use written data capture forms for data retrieved through documentary analysis and statistical enquiry. The drawn up standard forms included columns that showed the data source, retrieval date, theme or title and the recorded information. The targeted information, for instance from court records, included records of the occurrence of a particular type of adoption petition, trends in the adoption rulings such as regarding cases with obvious legal pluralism issues, profiles of litigants in terms of nationality, occupation, age, etc., as well as the procedure and criteria used to determine the best interests of the child. The forms, which showed unique or interesting features, or issues from the analysed records, assisted in their quick identification later in data analysis and thesis writing.

The written data capture forms were seldom used directly in the research setting. Instead, in most cases, the researcher obtained permission to scan or photocopy the accessed documents and filled the information in on the forms later at home. The main reason for this arrangement was the lack of sufficient time to go through the documents, analyse them and record the information on the forms while in the field research setting.

1.6.4 Fieldwork and Data Collection

Field research was a process that included complicated activities. As mentioned above, it did not by any means involve only typical field activities. A brief description of the procedure for field research and data collection is given below. Since this was a doctoral research project, fieldwork and data collection activities were, in large part, executed by the researcher. Research assistants were used only to a limited extent. This was because of the nature of the research topic, as well as limited financial resources.

1.6.4.1 Fieldworker Training

The field research process commenced with training in how to conduct field research for a socio-legal study. Of course, the researcher already had training and skills in legal research through her postgraduate studies in law. Nevertheless, to incorporate the social in the legal, the researcher obtained training in field research from the perspectives of legal and social anthropologists. The training took the form of a research colloquium series held before, sometimes during, and after each field research phase. For the most part, the colloquia were held in Bayreuth, Germany, and one colloquium was held in Dar es Salaam, Tanzania. They took different forms, depending on the central theme for each, but were all committed to equipping the researcher for fieldwork and its pre and post activities. Six expert researchers and lecturers in family law, children's rights and other socio-legal topics led the discussions in these colloquia. These were Professors Ulrike Wanitzek (who organised and hosted the series), Bernd Kannowski, Chuma Himonga, Bart Rwezaura and Keebet von Benda-Beckmann, and Dr. Habil. Jeannett Martin. The colloquium series consisted of six sessions which are summarised as follows:

Colloquium I: Professors Ulrike Wanitzek and Chuma Himonga led the colloquium at the University of Bayreuth on 07-08 November 2017 before the researcher travelled to Tanzania for the first phase of field research. Professor Himonga presented and discussed *'The Conceptualisation of Customary Law and Its Implications for Research in Africa'* based on her article titled "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa".[46] Also, she shared her experience on researching customary law in Africa based on a research project she headed, reported in a book titled "Reform of Customary Marriage, Divorce and Succession in

[46] Chuma Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa", in J. Fenrich, P. Galizzi, T. E. Higgins (eds.), *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2011), pp. 31-57.

South Africa".[47] Then, in line with the colloquium's theme of preparation for field research, the researcher presented her research proposal and field research plan on child adoption in Tanzania. The ensuing discussion mainly revolved around methodological approaches to doing research in a pluralistic legal setting and formulating a theoretical and conceptual framework upon which to base the study.

Colloquium II: Professor Bart Rwezaura presided over the second session in Dar es Salaam, Tanzania, on 26-27 March 2018. The discussion revolved around his two texts: "Competing 'Images' of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa"[48] and "The Value of a Child: Marginal Children and the Law in Contemporary Tanzania"[49]. His presentation centred on the interaction of customary and religious laws with state law and how people perceive their rights as coloured by these laws. It provoked a debate on the interrelation between the image of childhood and the concept of child care in the Tanzanian community compared to the global (Western) concepts of childhood and child care. The researcher presented her field research experience and a draft chapter on the child's best interests as the guiding principle in child adoption. The colloquium underlined the importance of doing further research into the concept of care and different levels of legal pluralism in child adoption in Tanzania. Also, it insisted on the effectiveness of a well-drafted conceptual framework, which as a strong stem, holds and nourishes all branches of argument in a doctoral thesis.

Colloquium III: Professors Ulrike Wanitzek and Keebet von Benda-Beckmann headed research colloquium number three held at the University of Bayreuth on 23-24 April 2018 after the researcher's return from the first phase of field research. Professor von Benda-Beckmann discussed two topics: '*Theoretical Perspectives on Legal Pluralism'* as based on her article on "Legal Pluralism, Social Theory, and the State"[50]; and *'The Practice of Care'* as based on her article "The Practice of Care: Social Security in Muslim Ambonese Society".[51] Being a legal anthropologist, Professor von Benda-Beckmann's experience in doing research

[47] Chuma N. Himonga, Elena Moore, *Reform of customary marriage, divorce and succession in South Africa*: *Living customary law and social realities* (Claremont, Cape Town: Juta & Company, [Pty] Ltd, 2015).

[48] B. Rwezaura, "Competing 'Images' of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa", International Journal of Law, Policy and the Family 12(3) (1998), pp. 253–78.

[49] B. Rwezaura, "The Value of a Child: Marginal Children and the Law in Contemporary Tanzania", International Journal of Law, Policy and the Family 14(3) (2000), pp. 326–64.

[50] Keebet von Benda-Beckmann, Bertram Turner, "Legal pluralism, social theory, and the state", The Journal of Legal Pluralism and Unofficial Law 50(3) (2018), pp. 255–74. This was then still a paper that she presented on 5th - 7th October 2017 in Berlin at the DGV [Deutsche Gesellschaft für Völkerkunde] Sozial- und Kulturanthropologie Conference.

[51] Found in David J. Mearns, Christopher J. Healey, *Remaking Maluku*: *Social transformation in eastern Indonesia* ([Darwin, Australia]: Centre for Southeast Asian Studies, Northern Territory University, 1996), at pp. 121-139.

from the perspectives of both law and the social sciences, and her expertise in legal pluralism enabled her to give good advice on socio-legal research in legally pluralistic Tanzania. The colloquium included a discussion on the field research experience of the researcher, and, based on Professor von Benda-Beckmann's previous research work, on legal pluralism as a concept and theory. Suitable research methods for this type of study were identified.

Colloquium IV: Together with Professor Ulrike Wanitzek, Dr. Habil. Jeannett Martin, a social anthropologist and seasoned researcher at the University of Bayreuth, led a bi-monthly text-reading colloquium series from May to July 2018. Although they were like a mini-series of their own, the reading meetings formed a subset of the main colloquium series. Each meeting lasted for a minimum of two hours, with discussion of a pre-read selected text with academic relevance to this doctoral research.[52] The discussion was predominantly on theory and methodology. An exploration of alternative research perspectives, methods, and tools was one of the main themes of the meetings. Dr. Martin shared her research experience on participant observation as a research method and discussed possible ways of using the method in this doctoral research. The primary purpose of these meetings was to prepare the researcher for the second phase of field research.

Colloquium V: Professors Ulrike Wanitzek and Bernd Kannowski, together with Dr. Habil. Jeannett Martin organised and moderated a research colloquium from 24-26 June 2019. The colloquium was held at the University of Bayreuth, Germany. This colloquium was different from the previous colloquia in the series as it combined several topics in family law regarding marriage and child care. The pluralistic nature of law in Africa was a thread that ran through all the topics and drew them together. The researcher presented her field research experience

[52] Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Hans Marks (eds.), *Coping with Insecurity: An 'Underall' Perspective on Social Security in the Third World*, Special Issue, Focaal No. 22/23, 1994; Michael Lipsky, *State-Level Bureaucracy. Dilemmas of the Individual in Public Services*, New York: Russell Sage Foundation, 1980; Brenda Smith and Stella Donovan, *Child Welfare Practice in Organizational and Institutional Context*, Social Service Review, Vol. 77, No. 4, The University of Chicago Press, 2003, pp. 541-563; Weatherly, Richard and Lipsky Michael, *Street-Level Bureaucrats and Institutional: Innovation Implementing Special Education*, Harvard Educational Review Vol. 47, No. 2, Cambridge Massachusetts, 1977, pp. 171-197; Gerhard Anders, *'Old-School Bureaucrats and Technocrats in Malawi: Civil Service Reform in Practice'* in Thomas Bierschenk, Jean-Pierre Olivier de Sardan (eds), States at Work: Dynamics of African bureaucracies, Africa-Europe Group for Interdisciplinary Studies, vol. 12, Leiden, The Netherlands: Brill, 2014, pp. 329-348; Keebet von Benda-Beckmann, *The Broken Stairways to Consensus: Village Justice and State Courts in Minangkabau*, Dordrecht: Foris Publications, 1984; Erick Nyambedha, Simiyu Wandibba and Jens Aagaard-Hansen, *Changing Patterns of Orphan Care due to the HIV Epidemic in Western Kenya*, Social Science and Medicine, Vol.57, Issue 2, July 2003, pp. 301-311; Bernard H. Russell, *Research Methods in Anthropology: Qualitative and Quantitative Approaches*, 4th edition, Oxford: AltaMira Press, 2016; and Steven J. Taylor, Robert Bogdan and Marjorie L. DeVault, *Introduction to Qualitative Research Methods: A Guidebook and Resource*, 4th edition, Hoboken, New Jersey: John Wiley & Sons, Inc., 2016.

(second phase) and preliminary research findings, which formed the basis for discussing how to analyse, present and discuss collected data.

Colloquium VI: Professors Ulrike Wanitzek, Bernd Kannowski, and Keebet von Benda-Beckmann led the final colloquium in the series held at the University of Bayreuth on 17 February 2020. The researcher briefly presented her experience during the third phase of field research in Tanzania. Also, she received feedback from the three professors on a draft thesis chapter that she had previously shared. The dominant theme of discussion in this colloquium was data presentation, discussion and writing styles that best suit doctoral research reporting.

The colloquia served their purpose of assisting a constant evolving of capacities for the researcher. Research methodology was the main area of doctoral research that benefited from the colloquia. The researcher obtained extensive training on selecting a study type, research perspective, methods, and tools. A realistic field research plan was also an outcome of the colloquia after discussing in detail the research setting, especially after the first phase of field research.

The researcher obtained other forms of training in the course of the doctoral project, for instance, from workshops, summer schools and conferences. However, such training did not have as great an impact on research methodology as the colloquia did.

1.6.4.2 Field Research Plan

The researcher developed a field research plan for each phase of research. The plans acted as road maps that directed the researcher through the research processes. The plan included a clear statement of the research problem and questions and research methodology – constituting area of study, research approaches, selected methods and instruments, pilot study arrangements, timeline, budget, and logistics. The researcher always developed the plans and reviewed them during the research colloquia before going to the field.

1.6.4.3 Pilot Study

Here, the term pilot study does not refer to the traditional preliminary small-scale study conducted to determine the feasibility of the main study. Rather, it represents only a subset of it. It denotes the preliminary testing of research instruments in a small group of people to pre-determine their effectiveness before use in the field.

The researcher pre-tested research instruments to obtain a picture of the type of data they may generate. Also, to determine the average time required to collect data per instrument. Time determination was significant for the interview guides as it helped estimate the time needed for an interview. Additionally, the pilot study provided room for re-designing or adjusting the research instruments.

The pilot study was two-fold. First, in critical reviews in the first and third colloquia, the experts reviewed the research instruments to assess their potential to collect valid and reliable data. The reviews took place before the first and second phases of field research. Second, the instruments were tested on a randomly selected group of people consisting of law academics, practitioners, and university students in Tanzania. The testing was done only once between mid-December 2017 and early January 2018 before visiting the selected respondents in the first phase of field research.

The pilot study led to minor adjustments to the research instruments and the researcher's way of posing questions and using probes and prompts.

1.6.4.4 Sampling

This study being mainly qualitative and small-scale, a non-probability sampling strategy was used to select the data sources.[53] The sample selected was not statistically representative but was picked because its characteristics or roles were related to the research questions. The selection of the research participants, institutions, settings, and locations was purposive, based on criteria such as official mandates or roles, specific experiences, and socio-demographic characteristics. Significant to note is that the subject of the study acted as a sampling criterion. This is because data sources are, in a way, legally pre-defined actors in the field of child care and protection, and specifically in child adoption practice. 'In a way', because the study is socio-legal. Therefore, the researcher selected other sources based on their characteristics rather than the law. For instance, selected family law experts were mainly academics or law practitioners with knowledge or experience of child adoption law. The researcher also used a convenience sampling approach in rare instances depending on the ease of accessibility of the research participant.[54] For example, the researcher included a specific faith-based Non-Governmental Organisation as a research participant after discovering in the field its contribution to the child protection system and finding a relatively uncomplicated research connection to it.

Following the sampling strategy and approaches mentioned above, the researcher prepared a list of authorities, institutions and organisations, and individual persons that she deemed significant to the study. In the case of institutions, respondents were either specific personnel or occupiers of the targeted offices. As regards individuals, the researcher had to identify

[53] For a discussion of probability and non-probability sampling, see Ritchie, Jane, Lewis, Jane and El am, Gillian, "Designing and Selecting Samples", in Ritchie, Jane and Lewis, Jane (eds.), *Qualitative research practice: A guide for social science students and researchers* (Los Angeles, California: SAGE, 2003), at pp. 77-78.

[54] *Ibid.*, at p. 81.

specific persons who fit the sampling criteria in the field. Knowledge of persons with experience in the subject of the study assisted their identification. The table below provides a list of research participants or units that were the respondents to this study:

Table 1-1: Data Sources

SN	Institution/Person	Responsible Office
1	The Ministry of Constitutional and Legal Affairs • Registration, Insolvency and Trusteeship Agency (RITA)	Registration Manager • Registration of Births, Deaths, Marriages, Divorces and Adoptions
2	Judiciary of Tanzania The High Court of Tanzania Court Registry and Records: • Dar es Salaam Registry • Arusha Registry Resident Magistrate's Courts at Kisutu, Dar es Salaam and Sekei, Arusha	Office of Chief Court Administrator The Registrar of the High Court • Adopted Children Register • Adoption cases and records The Registrar, RM Court Kisutu and Sekei • Adopted Children Register • Adoption cases and records
3	Ministry of Health, Community Development, Gender, Elderly and Children (MoHCDGEC) • Department of Social Welfare • Child Development Department • Legal Services Unit Ministry Headquarters in Dodoma and offices in Dar es Salaam and Arusha	Permanent Secretary MoHCDGEC • Commissioner for Social Welfare • Director of Child Development Department • Director of Legal Services Unit
4	President's Office – Regional Administration and Local Government (PO – RALG) • Local Government Authorities in Dar es Salaam and Arusha • Social welfare departments at the local government level in Dar es Salaam and Arusha	Permanent Secretary PO-RALG • Regional Administrative Secretary: Dar es Salaam and Arusha • Municipal Council Directors: Kinondoni, Ilala, Temeke and Arusha Town • Social welfare officers at the district and ward levels
5	The Ministry of Home Affairs The Tanzania Immigration Services Department	The Commissioner General Passport and Travel Documents Department
6	Parliament of Tanzania • Parliament library in Dodoma	Office of the Clerk of the National Assembly • Chief librarian, Parliament Library in Dodoma
7	Office of the Attorney General • Headquarter offices in Dodoma	Assistant Chief Parliamentary Draftsman • Legislative Drafting Division Principal Law Secretary • Legal Registry Unit
8	National Bureau of Statistics (NBS) • NBS offices in Dodoma and Dar es Salaam	Office of the Director General • Legal Office • Directorate of Population Census and Social Statistics
9	A selection of children's agencies, orphanages, residential homes and centres in Dar es Salaam and Arusha	Executive Directors • UNICEF Tanzania • Save the Children Tanzania • SOS Children's Village in Dar es Salaam • PASADA - Pastoral Activities and Services for People with AIDS Dar es Salaam Archdiocese

SN	Institution/Person	Responsible Office
		• Msimbazi Centre Children's Home • Mburahati Children's Centre • UMRA Orphanage Centre • Kijiji cha Furaha • Kurasini National Children's Home
10	Key informants	• Adoption law experts and practitioners - Family law experts - Judges, Registrars, and court officials - Advocates dealing with child adoption - Social welfare officials • Adoptive parents/applicants

1.6.4.5 Access to the Field

The success of a study hinges critically on how the researcher establishes access to the research setting. Since this study involved research in institutional/organisational and private individual contexts, access was obtained through two distinct procedures. First, the study sought access through obtaining research clearance to engage in field research activities with the above-listed respondents. This was an absolute requirement for research in the institutional setting, especially where the government was involved. Second, the study obtained access through negotiations that establish research relationships. While obtaining research clearance is significant, specifically for research ethics compliance, it is the process of negotiating access that determines whether a researcher can collect data or not. These two aspects are further elaborated below.

1.6.4.5.1 Research Clearance

The Vice-Chancellor of the University of Dar es Salaam is empowered to review and grant applications for research clearance for the University's staff and students on behalf of the government and the Tanzania Commission for Science and Technology (COSTECH). Being a University staff member, the researcher applied to the Vice-Chancellor for research clearance for each phase of field research. The Vice-Chancellor granted the clearance, which signified that the research project was approved. The clearance, among others, introduced the researcher to the respondents and, on her behalf, requested permission to research. Since it came in the form of a letter to the respondents, it represented the University's endorsement of the researcher.

1.6.4.5.2 Research Permit

In the field, the researcher found that research clearance does not on its own guarantee access to the targeted research participants, both in the governmental and non-governmental institutions. The researcher had to apply for research permits in every institution. Here, the

researcher had to understand each institution's organisational structure in order to identify the respective gatekeepers to whom the applications should be addressed. The application procedure differed significantly from one institution to another. In some, especially non-governmental, it was relatively quick and straightforward. In most governmental institutions, however, the procedure was cumbersome. For instance, obtaining research permits from local government authorities in all four selected districts in Dar es Salaam and Arusha involved complex, confusing and time-consuming procedures. The procedures involved double or triple levels of assessment before the permits were issued. In the applications for permits, the researcher had to deal with two central and local government systems operating concurrently from the regional level down to district and ward levels. The researcher had to write another letter or fill another form at each level as if it was an entirely new application.

The processes involved in obtaining permits are too extensive to be reported in this part. It suffices to say that ultimately research permits were obtained from each respondent institution.

1.6.4.5.3 Negotiating Access and Developing Relationships

Being equipped with a research clearance and permit, much as this provided an umbrella and specific permission to access the field, was not all that it took. Entrance into each research setting required yet another kind of authorisation. This involved the sensitive task of establishing contact and developing relationships with the respondents, in order to obtain an uninhibited flow of information. Making initial contact comprised introductions, setting the time, location, and duration of interviews, mainly through emailing and telephoning or messaging. The researcher found this process tasking as it required great patience. For example, some respondents never replied to digital communication and had to be approached physically. Others postponed the set interview after the researcher had arrived at the setting. Ultimately, when the appointment was set, what remained was creating a proper atmosphere for data collection. It began with obtaining respondents' informed consent to participate in the research. The researcher explained the purpose of the study, how the collected data would be used, and that participation was voluntary. Further, she assured the respondents that their answers would remain anonymous and confidential.

In creating a research relationship, the researcher had to develop appropriate language skills that corresponded to the characteristics of each research setting and participant. The language used was crucial in establishing a good rapport with the respondent. Additionally, the researcher had to consider the respondents' social life and value system. This is due to the nature of the research subject, which arouses different reactions in different groups of people.

To address this, the researcher had to develop interviewing strategies that suited each group of respondents. For instance, the researcher found that while interviewing judges, social welfare officers and non-Tanzanian adopters, the interviews took a completely different approach from the other respondents. The differences lay in the level of legal proficiency as well as in people's understanding of child adoption.

Research needs reciprocity.[55] It is an exchange of raw data with the promise of accessibility to the resultant processed information (research report). Understanding this, the researcher explained how she would make the study's outcome accessible to the respondents. It also involved discussing how that outcome would assist in addressing the problems identified by the respondents (conclusions and recommendations). Finally, considering the need for reciprocity, the researcher provided tokens of appreciation which were, for the most part, a simple lunch after the interview. Several respondents proposed a considerable amount of cash, which the researcher could not provide due to the ethical dilemmas this would have given rise to, and her limited budget.

1.6.4.6 Ethical Procedures

The first step towards compliance with research ethics is obtaining approval of the research proposal and plan. The authority and procedure for approval differ from one jurisdiction to another. In the case of this study, the researcher was eligible to seek approval and obtain research clearance from the University of Dar es Salaam, as explained above. The Vice-Chancellor granted the clearance after internal deliberations that involved the University's Directorate of Research.

The second step is to obtain informed consent from the research participants. The research permits from institutions were a form of informed consent, but the researcher still sought informed consent from each interviewee, whether affiliated to the institutions or private individuals.

The researcher also promised anonymity and confidentiality to the respondents. Hence, she conceals the identity of the interviewees and their responses in the presentation and discussion of collected data. Although some specific comments are reproduced, the researcher cites them in a way that leaves the respondent anonymous. The presentation and discussion of data present the reality but do not expose the participants to any harm.

[55] Lewis, "Design Issues", above footnote 40, at p. 64.

1.6.4.7 Time and Financial Budget

Field research was carried out in three phases. The first two phases shared a similar duration, unlike the last phase, which was much shorter. Phase I commenced in mid-December 2017 and ended in the first week of April 2018, while phase II began in mid-December 2018 and concluded at the end of March 2019. They each consisted of three months of active field research from January to March 2018 and 2019. In each case, the researcher used the few days in December of the previous year for preliminary activities in the field. These activities mainly related to negotiating access. In the three months, the researcher collected data in the field. The other fieldwork and data collection activities included in the research plan were done pre or post the months of field research. Phase III, which was purely follow-up research, was in January 2020. In total, this study is based on about eight months of field research. This was a limited amount of time considering the nature of the data sources and data to be accessed and collected.

Funds for the three phases of field research came from three different sources. The Bayreuth International Graduate School of African Studies (BIGSAS) financed phase I of the study, the University of Dar es Salaam financed phase II, and the DAAD, through the office of the academic supervisor, financed phase III. Each institution had a limit to the funds that could be granted for research. In addition, each had its own regulations for application, use, and accounting that the researcher had to comply with. The researcher conformed with all the conditions of the granted funds.

1.6.4.8 Personnel and Logistics

In each of the first two phases of field research, the researcher was to a small extent supported by two research assistants. Their role was limited to delivering letters requesting research permits and following up on promised documents, especially in courts of law, while all tasks concerning interviewing were carried out by the researcher. Also, access to sensitive documents, such as the Adopted Children Register, was possible only for the researcher herself. Furthermore, the assistants' support ended at the data collection stage; they did not assist in data interpretation, analysis, presentation, and discussion.

The organisation and implementation of the field research plan in each phase fell squarely upon the researcher. Management of logistical issues was, therefore, the researcher's responsibility. This included setting up appointments, travel logistics in the field such as obtaining directions to the research sites, means of transport, finances, and time management.

1.6.5 Data Analysis

Although there are no hard and fast rules and procedures for qualitative data analysis,[56] for data analysis to be effective and efficient, the researcher had to identify suitable approaches and procedures. Factors that guided this decision were the nature of the data and the main aim and focus of the analysis. The researcher had to consider the analysis of laws as well as the social phenomena emerging from the data, since this is a socio-legal study. Furthermore, since the study generated a voluminous mass of data in spoken form (recorded in extensive fieldnotes) and in written form (documents from field and desk research), the researcher needed to consider how to analyse these data. The researcher, therefore, adopted a mixture of analytical approaches. This included content analysis, law or policy analysis, and descriptive and interpretative analysis.

A three-step process of data analysis was developed which involved data management, presentation, and discussion. These analytical processes can best be understood from the borrowed concept of analytic hierarchy explained by Spencer, Ritchie and O'Connor.[57] The authors describe the hierarchy as an analytic structure "made up of a series of 'viewing' platforms, each of which involves different analytical tasks, enabling the researcher to gain an overview and make sense of the data".[58] The hierarchy involves three stages of analysis which begin with data management, followed by making descriptive and explanatory accounts from the data.[59] Data management in this study comprised sorting through and reducing the data by using themes and concepts to assign labels to identified data categories. The researcher executed this process manually without the facilitation of any computer-assisted qualitative data analysis software.[60] However, some manual data analysis tools such as mapping methods (creating thematic links in the data) and document summary forms (primarily for court cases) aided the process. Once the researcher had sufficiently organised the data, she moved to present it in descriptive accounts. Here, she relays the study's findings using actual and paraphrased words of respondents or written accounts, charts, tables, and other forms of data presentation to ensure a full report of the research content. Lastly, the researcher discusses the

[56] Spencer, Liz, Ritchie, Jane and O'Connor, William, "Analysis: Practices, Principles and Processes", in Ritchie, Jane and Lewis, Jane (ed.), *Qualitative research practice: A guide for social science students and researchers* (Los Angeles, California: SAGE, 2003), at p. 200.
[57] *Ibid.,* at p. 213.
[58] *Ibid.*
[59] See *ibid.,* at pp. 214-217.
[60] The main reason for not utilising CAQDAS was shortage of time. The researcher had limited time and could not use it to learn how different softwares work before selecting a suitable one, then upload the data on it, and still use time and intellect to synthesise it. She found manual analysis more direct and time saving in this case.

findings by providing explanatory accounts of the different legal and social phenomena and patterns which have emerged.

The process of data analysis included the transcription of interviews. There were only two sets of interviews that were recorded in audio form and required transcription. The interviews were both conducted in English and hence required no translation. However, a considerable percentage of data from interviews was in Kiswahili. Therefore, the researcher had to deal with language translation in data management to fit the labels, which had to be in English, the reporting language. Since the data is also primarily presented and discussed in English, translation from Kiswahili was imperative.

The researcher guarantees that all the field data presented and discussed in this thesis is authentic. In case of any question, the data can be checked in the author's field notes, with the respondents, and in formal records of the researcher's visits at the respondent institutions.

1.6.6 Methodological Challenges

In the course of the research, the researcher experienced several challenges that shaped the study in one way or another. Below, the challenges related to research methodology are explained.

Research clearance/permit: In the first phase of field research, the researcher experienced challenges in applying for and obtaining research clearance and permits. Application for research clearance from COSTECH through the University of Dar es Salaam while still in Germany in November 2017 was not fruitful due to changes in application procedures. After extensive follow-up in December 2017, the researcher had to re-apply in January 2018. The re-application was, unfortunately, met with cumbersome bureaucratic delays. The University issued research clearance towards the end of February 2018. The delay significantly affected the field research schedule. Regrettably, there was still a need to apply for research permits from the respective government ministries and institutions and some of the non-governmental organisations before obtaining access. As explained above, some complications further delayed the issuance of permits, delaying access to the research settings and participants even longer. As a result, the researcher accomplished only a small number of visits with unsatisfying research findings.

The second phase of field research drew lessons from the first. Research clearance was applied for early in September 2018 before the planned field research in January 2019. Although it helped, the researcher still had to make follow-ups physically at the University of Dar es Salaam in mid-December 2018. However, within a few days, the research clearance

was obtained. While that was an improvement, request for research permits and appointments with respondents, unfortunately, remained cumbersome—bureaucratic hurdles in permit processing in public and private institutions still held up the field research schedule. The problems mainly stemmed from gatekeepers' reluctance to do their job efficiently, several officials' unavailability in the office and disregard for appointments.

Negotiating access: In negotiating access and establishing research relationships, the researcher experienced some largely communication-related challenges. These challenges took the form of non-response to e-mail communication, unanswered and unreturned phone calls, non-response to letters until physical follow-up (mostly experienced in government institutions), indefinite unavailability of research participants due to their engagement in training or travel (especially in the contacted NGOs), and postponement of appointments, sometimes indefinitely. In addition, some institutions misunderstood the research subject and withheld research permits entirely. Others denied access due to the confidential nature of child adoption (this happened with some children's homes).

Ethical issues: Some individuals approached withheld their consent to participate in the study. Some, mostly public officers, cited the political atmosphere at the time of research as the ground for their denial. Others did so because of required confidentiality in child adoption practice. Even when they consented, respondents speaking in their official capacities rejected digital recording of interviews, anticipating harm. The researcher's promise of anonymity and confidentiality did not help matters. The confidential nature of child adoption also complicated access to information that would have been otherwise readily available. Documents that are usually accessible to the public, such as copies of court decisions, were not accessible because they contained information on child adoption. For the same reason, complex procedures were involved in gaining access to adoption registers, both at RITA and in courts of law.

Also, particulars of adoptive parents or prospective adoptive parents needed in order to establish contact for interview purposes were hardly accessible. Confidentiality issues also complicated the reporting of research findings. For instance, the researcher came upon some information that became difficult to substantiate or follow up due to its being confidential. For example, one particular story related to adoptive parents who adopted a child fraudulently entirely without the involvement of the Department of Social Welfare. Finally, the Department figured it out when the parents wanted to adopt a second child. However, the source refused to open up channels for following up on this story, citing confidentiality of child adoption.

Institutional logistics: There were substantial institutional practical and logistical complications that challenged research in government institutions. For instance, one challenge concerned internal institutional coordination. The researcher had to separately request for research permits in two inter-related departments of the Ministry of Health, Community Development, Gender, Elderly and Children (MoHCDGEC). Research in Social Welfare and Community Development departments of the Ministry required separate applications for permits at the ministerial level and again at the departmental levels. Since the departments are under the same Ministry (MoHCDGEC), one ministerial permit should have sufficed.

The researcher faced a similar challenge with procuring a research permit from the judiciary of Tanzania. The department dealing with research and training in the judiciary is under the Court of Appeal. Therefore, a researcher must apply to the Court of Appeal for a permit to research in Tanzanian courts. Challenges were met here in the application process due to misinformation and delays in issuing the permit. For example, when the researcher sought guidance from the High Court of Tanzania Registrar's office, she was directed to apply for a research permit there, only to be later redirected to the Court of Appeal. This misdirection cost time as the researcher had to submit the permit from the Court of Appeal to each respondent court to obtain a direct research permit from them.

Another institutional challenge experienced related to the merging and restructuring of government ministries. For instance, the Ministry of Health and Social Welfare merged with the Ministry of Community Development, Gender and Children in 2015 to form the Ministry of Health, Community Development, Gender, Elderly and Children. The merger, together with the transfer of the resultant Ministry to Dodoma in 2017, adversely affected the functionability of the ministerial departments and officers. For instance, in the first and second phases of field research, only a part of the Department of Social Welfare's staff was transferred to Dodoma, with the remainder in Dar es Salaam without defined functions. The Department was also not yet settled-in in Dodoma (everything still packed in boxes). Also, the Ministry's organisational structure was confused due to the merger, which meant its institutional co-ordination was at its nethermost.

There were also complexities in the institutional framework responsible for child welfare issues in Tanzania that posed a challenge during field research. For instance, social welfare officers who do the same work, only at different levels, work under the mandate of two different ministries: the Ministry of Health, Community Development, Gender, Elderly and Children and the President's Office – Regional Administration and Local Government. As a

result, figuring out their chain of command and how they operate posed considerable challenges, especially regarding application for research permits.

1.7 Literature Review

Traditional literature review sections in scholarly works provide an overview of the existing body of knowledge on the topic at hand. In a fixed, so-labelled section, they critically analyse and evaluate the state of knowledge on the subject by identifying theories, methods, and gaps in previous research. The researcher chose to use a different approach for this study. Rather than providing a comprehensive critical discussion on the literature only in this part, it adopts the approach of presenting it under the framework of concepts and theories and throughout the chapters where necessary. This part, therefore, serves to introduce key literature upon which the subsequent research is built. The works presented were selected because of the role they play in setting the foundation for the study. The main themes of the study set the framework under which the selected literature is explained.

The family and child care in Africa is a subject that scholars have extensively explored from numerous angles. This study focuses mainly on the conceptualisation of the African family and child care from a legal perspective and in terms of alternative child care. As seen above, a group of scholars in the mid-1990s found that they must part the long grass to reveal and reconceptualise the African family in its several dimensions, including historical, cultural, and legal.[61] These scholars utilised the framework of family function in various historical, cultural, and legally pluralistic contexts to describe what constitutes families in Eastern and Southern Africa. Their work depicts how the family is expected to care for its vulnerable members, such as children. It shows that there is a lack of child care facilities due to this expectation, even when socio-economic challenges have compromised the family's ability to care for its children.[62] In conclusion, the authors look closely at the relations between the family and the state, and find that state intervention in the affairs of the family is sometimes a necessity. They say,

> "We advocate a system by which the state can provide mechanisms for the support and review of the family where and when necessary, respecting the autonomy of the family, yet having the capacity to intervene as and when necessary."[63]

The processes of formal alternative child care provision necessitate state intervention in matters of the family. This is because, in many cases, child protection procedures involve

[61] Rwezaura, Armstrong, Ncube, Stewart, Letuka, Musanya, Casimiro, Mamashela, "Parting the Long Grass", above footnote 6.
[62] *Ibid.*, at p. 56.
[63] *Ibid.*, at p. 63.

agents of the state, such as the social welfare office and police department. Thus, apart from providing a deep insight into the African family, this article reveals the significance of state intervention in family matters through mechanisms that cut across the lawmaker, implementer and adjudicator.[64] It proposes state intervention where necessary, despite the concept of family democracy, which the authors discuss in detail.[65] However, the authors express reservations concerning state intervention, due to recorded adverse effects in Africa.[66] Also, although their work provides a useful background for understanding the African family, it does not take current developments into account and does not consider alternative child care in the discussion.

A similar group of scholars authored a book on the law, culture, tradition, and children's rights within Eastern and Southern Africa.[67] The book shows how international and regional instruments on the rights of the child, particularly the UNCRC, 1989 and the ACWRC, 1990, are localised and applied within the legal frameworks of a select number of countries within the region. To do so, the scholars use an approach that cements the universality of norms concerning the rights of the child, while trying to reconcile them with the prevailing African cultural relativism and legal pluralism contexts.[68] In the volume, the authors provide a conceptualisation of the child in two contexts; the African cultural context and the context of the children's and human rights. Then, in the light of these two contexts and the theoretical framework of legal pluralism, the authors consider diverse topics in respect of children's rights in the region.

The contributions in the book discuss who the African child is and what place he or she occupies in different contexts. Some of the contributors consider the law and practice in connection with the principle of the child's best interests[69] and child adoption[70], topics that are pertinent to this study. Thus, the book provided a concrete foundation for this study. This is because the contributions set the background for alternative care with regard to the African child. However, since the contributions refer to different countries in Eastern and Southern

[64] See the discussion *ibid.,* at pp. 62-65.
[65] *Ibid.,* at pp. 57-62.
[66] *Ibid.,* at p. 64.
[67] Ncube, *Law, culture, tradition and children's rights in Eastern and Southern Africa*, above footnote 17.
[68] See Ncube's introduction to the themes of the book, *ibid.,* at pp. 3-9.
[69] Puleng Letuka, "The Best Interests of the Child and Child Labour in Lesotho", in W. Ncube (ed.), *Law, culture, tradition and children's rights in eastern and southern Africa* (Aldershot: Ashgate, 1998).
[70] Jennifer Okumu-Wengi, "Searching for a Child-centred Adoption Process: The Law and Practice in Uganda", in W. Ncube (ed.), *Law, culture, tradition and children's rights in eastern and southern Africa* (Aldershot: Ashgate, 1998).

Africa, except for one contribution that covers Tanzania specifically[71], it was more of a source for comparative knowledge. Also, since the authors published the book towards the end of the 1990s, it does not provide a current discussion on this study's crucial topics.

Child adoption, the study's main subject, is one of the areas of family law and children's rights that have attracted profound scholarly interest. Such interest has translated into a massive volume of literature on the topic. However, current literature that is specific to child adoption law and practice in Tanzania is scarce. Rwezaura and Wanitzek published a crucial article on the subject in 1988.[72] The article was based on their research on child adoption law and practice in the mid-1980s. Although their work was an investigation of the past formal law of adoption under the Adoption of Children Act, 1953, repealed and replaced by the Law of the Child Act, 2009, it plays a central role as the groundwork upon which the researcher builds this study. The article addressed three main points that generated research interest for the study. These include the authors' analysis of the sections of Tanzanian society that used the formal law of child adoption, their motivations for doing so, and how child adoption law reflected state policy on the care of children.[73] In addition, they considered the influence of culture and religion on how people of different ethnic descent in Tanzania arranged care for their children. They found that legal pluralism was a factor to be reckoned with when considering alternative child care in the country. The issues discussed in the article prompted the present author to consider the new provisions concerning child adoption in the Law of the Child Act, 2009, and specifically two groups of adopters that represent those issues, non-resident Tanzanians and resident non-Tanzanians.

To pursue this research, it was necessary to gain a global understanding of child adoption. O'Halloran provides a critical perspective of the politics of adoption in a wide range of countries in different parts of the world.[74] This book uses an analytical approach that traces the historical evolution of child adoption law, policy, and practice across numerous societies, and identifies how and what caused its metamorphosis into the current modern adoption law. In doing so, the book considers the social values of indigenous peoples and how they have influenced child adoption custom and practice. It looks at the content of adoption laws in countries with different legal and cultural traditions and discusses their core constitutive

[71] Bart Rwezaura, "The Duty to Hear the Child: A View from Tanzania", in W. Ncube (ed.), *Law, culture, tradition and children's rights in eastern and southern Africa* (Aldershot: Ashgate, 1998).
[72] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22.
[73] See *ibid.*, at pp. 159-161 as summarised.
[74] Kerry O'Halloran, *The politics of adoption*: *International perspectives on law, policy and practice* (Dordrecht: Springer, 2015).

elements, which enables a comparative analysis of their law, policy, and practice on child adoption. The book also evaluates how international jurisprudence influences national child adoption law, policy, and practice, especially how national law is subject to relevant international principles. Among many other issues discussed in the book, these aspects informed this study on significant points of law, relevant concepts, and applicable principles in child adoption. However, the book does not provide a perspective on child adoption law, policy, and practice in African countries. Although its discussion on countries with a common-law tradition like Tanzania is informative, it is not close to home regarding cultural specificity, a significant variable in the book.

This study focuses on child adoption with an international element in Tanzania. Bromley's Family Law by Lowe and Douglas includes a section on child adoption with a foreign element in the UK.[75] Although it deals with a country other than Tanzania, the book provides clarity concerning what constitutes adoptions with a foreign element. The authors refer to such adoptions as intercountry adoptions. They define them as adoption of children usually resident abroad by adopters usually resident in the UK, or adoption of children resident in the UK by adopters resident abroad.[76] They proceed to categorise them into three types of intercountry adoption. These are Convention adoptions, overseas adoptions that are non-Convention, and domestic adoptions of foreign children.

The authors explain that the UK became a party to the Hague Convention on Intercountry Adoption in June 2003.[77] Reviewing practice under the Convention, they opine that it has become highly successful in the Contracting States due to the child protection mechanism it guarantees.[78] The authors emphasise that in intercountry adoption a child can be better protected if the states involved (sending and receiving) are party to the Convention. To demonstrate the Convention's success, the authors devise an important test based on the ability of the sending states to properly carry out the adoption process and safeguard the interests of both the child and the birth family.[79] However, Tanzania is not a party to the Convention; hence Convention adoptions and their protective guarantees do not apply. Instead, the category of overseas non-Convention adoptions fits the features of adoptions by non-resident Tanzanians covered in this study. For instance, if a Tanzanian resident in the UK comes to Tanzania and adopts a child resident in Tanzania, it is considered an overseas non-

[75] Lowe, Nigel V. and Douglas, Gillian, *Bromley's Family Law*, above footnote 25, at pp. 872-879.
[76] See *ibid.*, at p. 872.
[77] *Ibid.*, at p. 873.
[78] *Ibid.*, at p. 876.
[79] *Ibid.*, at p. 877.

Convention adoption. However, adoption of a Tanzanian child by a resident non-Tanzanian, who is a UK citizen, is different. It would be recognised in the UK according to common law principles established by *Re Valentine's Settlement*.[80] In this case it was decided that in such adoptions, the domicile of the adopters and the adopted child in an overseas country during the adoption is the key criterion for its recognition. Oppong clarifies that this is because child adoption occasions fundamental changes in the status of the adopters and the adopted child, and that at common law, questions regarding the status of a person are governed by the law of the domicile of that person.[81] Thus, there should be some degree of permanence in the residence of the adopters in the overseas country for the adoption to be recognised in the UK according to common law principles. Although Lowe and Douglas do not conceptualise this type of adoption as a Convention adoption or an overseas adoption, they still consider it an intercountry adoption while in Tanzania, based on residence requirements, both types of adoption, by resident non-Tanzanians and non-resident Tanzanians, are considered domestic adoptions.

Lowe and Douglas, in the section of their book on adoption with a foreign element referred to above, provide information pivotal to this study. Their discussion on the protections afforded under Convention adoptions exemplifies what Tanzanian children in adoptions with an international element lack in terms of protection. It lays a base for the discussion in this study on children's protection in the adoption process.

The best interests of the child principle is a key principle in international jurisprudence on children's rights. It has obtained an elevated status among the other cardinal principles laid down in children's rights conventions, in this case, the UNCRC and ACRWC. This status is also maintained in national child laws. This study uses the principle as a benchmark to measure the law, policy, and practice of child adoption in Tanzania. Scholarly works on the principle have been consulted and it is quite clear that the crucial position that the principle occupies in decision making on matters that affect children is not debatable. However, what scholars do not always agree on is what constitutes the child's best interests. Alston's works that explore how to interpret, determine, and apply the principle of the child's best interests in a way that takes into account the cultural values of different societies were especially

[80] [1965] 1 Ch 831; Lowe, Nigel V. and Douglas, Gillian, *Bromley's Family Law*, above footnote 25, at p. 878.
[81] See the discussion in Richard F. Oppong, *Private International Law in Commonwealth Africa* (Cambridge: Cambridge University Press, 2013), at pp. 229-232.

insightful for this study.[82] The contributions in the book trace the historical advancement of the principle up to its enshrinement in the UNCRC.[83] They provide an interpretation of the principle based on its formulation in the UNCRC and ACRWC and discuss criteria for its determination.[84] Further, the authors show how cultural differences influence how the principle is perceived and applied in different jurisdictions.[85] Ultimately, they conclude that, while the flexibility allowed by leaving the definition of the child's best interests open is justified, it renders the principle subjective and at risk of arbitrariness.[86] However, the authors also suggest ways of overcoming the indeterminacy of the principle to ensure its proper application.[87]

Rwezaura, in his contribution, gives a specific account of how social and economic conditions in sub-Saharan Africa affect the meaning assigned to the best interests of the child concept.[88] In his discussion, he shows how compliance with the principle has been reduced to satisfaction of the child's material needs and nothing more. This study critically analyses this finding in the discussion on compliance with the principle in child adoption practice. These authors' contributions helped to shape the research perspectives and discussions in this study, although they do not cover Tanzania specifically or reflect the current law and practice in Tanzania, especially with regard to application of the best interest of the child principle in child adoption.

Safeguarding the child's best interests in adoptions with an international element is extensively discussed in Cantwell's publication of 2014.[89] In this work, the author uses several studies of the principle to provide guidance on how the principle of the child's best interests may be interpreted, determined, and applied in intercountry adoption. While being quite informative, his discussion does not take into account the uniqueness of the child

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[82] See the contributions in Philip Alston (ed.), *The best interests of the child*: *Reconciling culture and human rights* (Oxford: Clarendon Press, 1994) and in Philip Alston, Bridget Gilmour-Walsh (eds.), *The best interests of the child*: *Towards a synthesis of children's rights and cultural values* (Florence: Unicef, 1996).

[83] See Alston, Gilmour-Walsh, *The best interests of the child*, above footnote 82, at pp. 3-8.

[84] *Ibid.*, at pp. 9-13.

[85] See the contributions in Alston, *The best interests of the child*, above footnote 82; and for a disussion on the relationship between culture and the determinacy of the principle and application of other human rights norms, see Alston, Gilmour-Walsh, *The best interests of the child*, above footnote 82, at pp. 17-23 and 35-39.

[86] See the discussion on indeterminacy of the principle based on culture and resources in Alston, Gilmour-Walsh, *The best interests of the child*, above footnote 82, at pp. 17-23 and 25-28.

[87] *Ibid.*, at pp. 29-34.

[88] B. Rwezaura, "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa", in P. Alston (ed.), *The best interests of the child: Reconciling culture and human rights* (Oxford: Clarendon Press, 1994); also published as Barthazar A. Rwezaura, "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa", International Journal of Law, Policy and the Family 8(1) (1994): pp. 82–116.

[89] Nigel Cantwell, *The Best interests of the child in intercountry adoption* (Unicef Innocenti Research Centre Italy, 2014).

adoptions covered in this study. This is because Cantwell, in large part, considers adoptions under the 1993 Hague Convention on Intercountry Adoption. The dilemma in the question he discusses in his article of whether the best interests principle is a pillar or a stumbling block for implementing children's rights also plays a significant role in examining adherence to the principle in child adoption practices in Tanzania.[90] The question directs attention to the authorities charged with the mandate of applying the principle in their decisions on matters concerning children, an angle that this study aims to explore. Although the discussion in the article does not reflect the conditions existing in Tanzania, particularly concerning child adoption, it enabled the researcher to consider the question more critically, especially as far as child protection in adoption is concerned.

Protection of children in adoption is an issue at the heart of this study. This is because the international element in the adoptions considered here raises this question in practice. While considering this topic, the researcher looked at the publications of the African Child Policy Forum (ACPF) regarding intercountry child adoption. The Forum has published two reports that give an essential account of intercountry adoption in Africa.[91] The first report analyses the international standards on intercountry adoption laid down in the UNCRC, the ACRWC and the 1993 Hague Convention on Intercountry Adoption.[92] It emphasises the thrust of international standards on intercountry adoption as protection of the child rather than promotion of the practice. The analysis depicts how ill-equipped policy-, law-, and practice-wise Africa is at safeguarding its children when adopted internationally.[93] Nonetheless the abridged second report discusses the rationale for intercountry adoption.[94] It argues that intercountry adoption provides a child with "permanency" in a loving family environment in a legalised and formal way that informal coping mechanisms such as community care cannot provide.[95] Since the practice can complement child care in Africa, the reports recommend measures to improve the situation of intercountry adoption in Africa. Among others, a measure of great significance for this study is the suggested comprehensive law reform to ensure protection of the child's best interests. One way to achieve this, the reports propose, is

[90] Nigel Cantwell, "Are 'Best Interests' a Pillar or a Problem for Implementing the Human Rights of Children?", in T. Liefaard, J. Sloth-Nielsen (eds.), *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (Leiden, Boston: Brill/Nijhoff, 2017).
[91] African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption* (Addis Ababa: The African child Policy Forum, 2012); and ACPF, *Intercounty Adoption*: *An African Perspective* (Addis Ababa: The African child Policy Forum, 2012).
[92] African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 91, at pp. 7-11.
[93] *Ibid.*, at pp. 12-38.
[94] ACPF, *Intercounty Adoption: An African Perspective*, above footnote 91.
[95] *Ibid.*, at p. 1.

domestication of the international standards formulated not only in the UNCRC and ACRWC, but also in the 1993 Hague Convention on Intercountry Adoption. The reports also advocate for legislative and procedural reform, establishing safeguards to protect the child, and searching for bilateral and multilateral assistance to minimise the need for adoption.[96]

The ACPF, as shown by the reports, frowns upon countries that are not party to the Hague Convention on Intercountry Adoption, and yet encourages intercountry adoption, which compromises the protection of the adopted children.[97] Tanzania is not party to the 1993 Hague Convention on Intercountry Adoption. Although adoptions with an international element are practised in the country, which would be deemed intercountry adoption by these and other authors, they are considered domestic adoptions in Tanzania. Since Tanzania is not among the countries discussed in the reports, they do not shed light on this question.[98] This study fills this gap and answers the protection question by considering how the child's best interests in adoptions with an international element are safeguarded pre- and post-adoption.

Mezmur also considers the issue of child protection in adoptions with an international element. He has written a crucial article on intercountry adoption in Africa.[99] He shows the vulnerabilities and gaps in African intercountry adoption systems by reviewing three cases: the Angelina case in Ethiopia, the Madonna case in Malawi, and the Zoe's Ark case in Chad. This article's primary focus is on drawing lessons from the three cases to address intercountry adoption irregularities in Africa.[100] The author discusses the international legal framework on intercountry adoption founded on the UNCRC, ACRWC and the 1993 Hague Convention on Intercountry Adoption.[101]

This article does not explicitly consider the situation in Tanzania. However, the author offers an opinion very relevant to this study, namely that it is not a foregone conclusion that intercountry adoption must be a secondary measure of alternative care to be considered after all other measures have failed, but that the child's best interests must be the paramount consideration.[102] His assertion is pertinent because the subsidiarity principle is one of the safeguards enacted under section 74 of the Law of the Child Act, 2009 for adoptions by

[96] See the recommended specific actions for African governments, *ibid.*, at pp. 33-34.
[97] "…disturbingly, the rapid increase in intercountry adoption numbers from Africa is almost entirely due to development of the practice in countries that are not parties to the Hague Convention…", *ibid.*, at p. 10.
[98] It has only one mention in the discussion of adoptability in the report, under fn. 107 at p. 18.
[99] B. D. Mezmur, "From Angelina (To Madonna) to Zoe's Ark: What Are the 'A-Z' Lessons for Intercountry Adoptions in Africa?", International Journal of Law, Policy and the Family 23(2) (2009): pp. 145–73.
[100] *Ibid.*, at p. 152.
[101] *Ibid.*, at pp. 148-152.
[102] *Ibid.*, at p. 154. For further discussion of the subsidiarity principle, see Benyam Mezmur, "Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child Rather than a Right to a Child", International Journal of Human Rights, São Paulo 6(10) (2009), pp. 82-105.

resident non-Tanzanians. In his discussion, the author emphasises further that the Hague Convention, if ratified and implemented, can solve a significant portion of the problems created by illegal adoptions in Africa.[103] This study does look at Tanzania's attitude towards the 1993 Hague Convention on Intercountry Adoption. However, it focuses more on investigating how Tanzanian children in adoptions with an international element are protected under the existing legal, policy and institutional framework governing child adoption in Tanzania.

Legal pluralism is a fact to reckon with in child adoptions with an international element in Tanzania. This study looks at how legal pluralism impacts the practice of these types of child adoption. In doing so, it refers to the work of the Commission on Legal Pluralism, whose members have constantly strived to conceptualise and reconceptualise legal pluralism since 1981.[104] Griffiths' pioneering article on legal pluralism helps to set the stage for understanding what legal pluralism means.[105] His use of Moore's concept of the semi-autonomous social field to define what law is in a context of legal pluralism inspired the researcher to consider the multiple legal constellations that exist in Tanzanian society and their influence on child adoption practices.[106] However, other scholars have been critical of Griffiths' views. Some, such as Merry[107], Woodman[108] and Tamanaha[109], refute his stance on what law is in contexts of legal pluralism. The question of what law is for purposes of defining what legal pluralism entails appears to be a permanent question. This is because Griffiths shows that law has an extraordinarily mobile and contingent nature that constantly reproduces the multiple faceted domains of legal pluralism.[110] Nevertheless, von Benda-Beckmann and Turner have offered a sufficiently broad definition of law to encompass its

[103] Mezmur, "From Angelina (To Madonna) to Zoe's Ark: What Are the 'A-Z' Lessons for Intercountry Adoptions in Africa?", above footnote 99, at p. 166.
[104] The first symposium of the Commission was held in Bellagio, Italy in 1981. The Commission was known then as the Commission on Folk Law and Legal Pluralism, as pointed out in Anne Griffiths, "Pursuing Legal Pluralism: The Power of Paradigms in a Global World", Journal of Legal Pluralism 64 (2011): pp. 173–202.
[105] John Griffiths, "What is Legal Pluralism?", Journal of Legal Pluralism and Unofficial Law 24 (1986): pp. 1–56.
[106] See Sally F. Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", Law & Society Review 7(4) (1973): pp. 719–46 for a deeper understanding of the concept.
[107] Sally E. Merry, "Legal Pluralism", Law & Society Review 22(5) (1988): pp. 869–96.
[108] Gordon R. Woodman, "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism", Journal of Legal Pluralism 42 (1998): pp. 21–59.
[109] Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism", Journal of Law and Society 20(2) (1993): p. 192. For a later change of perspective, see Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", Sydney Law Review 30 (2007).
[110] Griffiths, "Pursuing Legal Pluralism: The Power of Paradigms in a Global World", above footnote 104.

multiple dimensions and prompt an understanding of legal pluralism.[111] They call law any normative order that its participants consider as law.[112]

These discussions raise numerous issues that shape and reshape legal pluralism as a theoretical and conceptual analytical tool. However, it is not applied in the critical analysis of practical social phenomena such as alternative child care. This study attempts to explain the influence of plural legal systems in child adoption practice in Tanzania. Wanitzek's use of legal pluralism serves as an analytical framework for the discussions.[113] In her work, she considers legal pluralisation processes in child adoption caused by the increasing international mobility of people. She shows how international migration and immigration laws of foreign countries have influenced child adoption practice. In consideration of the laws at play in such adoption arrangements, she depicts their interplay and resultant contradictory effects. Wanitzek's work reflects the key issues in respect of legal pluralism in child adoptions with an international element, and can thus be compared to this study. The main distinction is the governing law on child adoption, in her case still the former Adoption of Children Act, 1953 as revised in 2002, and in this study, the Law of the Child Act, 2009. Also, the timelines for the two studies are different. The current study, therefore, endeavours to build on the foundation laid by Wanitzek's earlier study.

Street-level bureaucracy, a theory developed by Lipsky, was found helpful for evaluating the implementation of child adoption law by the mandated authorities in Tanzania.[114] Lipsky uses the term street-level bureaucrats to refer to those public servants who directly contact people as they perform their work. They are service providers who, in each encounter, present the government to the people and deliver public policy. Lipsky's theory says that, in the face of systematic and practical dilemmas in the workplace, the bureaucrats invent coping mechanisms to assist them in the discretionary discharge of their duties.[115] In essence, the policy enacted by higher administrative or legislative bodies is shaped by them in the process of executing their work. He further argues that though statutes, rules, regulations,

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[111] Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50.

[112] *Ibid.*, at p. 262. Also well explained in Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at p. 396; and in Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism?", The Journal of Legal Pluralism and Unofficial Law 34(47) (2002): pp. 37–82.

[113] Wanitzek, "Legal pluralism under the influence of globalisation: a case study of child adoption in Tanzania", above footnote 19. See also a subsequent discussion specific to Ghana in Wanitzek, "Child Adoption and Foster Care in the Context of Legal Pluralism: Case Studies from Ghana", above footnote 18.

[114] The theory is well articulated in Michael Lipsky, *Street Level Bureaucracy*: *Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980) which has a current edition published as Michael Lipsky, *Street-Level Bureaucracy*: *Dilemmas of the Individual in Public Service*, 30th Anniversary Edition (New York: Russell Sage Foundation, 2010).

[115] See Lipsky, *Street Level Bureaucracy*, above footnote 114, at pp. xi-xvi.

administrative directives, occupational and community norms and practices should direct their work and limit their discretion, the normative body is immense and constantly evolving; hence they adhere only to the most fundamental rules.[116] Although Lipsky's discussion is not directly related to the subject of this study, he advances a theory that is relevant to all street-level bureaucracies.[117] He lists police departments, social welfare departments, lower courts, and legal service offices, all of which are relevant to this study.[118] The researcher thus considers how street-level bureaucrats involved in child adoption processes in the existing context of legal pluralism interpret and implement child adoption law as they navigate the dilemmas characteristic of their jobs.

1.8 Thesis Outline

This thesis reports on all the research activities that constituted the author's doctoral research project. It is divided into seven chapters reflecting the varied but connected themes of the study. Each chapter consists of an introductory part that briefly explains what it covers. The chapters also have concluding remarks that provide a summary of the main points of discussion and their implications. This part, therefore, outlines only breifly what each chapter entails. The rationale is to draw a map of the thesis for ease of reference and to arouse the interest of the reader.

Chapter one, this chapter, introduces the study. It clarifies the subject under study, and sets the foundation for understanding the research problem. Next, it defines questions stemming from the research problem that the study seeks to answer and explains the purpose of the investigation. Further, it explains the limits of the study which ensure the validity and reliability of the research outcomes. Then, it details the methodology employed to arrive at such outcomes. Lastly, in an attempt to root the study, it discusses a select body of existing literature relevant to it. Chapter two, in extension of chapter one, reviews the literature from a broader perspective. It defines the theoretical and conceptual framework on which the study is built. This chapter also constructs a framework of institutions that operate and have a direct legal bearing on the subject of the study.

Chapter three, in relation to chapter one, provides the background to the study. First, it explains the socio-economic, political, legal, and cultural circumstances that lead to the existence of children in need of care in Tanzania. Next, it analyses the legal and policy

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[116] *Ibid.,* at p. 14.

[117] For an application of Lipsky's principle in matters of child welfare practice, see Brenda D. Smith, Stella E. F. Donovan, "Child Welfare Practice in Organizational and Institutional Context", Social Service Review 77(4) (2003): pp. 541–63.

[118] See the list of bureaucrats in Lipsky, *Street Level Bureaucracy*, above footnote 114, at pp. xi and 3.

provisions and procedures for the protection of these children. After that, based on the applicable law and practice, the chapter briefly looks at the provisions and procedures for placing children in available formal alternative care arrangements. Finally, the chapter outlines child adoption as a measure of alternative child care and portrays the rationale for research on child adoption law and practice in Tanzania.

The legal and policy framework on child adoption is examined in chapter four of the thesis. To begin with, the structure of national, regional, and international legal instruments regulating child adoption in Tanzania is presented. This chapter shows that legal pluralism is a reality in child law in Tanzania. Then, it goes on to critically discuss the legal process and requirements of child adoption. In the discussion, the roles of participants in child adoption and relevant institutions as described in chapter two are explained and evaluated. The chapter mounts the critique upon the dictates of the best interests of the child principle. Chapter five is pivotal to the whole discussion on the capacity of the legal, policy and institutional framework to oversee child adoption in Tanzania. This is because the chapter examines the best interests principle in Tanzania's child law and justifies its use as a yardstick against which the law and practice of child adoption are measured in this study. In doing so, chapter five attempts to show how the relevant authorities interpret, determine, and apply the principle in practice.

Chapter six presents the main research findings, although these are presented and discussed wherever relevant throughout the different chapters of the thesis. This chapter commences with statistical information on the basis of which the researcher explains the nature and trends of child adoption in Tanzania. This is followed by a discussion of motives for child adoption, to explicate the push and pull to adopt as experienced by different categories of adopters. After that, the legal and institutional management of child adoption is presented and discussed. The chapter looks at the adherence to and sufficiency of child adoption procedures and requirements in practice, while observing the performance of the mandated authorities in overseeing these procedures and requirements. In one way or another, the entire discussion is based on the analytical foundation of the theories of legal pluralism and street-level bureaucracy. In the end, the chapter considers the extent to which child adoption could help alleviate the problem of children without parental care in Tanzania. Finally, in conclusion, the chapter summarises how the findings answer the research questions.

Chapter seven is the conclusion of the study. It begins with a recapitulation of the research questions and objectives and then discusses them in relation to the research outcomes. Next, the chapter draws crucial conclusions and makes recommendations. Finally, it identifies areas

for further research which the researcher came across but which were outside the scope of this study.

Chapter 2: Theoretical, Conceptual, and Institutional Framework

> "Returning to our analogy of how writing a dissertation is similar to building a house, we believe that the theoretical framework and its associated tenants and principles would entail the elevation blueprints for a house, whereas the conceptual framework would involve the floor plan blueprint of how information flows throughout the dissertation."[119]

2.1 Introduction

This chapter lays the theoretical and conceptual foundation for the study. It considers existing relevant literature that establishes and develops theories and concepts underlying the study. The chapter's main aim is to explain the legal and social phenomena relating to the study in order to show their specific meaning and application in this study. Therefore, it discusses alternative meanings and applications from other scholars' perspectives to sharpen a distinctive perception valid for the study.

The chapter further provides the institutional framework constituting the child protection system in Tanzania by describing the mandated authorities in child welfare practice. Specific to the study's subject, the composition, governance, and functions of the authorities engaged in implementing child adoption law are discussed. The framework should be read in conjunction with chapter four to fully understand the authorities' roles in executing child adoption law.

2.2 Theoretical Framework

There is a vast amount of literature that attempts to define what a theoretical framework signifies. This study appreciates the graphic description based on construction engineering that Grant and Osanloo provide in their article.[120] The authors find that a theoretical framework for a thesis is analogous to a house blueprint that can serve the same purpose for the whole inquiry.[121] According to the authors, a theoretical framework is a structure that defines the study's philosophical, epistemological, methodological, and analytical approach. It guides a researcher on how to build and support their study. Usually, the framework is derived from existing theories that have been tested and validated by other researchers and are considered generally acceptable in scholarly literature.[122] A researcher may also use a theory

[119] Cynthia Grant, Azadeh Osanloo, "Understanding, Selecting, and Integrating a Theoretical Framework in Dissertation Research: Creating the Blueprint for Your 'House'", Administrative Issues Journal: Connecting Education, Practice and Research 4(2) (2014): pp. 12–26.
[120] *Ibid.*
[121] *Ibid.,* at p. 13.
[122] *Ibid.,* at p. 16.

that he or she develops in the course of the study.[123] Either way, one must use the theories that best align with the study's problem, purpose, and significance.

This study uses the theories of legal pluralism and of street-level bureaucracy as lenses through which the research problem is critically analysed.

2.2.1 Legal Pluralism

The advancement of legal pluralism as a theoretical and analytical tool demanded a clear conception of law and legal pluralism, the development of which commenced some decades ago[124] and is still ongoing. The researcher does not claim to trace the concept's historical development fully here, nor to discuss it exhaustively in all its breadth.[125] Nonetheless, she acknowledges the pioneering work of various scholars from legal studies and the social sciences, which laid the basis for the progress the concept boasts of today.[126] The strengths and weaknesses, success and failure of the concept of legal pluralism, and how far it has come, are not discussed here.[127] In this thesis the concept is used as a theoretical and analytical tool to the extent that the established knowledge of co-existing interacting plural legal orders within a defined locus and their effects on social life guides the study in answering the research questions. This part explicates the concept's gist and its relation to the study. Work done by the then Commission on Folk Law and Legal Pluralism, today's Commission on Legal Pluralism, and its members, published mainly in the Journal of Legal Pluralism, lays the basis for discussing the concept in this part.

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[123] *Ibid.*

[124] See the discussion on conceptualisations of law and legal pluralism and their use as analytical tools in Benda-Beckmann, "Who's Afraid of Legal Pluralism?", above footnote 112.

[125] For the historical development of the concept and theory of legal pluralism, see Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109.

[126] Griffiths, "What is Legal Pluralism?", above footnote 105; Merry, "Legal Pluralism", above footnote 107; Franz von Benda-Beckmann, "Comment on Merry", Law & Society Review 22(5) (1988): pp. 897–902; Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism", above footnote 109; Woodman, "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism", above footnote 108. See also the earlier writings on the concept of legal pluralism by Gilissen, John 1971; Vanderlinden, Jacques 1971; Moore, Sally F. 1973; Smith, M. G. 1969, 1974; Hooker, M. B. 1975; Pospisil, Leopold 1978; and Galanter, Marc 1981 discussed in the listed literature.

[127] For a comprehensive exploration of the theory, see Anne Griffiths, "Legal Pluralism", in R. Banakar and M. Travers (eds.), *An Introduction to Law and Social Theory.* Oxford and Portland Oregon: Hart Publishing, 2002; Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109; Anne Griffiths, "Anthropological Perspectives on Legal Pluralism and Governance in a Transnational World", in M. D. A. Freeman (ed.), *Law and anthropology* (Oxford: Oxford University Press, 2009); William Twining, "Normative and Legal Pluralism: A Global Perspective", Duke Journal of Comparative & International Law 20(3) (2009-2010): pp. 473–518; and Franz von Benda-Beckmann, Keebet von Benda-Beckmann, Anne M. O. Griffiths (eds.), *The power of law in a transnational world*: *Anthropological enquiries* (New York: Berghahn, 2012).

What is legal pluralism?[128] Griffiths asks and confirms that it is not legal centralism.[129] In his attempt to construct a conception of legal pluralism suitable for a descriptive theory of law, Griffiths defines legal pluralism as the existence of more than one legal order in a given social field.[130] Here, it is significant to note the use of and distinction between legal rules, mechanisms, orders and systems.[131] Distinguishing legal pluralism from legal centralism, Griffiths describes the latter as the perception that law is and should be the state's law that applies uniformly to all people in the state, is exclusive of all other law, and has only one set of state institutions to oversee its administration.[132] Legal centralists, he asserts, perceive other existing normative systematisations, such as the family, church, social associations, or economic organisations, as subordinate to state laws and institutions. Griffiths holds that legal centralism is to blame for hindering the advancement of general theory and accurate observation of legal reality.[133] He says this viewpoint has prevented lawyers and social scientists from perceiving the legal reality of a modern state as "an unsystematic collage of inconsistent and overlapping parts" which submits to no straightforward legal interpretation, and which in the view of a liberal idealist can be morally and aesthetically offensive, and to the empirical student nearly unintelligible in its complexity.[134]

After considering the said legal reality, Griffiths concludes that a society's legal organisation is congruous to its social organisation.[135] This means that social pluralism breeds legal pluralism. Merry states that almost every society, whether with a colonial past or not, is legally plural.[136] Although research on the concept of legal pluralism emanated from studying colonial or post-colonial societies in which imperialist nations superimposed parts of their own legal systems on pre-existing, mostly non-formalised indigenous legal systems, the

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[128] This article is seminal to the development of the legal pluralism theory in Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at p. 392; and in Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 262.

[129] Griffiths, "What is Legal Pluralism?", above footnote 105; Woodman describes Griffiths' work in the said article as having a central focus on combating the ideology of legal centralism in Woodman, "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism", above footnote 108, at p. 33.

[130] Griffiths, "What is Legal Pluralism?", above footnote 105, at p. 1-2; Merry, "Legal Pluralism", above footnote 107, at p. 870.

[131] See a discussion on this in Benda-Beckmann, "Who's Afraid of Legal Pluralism?", above footnote 112, at pp. 63-65; and a definition of legal system in Merry, "Legal Pluralism", above footnote 107, at pp. 870-871.

[132] Griffiths, "What is Legal Pluralism?", above footnote 105, at p. 3.

[133] *Ibid.*, at p. 4.

[134] Griffiths, "What is Legal Pluralism?", above footnote 105, at p, 4. Griffiths' propositions have been the subject of extensive criticism because scholars perceived them as delivering a value judgement that poses legal pluralism against the state. For the argument that this is not what he meant, see Keebet von Benda-Beckmann and Bertram Turner, 'Legal pluralism, social theory, and the state', *The Journal of Legal Pluralism and Unofficial Law* 50, 3 (2018), pp. 255–274, at p. 262. For some of the criticism of Griffiths' ideas, see Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at pp. 393-396.

[135] Griffiths, "What is Legal Pluralism?", above footnote 105, at p. 38.

[136] Merry, "Legal Pluralism", above footnote 107, at pp. 871 and 873.

concept exists beyond that category.[137] Merry classifies legal pluralism as classic or new, where the former relates to the colonial convergence of indigenous and European law, and the latter to the law of non-colonised Western countries. However, she declares that indigenous societies were legally and culturally plural due to conquests and migration, even before their encounter with colonisation.[138] Agreeing with Merry, Tamanaha argues the existence of legal pluralism in non-Western societies during medieval times.[139] Thus, the legal systems of both the coloniser and the colonised were plural, even before they met.

Indeed, instances of plurality are not found exclusively in these two groupings. With the increasing volume of interaction between societies, and burgeoning globalisation processes, other forms of legal pluralism have emerged. Tamanaha, and von Benda-Beckman and Turner use the umbrella term of "global legal pluralism" to express legal multiplicity in the context of international, regional and transnational laws, trans-governmental networks, global immigration, and human rights laws.[140] Further, setting aside its classifications and scope of *loci*, legal pluralism has become a widely studied concept across numerous academic fields, such as legal anthropology and sociology, socio-legal studies, comparative law, international law, and political science.[141] Thus, it seems that legal pluralism is always there and everywhere.[142]

> "Legal pluralism is everywhere. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level. There are village, town, or municipal laws of various types; there are state, district or regional laws of various types; there are national, transnational and international laws of various

[137] *Ibid.*, at p. 874.
[138] *Ibid.*, at p. 870.
[139] While concluding his discussion on legal pluralism in the medieval times in Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at p. 381, the author says, "…it is pertinent to note that, while the focus herein has been on legal pluralism within medieval Europe, the phenomena just described were by no means limited to that context. Wherever there were movements of people, wherever there were empires, wherever religions spanned different language and cultural groups, wherever there was trade between different groups, or different groups lived side by side, it was inevitable that different bodies of law would operate or overlap within the same social field."
[140] *Ibid.*, at pp. 386-390; Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at pp. 265-268; see also Corradi, Giselle; Brems, Eva; and Goodale, Mark (eds.), *Human Rights Encounter Legal Pluralism*: *Normative and Empirical Approaches* (Oxford, UK, Portland, Oregon: Bloomsbury Publishing, 2017).
[141] Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at pp. 376 and 390.
[142] See Woodman, "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism", above footnote 108, at p. 54; Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at pp. 375 and 376; however, in Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 264, the authors argue that it is not necessarily the case that legal pluralism is always present everywhere, though more than one legal order may be significant for social interaction; John Griffiths, "Legal pluralism and the theory of legislation - with special reference to the regulation of euthanasia", in H. Petersen, & H. Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law* (pp. 201-234). Dartmouth Publishing Company, 1995, at p. 201.

> types. In addition to these familiar bodies of law, in many societies there are more exotic forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society. There is also an evident increase in quasi-legal activities, from private policing and judging, to privately run prisons, to the ongoing creation of the new lex mercatoria, a body of transnational commercial law that is almost entirely the product of private law-making activities."[143]

Where, then, does legal pluralism start and end? In his attempt to set parameters of legal pluralism, Griffiths' critical analysis of other authors' work played a significant role in spearheading the debate on the concept. Griffiths chose to distinguish between legal pluralism and legal plurality as a clarification tool for the concept. The former refers to the situation where people in the same state can choose from two or more co-existing bodies of rules,[144] while the latter denotes a situation whereby multiple systems of law co-exist in one state but cater to different groups of people who are not at liberty to choose which should apply to them.[145] Woodman, however, concludes that both situations constitute legal pluralism.[146]

In line with the discussion on legal pluralism and plurality of law, Griffiths identified two conceptions of legal pluralism. The first one comprises the weak, state, classic, relative, legally-constructed, lawyers' or juristic version of legal pluralism (legal-political concept of legal pluralism or normative legal pluralism).[147] It takes the position that the state and its law are central in a plural legal constellation and that law is that which the state recognises. From this viewpoint, the state legal system in whose framework plural legal components may be incorporated defines the existence of non-state law.[148] However, conceptions in this version of legal pluralism may vary depending on how much power and sovereignty the state is assigned and the level of interaction between state law and the other normative orders occurring in the plural legal configuration.[149] Essentially, this boils down to one legal system (that of the state)

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[143] Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at p. 375.
[144] See Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 262.
[145] Woodman says that plurality of laws may refer to multiplicity of laws within a legal order which for instance may be state law pluralism: Woodman, "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism", above footnote 108, at pp. 25, 37, and 47; see also Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 262; the groups of people may be distinguished on the basis of ethnicity, religion, nationality or geography as explained in Griffiths, "What is Legal Pluralism?", above footnote 105, at p. 5.
[146] Woodman sums up his arguments in the paper by declaring that legal pluralism and plurality of laws merge and stand only as legal pluralism: Woodman, "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism", above footnote 108, at p. 54; legal pluralism also includes some degrees of plurality of law as argued in Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 263.
[147] Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 263; discussed in Griffiths, "What is Legal Pluralism?", above footnote 105, at p. 5; Merry, "Legal Pluralism", above footnote 107, at p. 871; and in Woodman, "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism", above footnote 108, at p. 34.
[148] Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 263.
[149] *Ibid.*

recognising and providing for the application of other legal systems. It is a conception that recognises the plurality of laws and a broad range of complex legal problems relating to conflict and choice of laws.[150]

The second conception is the strong, deep, real, factual, or social-science version of legal pluralism.[151] In this version, the state legal system is stripped of its superiority. What is law, in this category, is recognised not by the state but rather by the people.[152] Its proponents consider state law and other normative orders, including but not limited to customary and religious orders, to co-exist on an approximately equal footing, each with its own legitimacy and validity within a plural legal arrangement.[153] Thus, in this version, legal pluralism constitutes the co-existence of legal orders of different types and forms characterised by diverse, competing, and overlapping authority.[154]

From these conceptions arises a question that seems to be at the core of the concept. What is law for purposes of legal pluralism?[155] In view of the vast body of varying normative orders in a plural legal setting, Merry, for instance, cautions against describing ordinary social life as law.[156] Von Benda-Beckmann finds that there should be criteria to qualify social phenomena as legal and distinguish legal phenomena from non-legal.[157] However, who legislates and sanctions appears to be a fundamental point of departure that centres references on the relationship between the state and law in law conceptions.[158] Escaping such confinement, Griffiths, in the quest to identify law, borrows from Moore's concept of the semi-autonomous social field, which propounds that social groups generate rules and can coerce or induce compliance with them.[159] Though self-regulating, self-enforcing, and self-propelling, the social groups are still semi-autonomous because they are acting in a larger legal, political, economic, and social world whose rules can affect them.[160] Griffiths defines law as "the self-

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[150] See Griffiths, "What is Legal Pluralism?", above footnote 105, at p. 7; and Merry who gives an example of the African elite during the colonial era chafing at having African native law applied to them in Merry, "Legal Pluralism", above footnote 107, at p. 871.

[151] See above footnote 147.

[152] Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 263.

[153] *Ibid.*

[154] See Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at p. 375 and 396; and Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 263.

[155] See the questions the author sets and attempts to answer in Benda-Beckmann, "Who's Afraid of Legal Pluralism?", above footnote 112, at p. 39.

[156] Merry, "Legal Pluralism", above footnote 107, at p. 878.

[157] This was one of the questions that his paper attempted to answer; more about it can be read in Benda-Beckmann, "Who's Afraid of Legal Pluralism?", above footnote 112, see p. 39.

[158] *Ibid.,* at pp. 53-54 and 56-57.

[159] Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", above footnote 106, at p. 720 and 722.

[160] See *ibid.,* at p. 720 and 728.

regulation of a semi-autonomous social field",[161] a definition that scholars have vehemently criticised in the light of Moore's clarification that her concept refers to non-legal rather than legal obligatory orderings.[162] Later, according to Tamanaha, Griffiths revised his stance on what constitutes law for purposes of legal pluralism and limited his previous conceptualisation to normative pluralism.[163]

Identifying and delimiting law is essential for understanding the concept of legal pluralism and its application as a theory of law. Tamanaha is insistent on being able to differentiate legal from non-legal forms of social ordering or regulation.[164] This is because the inability to distinguish law from other forms of normative or regulatory orders results in a plurality of legal pluralisms.[165] Merry finds that it helps, for starters, to identify and define state law and non-state law.[166] She argues that it is relatively uncomplicated to identify state law, but quite challenging to define non-state forms of social orderings, especially when they exist in a setting of legal pluralism.[167] Von Benda-Beckmann, however, cautions that law should not be defined in relation to the state.[168] To assist the cause, Tamanaha provides a framework equipped with six systems of normative orderings that can guide the identification of law for legal pluralism purposes.[169] As it is impossible to rehash the complete discussion on what constitutes law here, it is best to conclude that law is not only that of the state, although state law inescapably shapes and provides for the practice of other normative orders operating within its boundaries.[170] Law may therefore be any normative order that its social actors or participants identify as law.[171]

Legal pluralism is a fact in Tanzania. First, the country is characterised by social and cultural pluralism, which reproduces diverse sources of social orderings. Tanzanians are predominantly of African descent mixed with a minority of Asiatic (primarily Indian and

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[161] Griffiths, "What is Legal Pluralism?", above footnote 105, at p. 38.
[162] See Sally F. Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999", The Journal of the Royal Anthropological Institute 7(1) (2001): pp. 95–116; also found in Sally F. Moore, *Law and anthropology*: *A reader* (Oxford, Malden, MA: Blackwell; Blackwell Pub, 2005), at p. 358; initially read in Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at p. 395.
[163] Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at p. 396.
[164] *Ibid.,* see discussion at pp. 393-396.
[165] *Ibid.,* at p. 392.
[166] Merry, "Legal Pluralism", above footnote 107, at p. 875.
[167] See her discussion on terminologies, *ibid.,* at p. 875-879.
[168] Benda-Beckmann, "Who's Afraid of Legal Pluralism?", above footnote 112, at p. 52.
[169] Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at pp. 396-400.
[170] Merry, "Legal Pluralism", above footnote 107, at p. 879.
[171] Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global", above footnote 109, at p. 396; and in Benda-Beckmann, Turner, "Legal pluralism, social theory, and the state", above footnote 50, at p. 262; Well explained earlier in Benda-Beckmann, "Who's Afraid of Legal Pluralism?", above footnote 112, at p. 58.

Arabic) and European descent.[172] Indigenous peoples comprise more than 120 ethnic groups, complete with their customs, traditions, religions, and languages. Their societal relations are governed mainly by customary law, which differs considerably from one community to another. The body of customary law referred to may be either static and codified or dynamic and living.[173] Religious laws also play a significant role in regulating social life in Tanzania. Since Tanzanians profess various faiths such as Christianity, Islam, Hinduism, and traditionalism, such laws are multiple and diverse.[174] According to the Judicature and Application of Laws Act (JALA), state law recognises these legal orders (customary and religious) as sources of law in Tanzania applicable in specific situations and subject to repugnancy clauses.[175] Within Tanzanian society, child care is a matter that is primarily regulated by customary and religious laws, unless there is a need for state interference. These laws regulate the most widely practised form of child care in Tanzania: kinship- and community-based care.[176] Their influence is far-reaching as perceptions of, for instance, traditional or religious-based foster care (*kafala*)[177] and adoption tint people's understanding of their statutorily regulated counterparts. The Law of the Child Act recognises the role played by customary law in organising care for orphaned children.[178] Also, in recognition of customary law as a coexisting legal order, section 68 of the Act subjects an adopted child to customary law in cases where the adoptive parent is also subject to it.

Second, Tanzania (then Tanganyika) was colonised by Germany, and later became a protectorate under British rule after WWI.[179] While German rule did not leave a significant

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[172] Chiteji, Frank Matthew Mascarenhas, Adolfo C. Bryceson, Deborah Fahy and Ingham, Kenneth, "Tanzania", https://www.britannica.com/place/Tanzania, Last Updated: Mar 10, 2021.

[173] Local Customary Law (Declaration) Order, 1963 (GN. No. 279 of 1963) represents a body of customary laws in Tanzania that were unified and codified in 1963. Living customary law refers to the observed unwritten, accepted and binding practices of a particular community. It adapts and changes according to the prevailing conditions in the community. Further on living customary law see Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa", above footnote 46, at p. 35.

[174] According to Chiteji, Frank Matthew Mascarenhas, Adolfo C. Bryceson, Deborah Fahy and Ingham, Kenneth, "Tanzania", above footnote 172, most dominant are Christianity, Islam and traditionalism, each being practised by one-third of the population.

[175] Section 11 and 12 of the Judicature and Application of Laws Act. For instance, Law of Marriage Act, 1971 [CAP 29 R.E. 2019] recognises marriages concluded according to customary or Islamic law, and the Law of the Child Act, 2009 allows for traditional alternative child care arrangements regulated by customary law.

[176] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at pp. 153-156. The authors found that state law on child adoption was underutilised by the people of African descent because they preferred informal adoption according to their own customary laws and traditional religious laws.

[177] Although Tanzania mainland's Law of the Child Act, 2009, does not provide for *kafala*, an Islamic form of child adoption, it is provided for under Tanzania Zanzibar's Children's Act, 2011, Act No. 6 of 2011.

[178] Section 9(4) of the Law of the Child Act, 2009.

[179] After the First World War, in 1919 the British received today's Tanzania mainland (then Tanganyika) as a mandate territory from the League of Nations, which later in 1947 became a trust territory under the United

mark on Tanganyika's legal system, the British imposed their legal system on the country. Although legislated mainly by the parliament today, state law in Tanzania is, for the most part, traceable back to the British colonial period.[180] British colonial legislation and institutionalisation received during the colonial period continued to be of relevance after independence. British laws are still applicable in Tanzania to some extent, some in the original version with amendments and some with significant changes that reflect the current society. State law recognises received law as a source of law in Tanzania. Received law constitutes Acts from the United Kingdom and India applicable in Tanzania from the reception date (22 July 1920) to date.[181] Tanzania also adopted the English common law tradition, in which, among others, judges can make law and are bound to it according to the doctrine of *stare decisis*. A fact pertinent to this study is that the Adoption of Infants Ordinance of 1942, based on the British Adoption of Children Act of 1926, introduced Tanzania's statutory child adoption law.[182] English-based adoption legislation underwent several changes but remained in operation in Tanzania up to 2009.[183] The Tanzanian Parliament enacted the Law of the Child Act in 2009, which replaced the English-based law but essentially adopted most of its provisions.[184]

Third, Tanzania forms part of today's global village and hence is affected by global legal pluralism. Tanzania is a State Party to the international community under the framework of the United Nations. It is also a Partner State to some regional organisations and blocs, such as the African Union (AU), the East African Community (EAC), and the Southern African Development Community (SADC). Such international and regional involvement commits the country to international and regional legal instruments on diverse subjects. As a result, international and regional law are sources of law in the country. For instance, concerning child rights, Tanzania has ratified and domesticated the UNCRC and the ACRWC. Being a player in the international arena, Tanzania also has to deal with the growing body of transnational law. For instance, the law regulating international agencies operating in the country, such as UNICEF, and transnationally, such as the International Social Service, must be reckoned with as it affects child adoption law and practice.

Nations. To facilitate their rule, the British imported their laws into the territory. See Britannica, The Editors of Encyclopaedia, "Tanganyika", https://www.britannica.com/place/Tanganyika.

[180] See sections 3 and 5 defining and adopting applied laws in Laws Revision Act [Cap 4 R.E. 2015].

[181] According to sections 9 and 14 of the Judicature and Application of Laws Act.

[182] Rwezaura, B. and Wanitzek U. (1988) at p. 126.

[183] See details of the legal developments in the last but one paragraph of part 1.1 in chapter 1.

[184] Part VI of the Law of the Child Act, 2009 includes provisions similar to those formulated in the Adoption of Children Act, 1953.

Inspired by what von Benda-Beckmann says, this study pays attention to the numerous variations in constellations of legal pluralism found in practice, and how they influence the conditions and lives of people involved in child adoption in Tanzania.[185] It considers the levels of legal pluralism within state law and its institutionalisation and beyond. In doing so, it acknowledges the existence of strong and weak legal pluralism in Tanzania's legal field. Thus, the study observes the interplay between the existing normative systems as they compete, clash, and overlap.

Further discussion on the identified layers of legal pluralism in Tanzania's legal system ensues in the following chapters, especially those discussing the legal framework, best interest of the child principle, and child adoption practice.

2.2.2 Street-Level Bureaucracy

Michael Lipsky's sociological theory of street-level bureaucracy is predominantly used as an analytical tool in public administration and political science.[186] However, it has also proved useful in this socio-legal study for analysing the work and behaviour of public service workers involved in child adoption processes. It has also been used to explore the differences between policy and laws as written and as implemented in practice, and between best practice found in guidelines and actual practice on the ground. Although Lipsky started developing the theory in 1969, his book of 1980 explains it comprehensively and has attracted much scholarly interest.[187] Numerous authors have written on the theory pre- and post-Lipsky, but this thesis uses the theory in so far as articulated by Lipsky and subsequently discussed by others basing on his ideas.

Street-level bureaucrats are public service workers who directly interact with clients in their work while exercising substantial discretion in the performance of their jobs.[188] These are bureaucrats whose work has a considerable impact on their clients' lives.[189] They are the ones who bring the government to the people, and each encounter constitutes public policy

[185] Part of the concluding remarks in Benda-Beckmann, "Who's Afraid of Legal Pluralism?", above footnote 112, at p. 74.

[186] See Mike Rowe, "Going Back to the Street: Revisiting Lipsky's Street-level Bureaucracy", Teaching Public Administration 30(1) (2012): pp. 10–18; and Lucy L. Gilson, "Lipsky's Street Level Bureaucracy", in M. Lodge, E. C. Page, S. J. Balla (eds.), *Oxford Handbook of the Classics of Public Policy* (Oxford: Oxford University Press, 2015), pp. 1-24.

[187] M. Lipsky, *Toward a Theory of Street-level Bureaucracy* (Institute for Research on Poverty, University of Wisconsin, 1969); Lipsky asserts that the paper in 1969 was his initial work on the theory in Lipsky, *Street Level Bureaucracy*, above footnote 114, at p. xvii. A second version of the 1980 book is available as Lipsky, *Street-Level Bureaucracy*, 30th Anniversary Edition, above footnote 114.

[188] Lipsky, *Street Level Bureaucracy*, above footnote 114, at p. 3; also defined in Michael Lipsky, "Street-Level Bureaucracy and the Analysis of Urban Reform", Urban Affairs Quarterly 6(4) (1971): pp. 391–409.

[189] Lipsky, *Street Level Bureaucracy*, above footnote 114, at pp. 4 and 8-12; Lipsky, "Street-Level Bureaucracy and the Analysis of Urban Reform", above footnote 188, at p. 393.

delivery.[190] Their employers, street-level bureaucracies, are public service agencies that engage numerous bureaucrats in their workforce. Lipsky gives an illustrative list of bureaucracies, including schools, police, social welfare departments, lower courts, and legal service offices. These employ, among others, teachers, law enforcement officers such as police officers, social workers, health workers, judges, public lawyers, other court personnel, and diverse public workers involved in delivering services in government programmes.[191]

Street-level bureaucracy theory describes the practices and beliefs of street-level bureaucrats faced by systematic and practical dilemmas in the workplace, and how, in their routine work, they enact public policy.[192] The main elements of the theory, which Lipsky summarises in the preface of his book, relate to existing stressful work settings, developing coping mechanisms, exercising discretion, and enacting policy.[193] Public service workers commit themelves to working in their fields based on ideal conceptions of their jobs, given the social usefulness potential they hold. They start with a commitment to service. However, their aspirations are defeated by the nature of their work, which is characterised by inadequate resources, uncertain methods, and unpredictable clients.

In his article on "Street-Level Bureaucracy and the Analysis of Urban Reform", Lipsky expands on the three types of stress that street-level bureaucrats face in their work. These include inadequate organisational resources (human, fiscal, infrastructural, information and time)[194], contradictory or ambiguous job expectations which create uncertainties in job performance, and threats and challenges to their authority perceived in their inability to control the work-related encounter.[195] These stresses necessitate coping mechanisms to aid the bureaucrats to discharge their responsibilities despite their workplace conditions. Lipsky finds that the coping mechanisms develop as psychological or behavioural reactions to the stresses.[196]

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[190] Lipsky, *Street Level Bureaucracy,* above footnote 114, at p. xii and 3; also see Richard Weatherley, Michael Lipsky, "Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform", Harvard Educational Review 47(2) (1977): pp. 171–97.

[191] Lipsky, *Street Level Bureaucracy,* above footnote 114, at p. xi and 3.

[192] Maxwell J. F. Cooper, Sangeetha Sornalingam, Catherine O'Donnell, "Street-level bureaucracy: an underused theoretical model for general practice?", The British Journal of General Practice: the Journal of the Royal College of General Practitioners 65(636) (2015): pp. 376–77.

[193] Lipsky, *Street Level Bureaucracy,* above footnote 114, at pp. xi-xvi. The core elements are analysed in Gilson, "Lipsky's Street Level Bureaucracy", above footnote 186, Chapter 27 of the Handbook, see pp. 2-3 of the chapter.

[194] On how insufficient resources affect public service provision and how public service workers deal with it, see Lipsky, *Street Level Bureaucracy*, above footnote 114, at pp. 29-39.

[195] Lipsky, "Street-Level Bureaucracy and the Analysis of Urban Reform", above footnote 188, at pp. 393-395.

[196] *Ibid.*, at p. 395.

Lipsky mentions three coping mechanisms that teachers develop to manage their stressful working conditions.[197] First, simplifications such as mass processing – teachers responding to children's educative needs as a class rather than individuals. Second, defences such as population segmentation or redefining during profiling or categorising clients – teachers labelling students as uneducable. Third, rationalisations such as creating validity for their actions and attitudes – teachers abandoning their duty to educate based on the belief that children are dull or unmotivated. In Lipsky's view, the coping mechanisms in the best-case scenario may lead to effective and efficient service provision, but at worst may lead to discrimination, stereotyping, and routinising, which may serve both private and agency purposes.[198] Here a question may arise; are the bureaucrats agents of the state or citizens?[199]

The stresses and coping mechanisms affect decision-making standards that street-level bureaucrats adhere to while executing their duties. In their interaction with clients, the bureaucrats exercise broad discretion in arriving at decisions. They determine the nature, amount, and quality of benefits or sanctions that their clients receive.[200] Professionals, Lipsky observes, are expected to exercise discretionary judgement in their fields relatively free from supervision or clients' scrutiny.[201] However, he finds that public service workers, who claim no professional status, may, in street-level bureaucracies, still exercise this discretionary judgement. Their discretion may be defined or limited by statute, rules, regulations, administrative directives, occupational and community norms, and practices. However, this normative body may be voluminous and ever-changing, potentially resulting in adherence only to the most fundamental rules.[202] Further, he finds that although exercising discretion is the root cause of numerous problems in public service, one has no option because the complex nature of the tasks impedes the use of programmed formats.[203]

Rowe asks, is discretion a good or bad thing?[204] The answer lies in the street-level work characterised by complicated situations requiring responses to their human dimensions which necessitate sensitive observation and judgement.[205] Also, in the bureaucrats' reflection, discretion boosts their self-regard and gives legitimacy to their decisions, something which

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[197] See *ibid.,* at pp. 395-399; and Lipsky, *Street Level Bureaucracy,* above footnote 114, at pp. xii-xiii.
[198] Lipsky, *Street Level Bureaucracy,* above footnote 114, at p. xii.
[199] See Rowe, "Going Back to the Street: Revisiting Lipsky's Street-level Bureaucracy", above footnote 186, at pp. 11-12.
[200] Lipsky, *Street Level Bureaucracy,* above footnote 114, at p. 13.
[201] *Ibid.,* at p. 14.
[202] *Ibid.*
[203] *Ibid.,* at p. 15.
[204] Rowe, "Going Back to the Street: Revisiting Lipsky's Street-level Bureaucracy", above footnote 186, at p. 11.
[205] Lipsky, *Street Level Bureaucracy,* above footnote 114, at p. 15.

makes clients perceive them as crucial holders of their well-being.[206] Finally, Lipsky declares that exercise of discretion needs to strike a proper balance between compassion and flexibility in dealing with the unique circumstances of each case and expected impartiality and rigid rule-application in service provision.[207]

Weatherley and Lipsky argue that the meaning of policy can only be understood once the bureaucrats have worked it out in practice at the street level.[208] From this perspective, they propose a dual way of studying policy formulation and implementation. First, by looking at policy from its traditional authoritative articulation by legislatures and high-ranking administrators, through different administrative modifications, to how it affects decision making at the end of the chain in street-level decision making.[209] And second, by looking at the street-level bureaucrats in their discretionary decision making in the context of their work as they encounter their clients.[210] Here one can observe policy as it shapes the behaviour of the bureaucrats and what is ultimately delivered to the citizens as the bureaucrats navigate their work situations.[211] In such a study, street-level bureaucrats become policy-makers and the high-ranking administrators restrictors of the lower level policy-making.[212] In this sense, policy should be understood both as the written version in government statements and legislation, and as the version delivered to the public as street-level bureaucrats use and interpret the written rules and deal with their work environment constraints.[213] Lipsky explains this as follows: "decisions of street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively *become* the public policies they carry out."[214]

Smith and Donovan's use of street-level bureaucracy's theoretical framework in their study of child welfare caseworkers' descriptions of their everyday work has substantially inspired its use in this study.[215] In their study, the authors use Lipsky's theoretical framework to explore the discrepancy between best and actual practice in the everyday workings of frontline foster

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[206] *Ibid.*
[207] *Ibid.,* at pp. 15-16.
[208] Weatherley, Lipsky, "Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform", above footnote 190, at p. 173.
[209] *Ibid.,* at p. 172; and in Lipsky, *Street Level Bureaucracy*, above footnote 114, at p. xii.
[210] Weatherley, Lipsky, "Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform", above footnote 190, at p. 173.
[211] Rowe, "Going Back to the Street: Revisiting Lipsky's Street-level Bureaucracy", above footnote 186, at p. 11; and Weatherley, Lipsky, "Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform", above footnote 190, at p. 173.
[212] Weatherley, Lipsky, "Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform", above footnote 190, at p. 173.
[213] Rowe, "Going Back to the Street: Revisiting Lipsky's Street-level Bureaucracy", above footnote 186, at p. 11.
[214] Lipsky, *Street Level Bureaucracy,* above footnote 114, at p. xii.
[215] Smith, Donovan, "Child Welfare Practice in Organizational and Institutional Context", above footnote 117.

care caseworkers.[216] They discuss the effects of organisational pressures and constraints facing the caseworkers, and challenges associated with their interaction with the judiciary, on their performance, measured against best practice guidelines and timelines set in the law (US Adoption and Safe Families Act).[217] Together with the work of Weatherly and Lipsky on the implementation of special-education law, their discussion pointed this study towards discussing the implementation of Tanzania's child adoption law from the street-level bureaucrats' viewpoint. The Law of the Child Act, 2009 is studied in this thesis from the perspective of a statute bringing new child adoption rules to the field, after the previous law had operated for more than half a century since 1953. This study considers how street-level bureaucrats in Tanzania cope with implementing the new law and policy, and how their decision-making is modified by it, while there are no substantial changes in their work environment, but instead in their work requirements.[218] Their work conditions and the stresses produced by them are analysed, and the coping mechanisms the bureaucrats have invented and their effects on child adoption practice are observed. The application of this theory is essential in discussions on the implementation of child adoption law by street-level bureaucrats throughout the thesis. In view of Tanzanian society's legal and social pluralistic settings, the influence of religion, local custom, traditions, education, and personal experience on the bureaucrats' interpretation and application of the rules is taken into account.

2.3 Conceptual Framework

A conceptual framework is a system of concepts, assumptions, and beliefs that lays out the study's key factors, constructs, and variables and explains their relationship.[219] The framework is based on the researcher's understanding of how best to explore the research problem and depict the specific direction of the study.[220] The researcher presents in the framework not a mere string of concepts but a structure of connected concepts relating to the research problem that provides a clear picture of how ideas relate to one another in the study.[221]

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[216] *Ibid.,* at p. 542-544.
[217] *Ibid.,* at pp. 549-553 and 553-557.
[218] A study in new law or policy implementation using the framework of street-level bureaucracy can also be seen in Weatherley, Lipsky, "Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform", above footnote 190, at pp. 172-173.
[219] Matthew B. Miles, Michael A. Huberman, *Qualitative data analysis*: *An expanded sourcebook* (Thousand Oaks: SAGE Publ, 1994); read in Grant, Osanloo, "Understanding, Selecting, and Integrating a Theoretical Framework in Dissertation Research: Creating the Blueprint for Your "House"", above footnote 119, at p. 17.
[220] Grant, Osanloo, "Understanding, Selecting, and Integrating a Theoretical Framework in Dissertation Research: Creating the Blueprint for Your 'House'", above footnote 119, at p. 17.
[221] *Ibid.*

This part explores select concepts key to the complete comprehension of child adoption law and practice in Tanzania as analysed in this study. The presented conceptual perceptions are from legal, anthropological, or other sociological standpoints uttered in numerous scholars' voices and discussed in line with the researcher's perception.

2.3.1 Child, Childhood and Child Welfare

The concept of child and childhood has been, for a long time, a contentious topic of debate in different fields of study. Ariès traced the concept of childhood from the Middle Ages, which led him to state that childhood, as we understand it today, is a European conception originating from the 18th century.[222] He contends that before this there was no distinction between the life of children and adults, to the extent that they were treated in the same way and enjoyed the same rights. His contentions have been the subject of extensive discussion and criticism. "'Childhood' in 'Crisis'?" is among the works criticising and building on Ariès' study. It provides a wide view of the historical, theoretical, and social construction and reconstruction of childhood.[223] However, it is not possible to delve into these debates here, nor to attempt to find a fitting concept of childhood. Instead, following Ncube, it suffices to say that previous authors have shown that the conception of childhood changes with time and in different social and cultural contexts.[224] While it is clear that the term child may refer both to a minor and to a person's daughter or son irrespective of age, this study centres on the former.

Norozi and Moen contend that the idea that childhood is the earliest phase of human life is an uncontested truth across all societies and cultures.[225] However, the conceptualisation of a child and childhood still varies between different societies and cultures. For instance, the term child may refer to bodily or mental incapacity or immaturity, natural dependency, friendship or flattery (an adult referred to as a child), or identity reference, e.g. calling a mother by her child's name as is common in African societies.[226] It may also hinge on set conceptualisations, such as being and becoming a child, referring to children as social actors

[222] Philippe Ariès, *Centuries of childhood* (London: Pimlico, 1996).
[223] Phil Scraton, *"Childhood" in "crisis"?* (London: Routledge, 2004).
[224] Ncube, Welshman. The African Cultural Fingerprint? The Changing Concept of Childhood in Welshman Ncube (ed.), *Law, culture, tradition and children's rights in eastern and southern Africa* (Aldershot: Ashgate, 1998), pp. 11–27.
[225] Sultana Ali Norozi, Torill Moen, "Childhood as a Social Construction", Journal of Educational and Social Research (2016): pp. 75–80.
[226] *Ibid.*

in their own right, or as adults in the making.[227] It also differs depending on the specific field in which the concept is defined: legal, political, social, cultural, or economic. Although across various societies, cultures, or fields, the attainment of a particular age is the primary determinant, many also consider capacity and purpose in child and childhood conceptualisations.[228] For example, in the legal field, statutory laws emphasise age as a defining factor for both a child and the duration of childhood, in contrast to capacity and purpose in customary and religious laws and other fields.

Black's law dictionary defines a child as a person below the age of majority.[229] The UNCRC and the ACRWC define a child as every human being under 18 years of age.[230] In the framework of the two instruments, the age of majority is 18 years. However, the UNCRC allows for an earlier age of majority applicable under the law relating to children in individual State Parties. Even so, the cap remains 18 years of age and not later. In Tanzania, the Law of the Child Act, 2009, domesticating the UNCRC and ACRWC, defines a child in section 4(1) as any person below 18 years. Since this is the principal statute relating to children, it provides the country's overarching legal meaning of a child.

The English suffix -hood affixed to the term child refers to a state or condition of being. Childhood is thus the state or duration of being a child. According to the above legal definition of a child, childhood generally spans a period of 18 years. However, this varies in some countries, as recognised by the UNCRC, for various purposes and in various circumstances.

In Tanzania, in different statutes, the age limit of childhood differs depending on the required purpose or capacity. Thus, age remains a defining factor, but the emphasis shifts to purpose or capacity. For instance, under sections 13 and 17 of the Law of Marriage Act, 1971, the minimum age at which a female may marry is fifteen years. Thus, for marriage purposes, a fifteen-year-old girl has capacity although she has not attained the age of majority set at 18

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[227] Jingyi Huang, "Being and Becoming: The Implications of Different Conceptualizations of Children and Childhood in Education", Canadian Journal for New Scholars in Education/ Revue canadienne des jeunes chercheures et chercheurs en éducation 10(1) (2019).

[228] Letuka, Puleng, The Best Interests of the Child and Child Labour in Lesotho, in Ncube, *Law, culture, tradition and children's rights in eastern and southern Africa*, above footnote 224, pp. 203-224, at p. 206; location, culture and dominant adult voice are stated to be the other set of determinants in Reesa Sorin, "Changing images of childhood: Reconceptualising early childhood practice", International Journal of Transitions in Childhood Vol. 1 (2005): pp. 12–21.

[229] Bryan A. Garner, (editor in chief), *Black's Law Dictionary*, Deluxe 9th ed. (St. Paul, MN: West Publishing Co., 2009), p. 271.

[230] Article 1 of the Convention on the Rights of the Child, UNCRC (20 November 1989); and Article 2 of the African Charter on the Rights and Welfare of the Child: ACRWC (11 July 1990).

years by section 2 of the same Act.[231] The Government of Tanzania justifies this exception to the general rule by arguing that the early biological maturity of girls calls for the social protection marriage affords if they engage in sexual relations below 18 years of age.[232] Also, the Employment and Labour Relations Act, 2004, which domesticates fundamental ILO conventions, defines a child as a person below 14 years, and for employment purposes in hazardous sectors, below 18 years. Section 5 of the said law, which criminalises child labour, details the type of employment children under 14 years and 18 years can pursue. Thus, in this law, the legal meaning of a child has changed for purposes of employment and in general consideration of a child's capacity at age 14.

Emphasis on ability and purpose rather than age is typical of traditional African definitions of childhood. For instance, Letuka, in her discussion on child labour in Lesotho, explains how the Basotho society defines a child and childhood for labour purposes, based on physical ability or development rather than age.[233] She adds the attainment of married status as another qualifying factor. Thus, childhood stops once married is crossed in one's marital checkbox; in the described instance, this applies to a girl aged 13. Rwezaura, who explains traditional African perceptions of childhood, asserts that the duration of childhood is relatively short in African societies compared to modern Western societies.[234] Based on competing images of childhood as a concept, his discussion shows how different African societies or cultures conceptualise a child and childhood. Using the concept of 'wealth-in-people', he describes how children in African societies end up in child labour because they are perceived as family assets or resources that guarantee the family's economic survival. Although the 1990s saw a revolution in the children's rights movement, these two studies show that the situation in traditional African societies had not changed significantly by the end of the decade. However, since then, there may have been some transformations in the perceived image of childhood.

[231] Competency to contract is set at the age of majority according to the law under which the person contracting is subject, as stipulated by section 11 of Law of Contract Act [Cap. 345 R.E. 2019].

[232] The Government of Tanzania has defended these provisions by arguing that they uphold affirmative action for girls who attain biological maturity before 18 years of age to engage in sexual relations and conceive within wedlock. These arguments may be read in Court of Appeal of Tanzania, "Attorney General vs Rebeca Z. Gyumi", https://tanzlii.org/tz/judgment/court-appeal-tanzania/2019/348-0, [2019] TZCA 348 (23 October 2019). The same views are also expressed by the former Minister for Legal and Constitutional Affairs in the Parliament. The speech in Kiswahili can be viewed at "Mnaotaka Mabadiliko ya Sheria ya Ndoa Subirini Kidogo, Msikilize Prof. Kabudi - YouTube", https://www.youtube.com/watch?v=v_LRtD95HDk.

[233] Letuka, Puleng, The Best Interests of the Child and Child Labour in Lesotho, in Ncube, *Law, culture, tradition and children's rights in eastern and southern Africa*, above footnote 224, pp. 206–208.

[234] Rwezaura, "Competing 'Images' of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa", above footnote 48.

'Image' of childhood is a crucial component in understanding a child's meaning, value, and needs. Since childhood is a social construction[235], the image of childhood that a particular society holds explains its conceptualisation of a child and childhood. The changing, evolving, competing, or conflicting images of childhood are perceived as such depending on the time, place, and developing socio-cultural, economic, and legal systems. In her article, Sorin paints ten different images of a child: innocent, noble/saviour, evil, snowballing, out of control, miniature adult, adult-in-training, commodity, victim, and agentic.[236] The images and what they imply give children varying meanings and values, which affects assessment of their needs and their ultimate treatment. The ever-changing images of childhood laid the foundation for the conception of the child as a subject of rights rather than an object of care—which considerably transformed children's rights and child welfare practice.[237]

Welfare is a term that may have several interpretations depending on the context. Generally, welfare means the state of being or doing well in all respects.[238] Within the family, child welfare in O'Halloran's view translates to a secure and contented home environment established and maintained by parents or carers and sustained by a harmonious parental relationship.[239] However, welfare in the society may refer to coordinated procedures or services, legal, social, economic, or otherwise, intended to promote the physical or psychological well-being of persons in need. Thus, child welfare can be described as a continuum of services designed to ensure children's safety and well-being within and outside of their families.[240] It spells child care and protection in various domains of children's lives. The child welfare system, which encompasses actors, services, and practices, evolves with time and need in both the domestic and international arenas.[241] It depends on a vast body of laws that may be national, regional, international or otherwise, and statutory, customary, religious or otherwise; on public or private agencies; on child- or family-centred, community-based or other services; and on evidence-based or other practices. These factors make clear

[235] See Ali Norozi, Moen, "Childhood as a Social Construction", above footnote 225, at p. 77 where the author discusses the understanding of childhood as a social constuction.
[236] Sorin, "Changing images of childhood: Reconceptualising early childhood practice", above footnote 228.
[237] The Convention on the Rights of the Child, UNCRC (20 November 1989) introduced children as subjects of rights into international jurisprudence; this can clearly be seen in the interpretations provided in Rachel Hodgkin, Peter Newell, *Implementation handbook for the convention on the rights of the child*: Fully revised third edition (Switzerland: Unicef, 2007).
[238] Garner, *Black's Law Dictionary*, above footnote 229, at p. 1732.
[239] O'Halloran, *The politics of adoption*, above footnote 74, at p. 104.
[240] Contributions in Helen Cahalane, *Contemporary Issues in Child Welfare Practice* (Dordrecht: Springer, 2013) put child welfare as a concept into clear perspective.
[241] Sheila B. Kamerman, Shelley A. Phipps, Asher Ben-Aryeh, *From child welfare to child well-being*: *An international perspective on knowledge in the service of policy making* (New York: Springer, 2010) for example shows developments in child welfare in the USA.

the diverse and varying nature of child welfare which makes it difficult to conceptualise.[242] However, no attempt will be made here to deconstruct the entire concept, but it will be focused on only as far as legal and social perceptions of child welfare relate to alternative child care, with specific attention to child adoption.

2.3.2 Concept of Care

Care is a multidimensional phenomenon. Whether used to name or describe an activity, care has various meanings. According to Morse et al., care may refer to an action as in the phrase *'to take care of'* or to concern displayed as in *'caring about'*.[243] It requires the existence of a caregiver and a care-receiver. Conceptualisations of care depend on the context of its use. This could be, for instance, in the health sciences (nursing), legal discourse, or social welfare. For example, phrases such as reasonable care, duty, standard, or degree of care are common in the legal field, especially in the law of negligence. Black's law dictionary defines care in that context as the way a person must act in a given situation: with serious attention while considering all possible risks and how to avoid them.[244] However, in social welfare, a field central to this study, care may refer to providing what is necessary for someone's health, welfare, maintenance, and protection.[245]

Defining a concept is one step towards successful conceptual analysis. Stroehlein finds that describing the concept's attributes, backgrounds, outcomes, and perceptions helps its understanding.[246] While developing a definition of caring, another author, Engster, uses care aims and virtues.[247] Engster believes that the resultant definition is wide enough to embrace care as practised across numerous fields, such as parenting, teaching, nursing, elder care, and psychology, and narrow enough to exclude acts which are done in a caring manner but are not caring per se.[248] He defines care as "everything we do directly to help others to meet their basic needs, develop or sustain their basic capabilities, and alleviate or avoid pain or

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[242] Stephen M. Cretney, J. M. Masson, *Principles of Family Law* (London: Sweet & Maxwell, 1997), at pp. 724 and 730. The authors argue that judges and social welfare officers, for the lack of a precise meaning of 'welfare', use the concept of the welfare interests of the child to justify their subjective decisions. With lack of agreement on what exactly child welfare comprises, those who make decisions are enabled to impose their own subjective views.

[243] J. M. Morse, S. M. Solberg, W. L. Neander, J. L. Bottorff, J. L. Johnson, "Concepts of caring and caring as a concept", ANS. Advances in nursing science 13(1) (1990): pp. 19–31.

[244] Garner, *Black's Law Dictionary*, above footnote 229, at p. 240.

[245] Lexico Dictionaries | English, care | Definition of care by Oxford Dictionary on Lexico.com, https://www.lexico.com/definition/care.

[246] Margaret Stroehlein, "Caring Concept", SOJ Nursing & Health Care 2(1) (2016): pp. 1–3.

[247] Daniel Engster, "Rethinking Care Theory: The Practice of Caring and the Obligation to Care", Hypatia 20(3) (2005): pp. 50–74.

[248] *Ibid.,* at pp. 55-56; Stroehlein, "Caring Concept", above footnote 246, at p. 1 also finds that observing caring behaviours in several professions assists in understanding the concept of caring.

suffering, in an attentive, responsive and respectful manner."[249] Common to several authors who attempt to conceptualise care, such as Daly and Lewis[250], Engster, Morse et al., and Stroehlein, is their study of existing literature regarding the concept. The literature review provides a historical development of the concept and prompts its broader understanding.

Daly and Lewis show that initially, and for a long time, care was in the purview of informal unpaid domestic and personal workers, and was provided in the sphere of relations defined by marriage and kinship.[251] At that time, care was considered a women-specific concept.[252] Providing care was the responsibility of a wife, mother, aunt, sister, or daughter. These relations underscore personal ties that influence trust, commitment, loyalty, and obligation, forming a foundation for the provision of care in the family. Hence, care in the family is understood as a moral practice or social relationship grounded on love, thoughtfulness, and a sense of duty.[253] However, further studies on the concept have shown that the provision of care may be personal or institutional. It may occur at the level of the state, community, family, or market. At such levels, care may be formal or informal, contractual or non-contractual, paid or unpaid, public or private, received in cash or services, and could be a form of dependence or independence.[254]

Over time, the concept of care evolved beyond the family. The introduction of care arrangements in the impersonal realms of the state, community and marketplace led to broader conceptualisations of care. Due to its diversity of use, care became an obscure and contested concept. The increased debate developed the concept and heightened academic interest in it.[255] This study utilises the empirical category of analysis termed 'social care' adopted in Daly and Lewis' work.[256] The authors describe care in three dimensions: as labour, as an obligation and responsibility within a social and state normative framework, and as an

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[249] Engster, "Rethinking Care Theory: The Practice of Caring and the Obligation to Care", above footnote 247, at p. 55.

[250] M. Daly, J. Lewis, "The concept of social care and the analysis of contemporary welfare states", The British Journal of Sociology 51(2) (2000): pp. 281–98.

[251] *Ibid.,* at p. 283.

[252] The earlier conceptualisation of care stemmed from an attempt to define a feature of women's experience as explained by the authors, *ibid.,* at pp. 282-283.

[253] These perceptions of care can be compared to those in nursing care discussed in Morse, Solberg, Neander, Bottorff, Johnson, "Concepts of caring and caring as a concept", above footnote 243, which include caring as a human trait, moral imperative, affect, interpersonal relationship and therapeutic intervention.

[254] Daly, Lewis, "The concept of social care and the analysis of contemporary welfare states", above footnote 250, at p. 282 and 285.

[255] Conceptual analysis of care is most evident in studies relating to the health sciences. For instance, in Morse, Solberg, Neander, Bottorff, Johnson, "Concepts of caring and caring as a concept", above footnote 243; and in Stroehlein, "Caring Concept", above footnote 246.

[256] Daly, Lewis, "The concept of social care and the analysis of contemporary welfare states", above footnote 250, at p. 285.

activity with financial and emotional costs extending across public and private boundaries. They define social care as,

> "…the activities and relations involved in meeting the physical and emotional requirements of dependent adults and **children**, and the normative, economic, and social frameworks within which these are assigned and carried out."[257] [emphasis added]

Child care, as discussed in this study, falls within the above definition of social care. Instead of describing the activities that constitute child care, this study focuses more on the frameworks within which care is defined and practised, and more on the normative and social rather than the economic frameworks. The normative framework spans the international, regional, and national levels, while the social framework considers care within the family and community in Tanzania. In these frameworks, what actions constitute care, and the ensuing relations depend on legal and societal definitions and care requirements.

In most African traditional communities, including Tanzania's, prevailing customs and traditions determine what child care encompasses. Customary rules and traditions on child care vary significantly from one traditional group to another and from time to time.[258] What one community considers as child care may not be considered as such by the next community. Nevertheless, a well-known common feature in African child care is that it is not limited to the nuclear family unit but is shared communally. Members of the extended family, distant relatives and neighbours may participate in child care. The care provided may vary from childminding for a few hours to fully-fledged child care permanently. When it operated without a glitch, children without parental care were rarely heard of in this setting. Informal kinship care was the answer for orphans or children deprived of parental care for any other reason. However, the African traditional safety net for children in need of care is no longer strong enough.[259] Its weakening has compelled states, including Tanzania, to design and implement alternative child care arrangements to fill the gap.

The UNCRC and the ACRWC are the leading legal instruments in respect of child care on the international and regional front. They do not define what child care means. However, they

[257] *Ibid.*

[258] Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa", above footnote 46; see also Anthony C. Diala, "The concept of living customary law: a critique", The Journal of Legal Pluralism and Unofficial Law 49(2) (2017): pp. 143–65.

[259] Its weakening can be traced from the discussion presented in Barthazar A. Rwezaura, "The Changing Role of the Extended Family in Providing Economic Support for an Individual in Africa", in T. Akinola Aguda et al. (eds.), *African and Western legal systems in contact* (Bayreuth: Breitinger, 1989).

state that children need special care because of their physical and mental immaturity.[260] For children in Africa, the need for special care is also due to socio-economic, cultural, traditional and political circumstances unique to their environment.[261] Special care for children starts at the family level. These instruments affirm that the family is the fundamental social group offering a natural environment for its members' growth and well-being.[262] Articles 7, UNCRC and 19, ACRWC, establish the right for every child to be cared for by their parents. This right gives to parents and legal guardians the primary responsibility for children's upbringing and development as stipulated under Articles 18(1), UNCRC, and 20(1), ACRWC. Recognising that this responsibility may not always be achievable, the instruments require suitable alternative care arrangements for children who are separated from their parents or who are deprived of their family environment temporarily or permanently for whatever reason.[263] Child care in these two instruments is, thus, parental or alternative.[264]

In Tanzania, the Law of the Child Act, 2009, which domesticates the UNCRC and ACRWC, mirrors the above provisions. Although it does not directly define child care, section 16 of the Act provides a list of circumstances in which a child needs care. Lack of nurturing and protection by a child's natural parents, relatives, legal guardians, or any other person with primary care of the child, qualifies him or her as a child in need of care. It follows that such a child should receive appropriate substitute care in line with section 7(3) of the Act. When needed, alternative child care, according to section 9(3) and (4) of the Act, must be as prescribed by statutory or customary law. The Act stipulates a range of alternative care arrangements according to sections 18 and 24.

Since this study focuses on children without parental care[265], understanding alternative child care becomes imperative. According to the UN Guidelines on Alternative Care of Children 2010, alternative care can be formal or informal.[266] The critical difference between the two is the ordering authority; in contrast to informal care, for formal care a competent administrative, judicial, or other duly accredited body regulating formal care must be used.

[260] In preamble statements no. 4, 8 and 9 of the Convention on the Rights of the Child, UNCRC (20 November 1989); and African Charter on the Rights and Welfare of the Child, 1990 preamble statements no. 3 and 5.
[261] Preamble statement no. 3 of the African Charter on the Rights and Welfare of the Child, 1990.
[262] Preamble statements no. 5 and 4 of the Convention on the Rights of the Child, UNCRC (20 November 1989); and the African Charter on the Rights and Welfare of the Child,1990 respectively.
[263] Articles 9 and 20 of the Convention on the Rights of the Child, UNCRC (20 November 1989); and Articles 19 and 25 of the African Charter on the Rights and Welfare of the Child, 1990.
[264] The UN has developed guidelines for alternative child care that detail models of and grounds for different care arrangements; UN General Assembly, "Guidelines for the Alternative Care of Children", https://digitallibrary.un.org/record/673583/?ln=en (resolution adopted by the General Assembly, 24 February 2010, A/RES/64/142).
[265] See definitions under section 29 (a) *ibid.* and section 16 of Tanzania's Law of the Child Act, 2009.
[266] *Ibid.*, section 29 (b) (i) and (ii).

Different types of alternative care are kinship care, foster care, other family-based care (such as care by fit persons in Tanzania), residential care, and supervised individual living for children.[267] Child adoption is another form of alternative family care under the UNCRC, the ACRWC, and the Law of the Child Act, 2009.[268] However, the UN Guidelines apply to child adoption as an alternative care arrangement only as far as the pre-adoption process is concerned, and considers it a form of parental care after placement.[269] This study focuses on child adoption as an alternative child care measure within Tanzania's legal framework.

2.3.3 Concept of Parenthood

Parenthood is a relation and an activity. Its conception considers how one becomes a parent and acquires parental rights and responsibilities.[270] 'Parent' as an English noun means a person's mother or father. It denotes the presence of a parent-child relationship. The way this relationship comes into existence determines interpretations of the term. Biological, social, artificial, judicial, or de facto processes can establish parenthood.[271] Considering the numerous ways through which one can become a parent, especially in the context of the emergent contemporary complex patterns of family life, conceptualising parenthood is a rather tricky task. Technological advancements that diversify ways of reproducing do not help matters. Further, a number of variables influence conceptions of parenthood, such as the formality of relationships, biology, attachment, rights and responsibilities of adults and children, and gender difference and equality in adult relationships. As a result, parenthood is currently a highly contentious topic in academic discourses on the family.

This study does not include a debate on conceptions of parenthood. Instead, it uses existing conceptualisations to understand parenthood in the Tanzanian context. While several other authors[272] have written on the concept too, the book "What is Parenthood?: Contemporary Debates about the Family", which covers topics pertinent to understanding the term parenthood, is a key used in this study to unlock the concept.[273] The authors use two

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[267] *Ibid.*, section 29 (c) (i) - (v).
[268] Article 20(3) of the Convention on the Rights of the Child, UNCRC (20 November 1989) and section 24(1) of Tanzania's Law of the Child Act, 2009.
[269] Section 30(b) of the UN General Assembly, "Guidelines for the Alternative Care of Children".
[270] Michael W. Austin, *Conceptions of parenthood*: *Ethics and the family* (Aldershot, England, Burlington, VT: Ashgate, 2007), at p. 2.
[271] Eekelaar, John and Šarčević, Petar (ed.), *Parenthood in modern society*: *Legal and social issues for the twenty-first century* (Dordrecht, London: M. Nijhoff, 1993). The contributions discuss various ways and processes through which parenthood is conceived.
[272] Malcolm Hill, "Concepts of Parenthood and Their Application to Adoption", Adoption & Fostering 15(4) (1991): pp. 16–23; Stephen Gilmore, Alison Diduck, *Parental Rights and Responsibilities* (Florence: Taylor and Francis, 2017); Austin, *Conceptions of parenthood*, above footnote 270.
[273] Linda C. McClain, Daniel Cere (eds.), *What is parenthood?*: *Contemporary debates about the family* (New York: New York University Press, 2013).

competing models of parenthood to analyse the concept and organise the discussion on it: integrative and diversity parenthood. These two parenthood models attempt to avoid the simplistic contrasts made in the debate, such as for versus against, traditional versus modern, and conservative versus liberal.[274] Instead, they explain perceptions of parenthood in the context of each model and answer each question from both perspectives. This study borrows their approach and considers the two models to assist comprehension of what parenthood signifies in Tanzania.

The integrative model[275], also known as the conjugal model, derives its convictions about parenthood mainly from religion. However, some of its proponents derive their ideas from kinship studies, evolutionary psychology, and biological anthropology. The model conceptualises parenthood as a natural adult-child relationship arising from biological procreation by a man and woman within wedlock. It is integrative because it regards marriage between opposite-sex couples as the centre for integrating adult intimate bonds and parent-child bonds. Emphasis is on sex difference between the parents, biological connection with the children, and children's right to two biological parents for optimal development. The model also recognises parenthood resulting from child adoption within the ambits of opposite-sex marriage. However, it does not recognise other methods or family forms through which a person becomes a parent. For instance, it does not support assisted reproduction technology (ART) because of the trenches it digs between biology and parenthood as well as marriage and parenthood. Also, it generally opposes the legalisation of marriage between same-sex couples because this weakens the model's pillar, namely that every child has a right to a father and a mother. However, some proponents of the model recognise and support same-sex marriage to strengthen the marital institution, foster marital parenthood, and rethink ART. They also support second-parent adoption in same-sex marriages, favouring formal relations that promote the child's well-being over informal ones.

The diversity model[276], unlike the integrative model, focuses not on family form but on function. It conceptualises parenthood as the quality of the relationship between an adult and a child, measured by the psychological concept of attachment. It recognises any person who functions as a parent irrespective of biological or formal connection to the child. Thus, it emphasises adults' authority and responsibility, and children's fundamental right to healthy

[274] *Ibid.*, at p. 2.

[275] Daniel Cere, "Toward an Integrative Account of Parenthood", in L. C. McClain, D. Cere (eds.), *What is parenthood?: Contemporary debates about the family* (New York: New York University Press, 2013).

[276] Linda C. McClain, "A Diversity Approach to Parenthood in Family Life and Family Law", in L. C. McClain, D. Cere (eds.), *What is parenthood?: Contemporary debates about the family* (New York: New York University Press, 2013).

attachments and good parenting, rather than the biology and formality of relationships proposed by the integrative model. Like those of the integrative model, some proponents of the diversity model recognise marriage as a valuable integrative tool between adult intimate relationships and parent-child relationships. However, unlike the integrative model's proponents, this recognition is their reasoning for supporting same-sex marriage. Considering the integration between adult intimate relationships and parent-child relationships, some proponents of the diversity model urge that family law and society should recognise the array of adult intimate relationships. By contrast, others propose moving the focus to parenthood and children's needs.

Considering Tanzanian society, one model alone cannot fully capture the existing conception of parenthood. The Law of the Child Act under section 3 defines a parent as "a biological father or mother, the adoptive father or mother and any other person under whose care a child has been committed."[277] This is an expansive definition of a parent. One may find that it fits the big tent of the diversity model. However, same-sex relationships are neither legal nor socially recognised in the country.[278] Thus, that part of the model does not apply in Tanzania. Nonetheless, the end part of the definition aligns with the diversity model in the sense of parental function. Sections 6 to 10 of the Law of the Child Act describe the care functions of the parent in terms of parental rights and responsibilities towards the child.[279] Regulation 2 of the Child Protection Regulations defines parental duty and responsibility as "all the rights, duties and responsibilities which, under both statutory and customary law, a parent has for his child including those prescribed in section 9(3) of the Act." The said subsection assigns child care duty to parents and requires them to ensure care by a competent person in their temporary absence. In its proviso, section 9(3) of the Act relieves parents from child care duty when they have surrendered their rights and responsibilities per statutory, traditional, or customary law arrangements. Section 9(4) of the Act provides that a court order or traditional arrangement can confer the parental responsibilities of deceased biological parents on a relative of either parent or a custodian. These provisions show that statutory or customary law can bestow and withdraw parenthood status in Tanzania. Therefore, a parent in Tanzania is

[277] Under section 2 of the Child Protection Regulations, 2014 (GN. No. 11 of 2015) the definition of a parent does not include the phrase 'and any other person under whose care a child has been committed'.

[278] Sections 154 and 157 of Penal Code, 1945 [Cap 16. R.E 2009] makes it a criminal offence for any person to have carnal knowledge of another against the order of nature. More can be read about the government and public sentiments in Jason Burke, "Hundreds in hiding as Tanzania launches anti-gay crackdown: Dar es Salaam official creates taskforce aimed at finding and punishing LGBT community", The Guardian (11th May 2018).

[279] Regulation 2 of the Child Protection Regulations, 2014, defines parental rights as the parental rights and responsibilities stipulated under sections 6-10 and 57 of the Law of the Child Act, 2009.

anyone, besides biological parents, who holds that status according to statutory or customary law arrangements.

However, returning to the Act's definition of a parent, the phrase 'has been committed' suggests an authority assigning the child's care to a person or even an institution. Sections 6-10 of the Act which set out parental rights and responsibilities show that persons other than parents can have such rights and responsibilities. These include guardians and relatives. Section 3 of the Act and regulation 2 of the Child Protection Regulations define both guardians and relatives. They define a guardian as "a person who has a charge or control over a child or a person appointed by deed, will or order of the court vested with the duty of taking care and managing the property and rights of the child." A relative is defined as "a grandparent, brother, sister, uncle, auntie or any other member of extended family."[280] Numerous provisions of the Act contain the phrase 'parent, guardian, or relative', referring to persons who have parental rights and responsibilities over the child.[281] Regulations made under the Act, whenever providing specifically for the numerous instances regarding which the Act refers to 'parent, guardian or relative', also use the same phrase. The Child Protection Regulations, in some provisions, add the term carer to the phrase, or replaces 'relative' with it instead.[282] Its regulation 2 defines a carer as a person who has lived with and provided care to the child for at least three months in the last six months. Considering the definitions of parent, guardian, relative, and carer under the Act and Regulations, and the way they refer to parenthood, a child lacks parental care only when all these persons are unavailable to care for him or her.

'Has been committed' implies formality in terms of care ordered by judicial or administrative organs and informality in traditional care arrangements, which brings both integrative and diversity models into play.[283] The determinant role of statutory and customary law child care arrangements in defining parenthood also underscores the existence of either formality or informality. However, the first part of the definition reflects the integrative rather than the diversity model. This is because it requires a biological or formal connection for a parent-

[280] *Ibid.* Regulation 2 adds 'cousin' to the definition of a relative under the Act,

[281] See sections 8(4), 9(2), 18(3) (d), 19(2) and (3), 21, 23(d), 24(1), 31(3), 37(1), 38, 43, 57(2) and (3), 90(1) and (3) (a), 94(3) and (6), 95(1), 101, 108(2), 112, 114(2), 116(2), 118(1) - (3), 132(1) (c), 137(3), 138(2), 139(1), 144(3) and 157(f) of the Law of the Child Act, 2009.

[282] See regulations 11(1) (d) and 12(1) (d) which add the term carer to 'parent, guardian and relative'. The word relative is repleced by carer in regulations 13(5) (e), 18(c), 19(3) and (6), 20(1) (c), 22(4) and (9), 23(9), 26(2) (b), (c) and (3) (b), 35(4) and (6), 38(7) (a) and (9), 45(1), 46(2) (b) and (c), 66(8) (b) and (e), 68(4)-(7), and 70(1) of the Child Protection Regulations, 2014.

[283] Sections 7 and 9 of the Law of the Child Act, 2009, articulating the right to grow up with parents and parental duty and responsibility, speak about both kind of authorities.

child relationship. It, nonetheless, does not expressly demand a marital bond for a couple to be parents. However, only married couples can adopt a child in Tanzania, except for a Tanzanian single woman or a single man under exceptional circumstances.[284]

Since Tanzania's society is highly religious, the general public may relate to the integrative more than to the diversity model. However, being a pluralistic legal society governed, among others, by both statutory and customary laws, there are diverse conceptualisations of a parent and parenthood. As a result, a wide range of persons with varying primary formal and informal relationships to the child can become their parents. Therefore, the conceptualisation of parenthood in Tanzania draws from parts of both the integrative and diversity models.

This study focuses on statutory child adoption. For adoption purposes, it is vital to define what constitutes a child without parental care. Thus, understanding what parenthood entails in Tanzania helps to establish the meaning of parental care and to define what is a child deprived of parental care. This assists the categorisation of children without parental care, which is necessary for the identification of alternative care arrangements suitable for each child. In turn, it sets apart parenthood in child adoption against parenthood in other arrangements, such as foster care and institutional care. In the course of this thesis, this distinction under the law and in society will become apparent.

2.3.4 Child Adoption

There exist multiple perceptions of child adoption, depending on the lens through which one views the concept. Understanding of this concept varies within a society and from one society to another. It is also dynamic, depending on the context, time, and field of study. This part considers conceptualisations of child adoption in legal and anthropological studies, while focusing on Tanzanian society in recent times. The plurality of legal orders governing life in Tanzania has led to diverse perceptions of child adoption. Adoption under state law (formal/statutory adoption) is quite different from adoption practices under customary and religious laws (informal/traditional law, kinship adoption).[285] Fundamental elements and procedures that constitute child adoption differ from one legal order to the other. As well,

[284] *Ibid.*, sections 55 and 56, with special attention to section 56(1) (d) and 56(2) of the Act.

[285] While state law adoption is always formal, customary, and religious law adoptions are not always informal. For instance, in O'Halloran, *The politics of adoption*, above footnote 74, at p. 756, the author shows the degree of formality that customary law adoptions have acquired in the First Nations in Canada. Also, in some religious laws such as modern codified Hindu law, adoptions have become formalised. Reference is made to the Hindu Adoptions and Maintenance Act, 1956.

there are very diverse motives for adoption.[286] Thus, society members living according to the various laws understand and practice child adoption differently.

Tanzania's formal adoption law, particularly regulation 2 of the Adoption of Children Regulations, defines adoption as a measure that provides permanent family care to a child deprived of their family environment.[287] The Regulations do not define 'family environment', nor does the Law of the Child Act under which the Regulations are made. However, section 3 of the Act defines a family as a father, mother, and children, blood-related or adopted, and other typical members of an extended family living in a household. Therefore, it means children may be regarded as deprived of their family environment only when found without the care of their parents or members of the extended family.[288] However, the UN Guidelines emphasise the deprivation of parental care rather than the family environment.[289] In the context of the Guidelines, the term parents refers to the father and mother of the child. In Tanzania, as discussed above, the definition of a parent in the Law of the Child Act is extensive. Thus, children are considered as being deprived of their family environment or parental care in Tanzania only when they are without the care of their parents, members of the extended family, or any other person to whose care they are committed. The term 'deprived of' is also open to broad interpretations. It may cover a wide range of scenarios, including children who are parentless, relinquished, sold, trafficked, neglected, abused, maltreated, or even runaways.[290] The remaining question is how adoption as an alternative measure of child care can be understood.

Wanitzek finds that almost always adoption refers to the voluntary assumption of parental rights and obligations over a child by a non-biological parent.[291] It is a process that creates full or partial kinship ties by agreement or law instead of blood. O'Halloran gives numerous interpretations of the concept as she attempts a comprehensive conceptualisation of child

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[286] Inheritance, kinship, allegiance, child welfare, extra pair of hands, and childless couple motives are explained, *ibid.*, at pp. 6-10.

[287] Article 20 of the Convention on the Rights of the Child, UNCRC (20 November 1989) recommends alternative care (including child adoption) for children deprived of their family environment. Article 25 (1) and (2) of the African Charter on the Rights and Welfare of the Child, 1990 provides similarly.

[288] Wanitzek, "Child Adoption and Foster Care in the Context of Legal Pluralism: Case Studies from Ghana", above footnote 18, at p. 226, supports that in the African context, a child cared for not by their parents but within the extended family is not deprived of their family environment; also see Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, at p. 33.

[289] Section 1 of the UN General Assembly, "Guidelines for the Alternative Care of Children". Article 25(2) (a) of the African Charter on the Rights and Welfare of the Child, 1990 also refers to parental care as it mentions 'parentless' children.

[290] Wanitzek, "Child Adoption and Foster Care in the Context of Legal Pluralism: Case Studies from Ghana", above footnote 18, at p. 226.

[291] Wanitzek, "Legal pluralism under the influence of globalisation: a case study of child adoption in Tanzania", above footnote 19, at p. 471; Also see definition of adoption in Garner, *Black's Law Dictionary*, above footnote 229, at p. 55.

adoption in various jurisprudences.[292] She terms statutory adoption as the most radical family law order empowered to permanently change the legal status and impact the legal interests of members of the adoption triad with far-reaching implications for their entire families, social circles, and future generations.[293] She argues that statutory adoption creates an artificial parent-child relationship between a child and a non-biological parent that is tantamount to the preexisting biological relationship. It severs the original family relationship by transferring parental rights and responsibilities to the adopter and gives the child a new identity, address, kin, and property. The adopter voluntarily takes on the duty to nurture and protect the child of another, hoping that their mutual bonding will create sufficient attachment for them both to sustain their need for a family.

Section 64(1) (a) and (b) of Tanzania's Law of the Child Act, which names the effects of child adoption, confirms the picture O'Halloran paints. It reads,

> "When an adoption order is made– (a) the rights, duties, obligations and liabilities including those under customary law of the parents of the child or of any other person connected with the child of any nature whatsoever shall cease; and (b) the adoptive parent of the child shall assume the parental rights, duties, obligations and liabilities of the child with respect of custody, maintenance and education as if the child was born to the adoptive parent in a lawful wedlock and was not the child of any other person."

Howell, from a different angle, conceptualises child adoption from the standpoint of anthropological kinship studies.[294] She establishes that child adoption is a process involving the kinning of strangers. It is an expression of a kin idiom that entails bringing a foetus, newborn, or any previously unconnected person into a significant and permanent relationship with a group of people.[295] She points out that numerous societies and scholars consider biological connectedness as the universal identifier of kin relatedness.[296] Such thinking is based on biocentrism, which perceives social relatedness as being weaker than biogenetic relatedness. The perception leads to the characterisation of adoption as a fictive, pseudo or

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[292] O'Halloran, *The politics of adoption*, above footnote 74.
[293] *Ibid.*, at p. 35.
[294] Signe Howell, "Kinning: The Creation of Life Trajectories in Transnational Adoptive Families", The Journal of the Royal Anthropological Institute 9(3) (2003): pp. 465–84; Signe Howell, *The kinning of foreigners*: *Transnational adoption in a global perspective* (New York: Berghahn Books, 2007); Signe Howell, "Imagined Kin, Place and Community: Some Paradoxes in the Transnational Movement of Children in Adoption", in M. E. Lien, M. Melhuus (eds.), *Holding worlds together: Ethnographies of knowing and belonging* (New York, Oxford: Berghahn Books, 2007); Signe Howell, "Adoption of the Unrelated Child: Some Challenges to the Anthropological Study of Kinship", Annual Review of Anthropology 38(1) (2009): pp. 149–66.
[295] Howell, "Kinning: The Creation of Life Trajectories in Transnational Adoptive Families", above footnote 294, at p. 465; and Howell, "Imagined Kin, Place and Community: Some Paradoxes in the Transnational Movement of Children in Adoption", above footnote 294, at p. 25.
[296] Howell, "Imagined Kin, Place and Community: Some Paradoxes in the Transnational Movement of Children in Adoption", above footnote 294, at pp. 24-26; and Howell, "Kinning: The Creation of Life Trajectories in Transnational Adoptive Families", above footnote 294, at pp. 467-468.

artificial kin relationship. Howell vehemently rejects such labelling and asks, fictive to whom?[297] She says in no way do adoptive parents or children visualise their relationship as fictive.[298] Instead, Howell suggests the classification of self-conscious kinship.[299] She describes adoption as being akin to the natural process of childbirth, comparing the approval of a couple for adoption with the beginning of pregnancy, and child allocation with the beginning of childbirth.[300] She explains the process of 'kinning' and imparting to adopted children the sense of belonging to the new family as transubstantiation. In her words, she says,

> "On their arrival in Norway, adopted children are treated as *tabulae rasae*. Indeed, they undergo something akin to a rebirth. The main actors in this process are the parents, the bureaucracy, and the judiciary, all of whom are concerned with the transubstantiation of the child. Each child is given a new name, new citizenship, new birth certificate, new kin and home, new social and cultural expectations, and new relationships beyond the family. This is a time characterized by an extreme effort to de-biologize origins and transubstantiate the child's essence. The ultimate aim is to kin the adopted child into his or her parents' network."[301]

In contrast to Howell's conceptualisation of adoption as a kinning process, Fonseca explains it as a de-kinning of birth mothers.[302] She describes plenary adoption as a form of bureaucratic violence designed to write out birthparents from their children's lives.[303] In her view, de-kinning is achieved through the characteristic clean-break principle, no-contact rule, and shrouding the adoption process in secrecy[304]. This is meant to completely supplant the child's preexisting family relations by the adoptive ones. These aspects of child adoption also prohibit or restrict direct contact between the two sides involved. She opines that poor birth parents accustomed to traditional child circulation practices fail to comprehend the severance of family ties when consenting to formal child adoption. Fonseca attempts to rationalise the clean-break principle in the Euro-American kinship system as being based on antipathy to

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[297] Howell, "Adoption of the Unrelated Child: Some Challenges to the Anthropological Study of Kinship", above footnote 294, at p. 155.
[298] Howell, "Imagined Kin, Place and Community: Some Paradoxes in the Transnational Movement of Children in Adoption", above footnote 294, at p. 25.
[299] Howell, "Kinning: The Creation of Life Trajectories in Transnational Adoptive Families", above footnote 294, at p. 468; For further reading see Signe Howell, "Self-Conscious Kinship: Some Contested Values in Norwegian Transnational Adoption", in S. Franklin, S. McKinnon, J. Carsten, G. Feeley-Harnik, Y. Yunxiang (eds.), *Relative Values: Reconfiguring Kinship Studies* (Durham: Duke University Press, 2001), pp. 203-223.
[300] Howell, "Kinning: The Creation of Life Trajectories in Transnational Adoptive Families", above footnote 294, at p. 471.
[301] *Ibid.*
[302] Claudia Fonseca, "The de-kinning of birthmothers: reflections on maternity and being human", Vibrant: Virtual Brazilian Anthropology 8(2) (2011): pp. 307–39.
[303] *Ibid.*, at p. 307 and 309.
[304] For detailed information relating to shrouding the adoption process in secrecy, see *ibid.*, at pp. 314-318.

shared parenthood, but finds that this does not apply to modern family formations, such as blended families. Instead, she comments on the characteristic plasticity of kinship across all systems, as it can "bend, relocate and adjust to new situations." However, she argues that such plasticity can be prejudicial, especially where society admires an adoptive mother for creating kinship relations where there were none, but shuns and excludes a birth mother for giving away her child, which means that she is de-kinned.[305] She accuses adoption legislation of the crime of endorsing erasure of parental status, which renders the birth mother non-existent, based merely on the justification of given consent to a set of contractual conditions. Concluding her analysis from the perspective of violence and subjectivity, legal anthropology, and kinship studies, she terms a birth mother's act of giving away her child for adoption as social suffering.

The modern statutory form of adoption as conceptualised by O'Halloran, Howell and Fonseca, and broadly practised today, was not always, and still is not, practised across all societies. One UN publication on adoption trends and policies provides detailed accounts of the evolution of child adoption and its laws across numerous societies globally.[306] It lists Tanzania among the first countries to enact a modern adoption law during or after WWII, which it did in 1942 based on the English 1926 Adoption of Children Act.[307] O'Halloran, in her book, argues that the basic model of formal adoption has not changed much in the UK since being introduced by the first statute in 1926. There has only been a re-balancing of public and private interests, necessitated by the principle of the welfare interests of the child.[308] She argues that adoption is a social construct that modern Western societies gave a specific, consistent meaning to, in order to address similar social problems in their diverse cultural traditions. But its definition can vary according to the norms and values of other cultures, including religious (Islam) and customary (indigenous communities). Since Tanzania's formal adoption law originates from the UK, it reflects the Western modern social construct. However, since it is implemented in a different cultural tradition, it is important to consider the co-existing forms of child adoption under customary and religious law.

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[305] *Ibid.*, at p. 311.

[306] United Nations Department of Economic and Social Affairs, Population Division, *Child Adoption*, above footnote 21. For a history of adoption, see Jenny Keating, *A child for keeps*: *The history of adoption in England, 1918-45* (Basingstoke: Palgrave Macmillan, 2009); and The Changing Face of Adoption in the United Kingdom, Chapter 2 in O'Halloran, *The politics of adoption*, above footnote 74, at pp. 39-78

[307] United Nations Department of Economic and Social Affairs, Population Division, *Child Adoption*, above footnote 21, at p. 15 See parts 1.1 and 1.2 of chapter 1 for further details on the introduction and development of formal child adoption law in Tanzania (formerly Tanganyika).

[308] O'Halloran, *The politics of adoption*, above footnote 74, at p. 36.

Since ancient times, African traditional legal systems have included arrangements for varying forms of child adoption.[309] Wanitzek shows that the forms of adoption governed by African customary laws of given communities do not fit the Western conceptions of adoption that involve complete severance and replacement of familial relations.[310] Rwezaura and Wanitzek argue that only certain rights and responsibilities over a child may be transferred in African traditional law adoption.[311] Procedures, objectives, elements and effects of traditional law adoption in Africa considerably differ from the Western statutory model, and from one community to another within the continent and individual countries. Customary law differs from one ethnic group to another, and because it is a living law it also changes with time. Okumu-Wengi found that the definition of customary law adoptions is unclear even among members of a particular community.[312] Tanzania attempted customary law codification, which resulted in the 1963 Local Customary Law (Declaration) Order. Still, the Order guarantees no cast-iron certainty regarding applicable customary laws, and it does not explicitly provide for adoption. Therefore, customary law adoption practices remain largely variant in Tanzania, from child adoption in the Kuria system of daughter-in-law marriages (*mokamona*) to adopting a son for an heir among the Haya (*okuzala*), as described by Rwezaura and Wanitzek[313], and further beyond these. The Law of the Child Act under section 9(3) (c) and (4) recognises traditional and customary child care arrangements, which may include customary law adoptions, although these are not provided for in detail.[314]

Tanzania is a legal and culturally pluralistic society, where religious laws also play a role in regulating family relations. Rwezaura and Wanitzek show that, although religious laws cannot create recognised parent-child relationships in adoption in Tanzania, they can influence child adoption practice under state law.[315] For instance, both traditional and modern codified Hindu laws recognise and provide for child adoption. However, the section of the Tanzanian

[309] African countries such as Burkina Faso, Cameroon, Ethiopia, Ghana, Kenya, Lesotho, Malawi, Sierra Leone, South Arica, Swaziland, and Uganda are reported to have the practice of customary law adoption in African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 91, at p. 4.

[310] Wanitzek, "Legal pluralism under the influence of globalisation: a case study of child adoption in Tanzania", above footnote 19, at p. 476.

[311] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 153.

[312] Okumu-Wengi, "Searching for a Child-centred Adoption Process", above footnote 70, at p. 235.

[313] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 154.

[314] Paras 3.0.1 and 6.5 of the Open University of Tanzania, *A Critical Legal Commentary - The Bill on Law of the Child Act, 2009 Viewed from International Child Rights Instruments* (The Open University of Tanzania, 2009) strongly discourage customary law adoption without state regulation as it has proven not to be in the best interest of the child.

[315] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 156.

population to which Hindu law applies can only use it for informal adoptions.[316] This form of adoption is meant to secure a male heir for a sonless adopter in order to further his lineage, provide for him in old age and perform his death rites. Islamic law, on the other hand, does not permit child adoption. It only provides for some arrangements that are analogous to certain forms of child adoption.[317] *Kafala*[318] is a widely recognised Islamic practice that comes close to weak child adoption or strong foster care practice. O'Halloran attempts a conceptual analysis and comprehensive description of adoption processes in the Islamic context.[319] She explains that *kafala* is,

> "…an Arabic legal term for a formal pledge to support and care for a specific orphaned or abandoned child until he or she reaches majority. A form of unilateral contract, it is used in various Islamic nations to assure protection for such minors, as these nations generally do not legally recognize the concept of adoption. But unlike adoption, kafala neither confers inheritance rights nor any right to use the grantor's family name."[320]

The UNCRC recognises *kafala* under Article 20(3). Although the Law of the Child Act, 2009 domesticates the Convention, it does not provide for *kafala*, unlike its counterpart, the Zanzibari Children's Act, 2011, under section 75. Section 2 of the Zanzibari Children's Act defines *kafala* as a voluntary commitment to care for a child's maintenance, protection and education, as the child's biological parents would. Section 75(2) and (3), which list the effects of *kafala* for the guardian and the child, clarify that the effects of adoption, including severance and transfer of familial ties, identity, and inheritance rights, do not apply in *kafala*.[321] Although the Children's Act provides for statutory child adoption under section 76, it prohibits people professing Islamic faith from engaging in such an undertaking. However, in Tanzania Mainland, where *kafala* is not recognised, Muslims are not forbidden to undertake state law adoption.

Conceptions of child adoption include a myriad of other factors. For instance, once, it was considered mainly a humanitarian act, while today, it is mostly a child protection measure

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316 For those residing in Tanzania, adoptions are bound by traditional Hindu law and not the modern codified law in the Hindu Adoptions and Maintenance Act, 1956 as in the discussion, *ibid.*; Shruti Johansson, Judith Lind, "Preservation of the Child's Background in In- and Intercountry Adoption", The International Journal of Children's Rights 17(2) (2009), pp. 235–60, also discusses Hindu adoptions.

317 For an example of such procedures, see Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 156-157.

318 Also spelled as kafalah under section 20(3) of Convention on the Rights of the Child, UNCRC (20 November 1989); and in Zanzibar's Children's Act, 2011, Act No. 6 of 2011 (2011).

319 O'Halloran, *The politics of adoption*, above footnote 74, at pp. 603-635.

320 *Ibid.*, at p. 604, fn. 3.

321 For more details on the principles of Islamic adoption, see S. Ishaque, "Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to an Identity", International Journal of Law, Policy and the Family 22(3) (2008): pp. 393–420.

taken when a child can no longer be cared for within the family of origin.[322] Thus, there has emerged a debate on whether adoption is an alternative child care measure. This debate stemmed from UNCRC's listing of adoption as an alternative care measure under Article 20(3). Also, there is a discrepancy between the UNCRC and the ACRWC, because the latter does not list adoption as an alternative care measure under Article 25(2) (a). Further, the UN Guidelines 2010 in section 30(b) explain specifically that the guidelines do not apply to adopted children after the final adoption order because it considers those children already under parental care. However, the present researcher opines that adoption falls into the alternative care category, since the guidelines apply to all pre-adoption processes. Cantwell, rejecting the alternative care label for adoption, calls it an outcome rather than a component of alternative care.[323]

Differences in conceptions of child adoption may also lie in its numerous forms arising from varying practices across different legal systems and societies. Below are a few contrasting categories described in brief with direct relation to Tanzania's law and society.

2.3.4.1 Full/Partial Adoption

Full adoption, also referred to as strong adoption, plenary adoption, or *adoptio plena*, denotes the type of adoption in which preexisting kinship ties with the birth family are entirely severed and replaced by new full kinship ties in the adoptive family.[324] It differs from partial adoption, which is also known as weak adoption, simple adoption, or *adoptio minus plena*, in which the preexisting familial relations are not supplanted in their entirety by the new adoptive relations.[325] Thus, some elements, such as inheritance rights vested in the birth family, may be retained in partial adoptions.

Tanzanian statutory adoption takes the form of full adoption only[326], although other global jurisdictions retain both forms. O'Halloran provides examples of countries that recognise only full adoption under state law, like Tanzania, including the UK, USA, Australia, and the Scandinavian countries, while France, Japan, Romania, and several South American and

[322] Cantwell, *The Best interests of the child in intercountry adoption*, above footnote 89, at p. 30.
[323] *Ibid.*, at p. 31.
[324] See Wanitzek, "Legal pluralism under the influence of globalisation: a case study of child adoption in Tanzania", above footnote 19, at p. 472; and O'Halloran, *The politics of adoption*, above footnote 74, at p. 138.
[325] Provided under Articles 26 and 27 of Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (29 May 1993).
[326] Section 64 of Law of the Child Act, 2009.

African countries recognise partial adoption as well.[327] However, customary and religious law in Tanzania do not recognise full but only partial adoptions.

2.3.4.2 Child/Adult Adoption

Child adoption is the practice that has been discussed in detail above. Adult adoption, on the other hand, is its counterpart. Adult adoption is a form of adoption descended from Roman law referred to as *arrogatio*, in which originally only sons above the age of puberty (18 years) were adopted.[328] Influenced by Roman law, adult adoption became a standard practice among European nations in the Middle Ages and early Modern Era.[329] It allowed childless couples to have descendants. It is not a practice currently recognised in all legal systems. In those jurisdictions that do, adult adoption has acquired varying patterns. Japan is a country that has adult adoption as the primary form, while child adoption remains the minority practice.[330] How and why the Japanese practise adult adoption is not necessarily the same as in other countries that practise it, such as the USA (except New Jersey), Germany, some Australian states, and Canada.[331] Like Tanzania, some other common law countries, such as UK, South Africa, and New Zealand, do not recognise adult adoption in their adoption law.[332] However, a recent High Court ruling in Tanzania granted an adoption order in favour of an adult person with a mental disability.[333] Since there is no legislation providing for adult adoption in Tanzania, the judge in the said case relied mainly on international and national laws for people living with disabilities to ground his argument for granting the adoption.[334]

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[327] O'Halloran, *The politics of adoption*, above footnote 74, at p. 138; see also fn. 37 in Wanitzek, "Legal pluralism under the influence of globalisation: a case study of child adoption in Tanzania", above footnote 19, at p. 472.

[328] United Nations Department of Economic and Social Affairs, Population Division, *Child Adoption*, above footnote 21, at pp. 7-8.

[329] *Ibid.*, at pp. 9-12; EU-Germany, "Overview of Adoption Law in Germany": pp. 1–11.

[330] Taimie L. Bryant, "Sons and Lovers: Adoption in Japan", The American Journal of Comparative Law 38(2) (1990): p. 299; and Kerry O'Halloran, "Japan", in K. O'Halloran (ed.), *The Politics of Adoption: Trends and Policies* (Dordrecht: Springer Netherlands, 2015).

[331] O'Halloran, *The politics of adoption*, above footnote 74, at pp. 345, 431, 464 and 594; and Kent Blore, "A Gap in the Adoption Act 2009 (QLD): The Case for Allowing Adult Adoption", Queensland University of Technology Law and Justice Journal 62([2010] QUTLawJJl 4) (2010): pp. 62–86.

[332] Blore, "A Gap in the Adoption Act 2009 (QLD): The Case for Allowing Adult Adoption", above footnote 331, at p. 77.

[333] High Court of the United Republic of Tanzania (Dar es Salaam District Registry), at Dar es Salaam, "Matayo K. Kihwelo vs. Gabriele Brandolini", unreported (01.12.2020).

[334] Some of which include Convention on the Rights of Persons with Disabilities, (2006); Optional Protocol to the Convention on the Rights of Persons with Disabilities (13 December 2006); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (29 January 2018); and Persons with Disabilities Act (2010).

Adult adoption refers to the practice of adopting persons who have attained the age of majority in accordance with the laws of the country where the adoption takes place.[335] Unlike the welfare motive in child adoption, the motives for adult adoption are based on emotion and practicality.[336] Adult adoption is used to give a person a sense of identity and belonging, as well as security (which includes inheritance rights). As Blore explains, this cannot be achieved by simply changing a name and writing a will.[337] Examples of emotion-based motives are searching for identity and belonging, which is seen frequently in step-parent adoptions, while on the practical side are searching for an heir, or an extra pair of hands, or a way to simplify emigration.[338] For instance, in the recent Tanzanian adoption ruling, foreign countries' immigration rules were central in granting the adoption petition.[339] The effects of adult adoption orders also vary, depending on the form of adoption allowed for adults in a specific country. For example, in Germany, adult adoptions are mainly partial, with full adoption being allowed in specific circumstances as stipulated under the German Civil Code, sections 1767-1772.[340] In the cited Tanzanian case, the judge granted a full adoption order.

In customary law adoptions, which vary across communities, it is possible to adopt adults, for instance as shown in the adoption of an heir among the Haya in Tanzania.[341] Okumu-Wengi describes other forms of adult adoption among the Bakiga and Jopadhola of Uganda. These include the adoption of war captives (*abazaana*), adoption for marriage when one has no bridewealth (*akutendera*), and self-obligation (*okwehonga*) adoption where a man renounces his clan and begs to be adopted into another to avoid punishment for crimes (death) committed in his clan.[342] As in traditional law child adoptions, these forms of adult adoption lack consistency in their motives, elements, procedures, and effects.

2.3.4.3 Adoption by Decree/Contract

It is no news that adoption laws have evolved continuously. In some jurisdictions, adoption was by way of a private contract between the parties concerned. A contract is an agreement

[335] See Blore, "A Gap in the Adoption Act 2009 (QLD): The Case for Allowing Adult Adoption", above footnote 331, at p. 63; and O'Halloran, "Japan", above footnote 330.
[336] Blore, "A Gap in the Adoption Act 2009 (QLD): The Case for Allowing Adult Adoption", above footnote 331, at pp. 64-66, 68 and 85.
[337] *Ibid.*, at pp. 65, 67-69, 81, 83 and 85.
[338] See *ibid.* for step-parent adoptions; and O'Halloran, "Japan", above footnote 330, for son-in-law adoptions in Japan to secure an heir and other forms of adult adoption for practical reasons.
[339] High Court of the United Republic of Tanzania (Dar es Salaam District Registry), at Dar es Salaam, "Matayo K. Kihwelo vs. Gabriele Brandolini", at p. 8.
[340] O'Halloran, *The politics of adoption*, above footnote 74, at p. 594; and further in EU-Germany, "Overview of Adoption Law in Germany", above footnote 329.
[341] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 155.
[342] Okumu-Wengi, "Searching for a Child-centred Adoption Process", above footnote 70, at pp. 239-241.

between two or more parties that creates rights and obligations either enforceable or recognised by law.[343] Thus the adoption agreement would include all the terms and conditions that bind parties to the adoption. The form, contents, and effects of such agreements have varied from one legal system to another. For instance, in ancient Greece adoption included a voluntary contractual relationship *inter vivos* or a testamentary or posthumous arrangement that needed court confirmation.[344] From the ancient Roman adoption laws up to the Napoleonic code, adoption was mainly of adults by agreement.[345] Countries whose adoption laws originated from Roman laws, such as Germany, mainly practised adult adoption as a private contract between adopters and adoptees. Adoption under the German Civil code of 1900 stipulated this.[346] When introduced in Germany, the adoption of children remained by way of a private contract (confirmed in court) until the legal reforms of 1976.[347] The German Adoption Act of 1976 changed this practice to adoption by court decree.

A decree is a final judicial decision issued by a court of law or a judicial body of equivalent authority.[348] Modern-era adoption laws introduced the concept of adoption by court decree. The first adoption law to do so was the Massachusetts Adoption of Children Act of 1851.[349] The legal change started in the Western countries and spread across other countries, such as those that inherited European-based adoption laws through colonisation. Tanzania Mainland (then Tanganyika) was one of those countries. An adoption decree has different effects depending on the form of adoption petitioned for in court. An adoption decree in Tanzania has full adoption effects as it permanently alters the relations of the adoptee with his or her birth and adoptive families.[350]

Customary law adoptions in Africa are concluded mainly by way of agreement between the families.[351] The only difference from the earlier adoption agreements in Europe is that the agreement is not by individuals but instead involves the community.[352] Customary law

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[343] See definition of contract in Garner, *Black's Law Dictionary*, above footnote 229, at p. 365.
[344] United Nations Department of Economic and Social Affairs, Population Division, *Child Adoption*, above footnote 21, at p. 6.
[345] *Ibid.,* at pp. 7 and 11.
[346] EU-Germany, "Overview of Adoption Law in Germany", above footnote 329, at p. 1.
[347] O'Halloran, *The politics of adoption*, above footnote 74, at p. 578.
[348] See definition of decree in Garner, *Black's Law Dictionary*, above footnote 229, at p. 471.
[349] United Nations Department of Economic and Social Affairs, Population Division, *Child Adoption*, above footnote 21, at p. 13.
[350] Section 64 of Law of the Child Act, 2009.
[351] African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 91, at p. 3; Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at pp. 153-155; and in Okumu-Wengi, "Searching for a Child-centred Adoption Process", above footnote 70, at pp. 235-243.
[352] On the role of the clan in customary law adoptions, see Okumu-Wengi, "Searching for a Child-centred Adoption Process", above footnote 70, at pp. 241-243.

adoption decrees are only possible in countries that have formalised this form of adoption and are concluded through a court order. Although the Law of the Child Act, 2009 recognises customary child care arrangements in Tanzania, it does not integrate them into the law; hence, the court in Tanzania grants no customary law adoption decrees.

2.3.4.4 Closed/Open Adoption

Clean-break, absolute secrecy, and no contact characterise the widespread closed adoption model originating from modern Western societies. It is a type of adoption defined by lack of contact between birth and adoptive parents pre- or post-adoption.[353] Confidential adoption is its alias because it does not permit disclosure of identities of the adoption triad.[354] Closed adoptions involve the process of assimilation.[355] An adopted child's past familial ties and identity are wholly severed and replaced by the newly acquired ties to the adoptive family. Information relating to the parties and circumstances of the adoption also remains sealed. The main ground for devising this type of adoption was the child's welfare. It followed the belief that complications and confusion arising from exposure to multiple sets of family relations and entanglements should be avoided to foster child development.[356] It was assumed that this allows the birth family to become reconciled to their loss, the adoptive family to move on, and the child to form attachments within their new family environment: a clean slate, a new beginning.

Open adoption, on the contrary, is based on the view that maintaining pre-adoption familial links is crucial to forming secure attachments and developing a genuine sense of identity in adoption. Research has shown that a child can understand a relationship framework of several sets of relations and form attachments that foster rather than deter healthy emotional development.[357] Therefore, in open adoption, an adopted child is permitted and assisted to maintain ties with the birth family.[358] The continued relations ease the sense of abandonment for the child and for the birth family, allowing for a clear conscience.[359] In such adoptions, the

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[353] United Nations Department of Economic and Social Affairs, Population Division, *Child Adoption*, above footnote 21, at p. 149.
[354] Garner, *Black's Law Dictionary*, above footnote 229, at p. 56.
[355] O'Halloran, *The politics of adoption*, above footnote 74, at p. 156.
[356] *Ibid.*, at p. 41.
[357] *Ibid.*
[358] For an extensive discussion of open adoption, see Mullender, Audrey (ed.), *Open adoption — the philosophy and the practice* (1991), cited in O'Halloran, *The politics of adoption*, above footnote 74.
[359] See para 6.5 of the Open University of Tanzania, *A Critical Legal Commentary - The Bill on Law of the Child Act, 2009 Viewed from International Child Rights Instruments*, above footnote 314; citing Andrew Bainham, Stephen M. Cretney, *Children*: *The modern law* (Bristol: Family Law, 1993), at pp. 242-245; and Chris Barton, Gillian Douglas, *Law and parenthood* (London: Butterworths, 1995), at p. 348.

birth and adoptive parents maintain contact pre and post-adoption. They even can both participate in the separation and placement processes of adoption.[360]

The acceptable level of openness differs from one jurisdiction to another. Demick and Wapner elaborate on four different levels of openness.[361] They explain that it can be, first, restricted open adoption (adoptive parents agree to sporadically send birth parents, via the adoption agency, pictures and other information about the child's development for a set time after placement); second, semi-open adoption (birth and adoptive parents meet pre-adoption without sharing any identifying information); third, full open adoption (birth and adoptive parents meet and share information); and fourth, continuing open adoption (birth and adoptive parents plan continued contact with the child over the child's development). Also, the way of negotiating and allowing contact varies, from contractual to judicial. For instance, in the UK, since the Children Act of 1989, contact orders are made alongside child adoption orders.[362] In Germany, however, the Civil Code maintains the traditional closed model, and open adoption is accommodated only in practice upon the consent of both parties.[363] Nevertheless, open adoption has now become the norm superseding the common closed model for adoption.[364] In some jurisdictions, such as Australia, prospective adopters' approval may be denied when aversion to open adoption is detected.[365]

Tanzania's Law of the Child Act allows for open adoption. However, it gives the practice a narrow construction that distorts the original conception of open adoption. Under section 54(3), the Act defines it as adoption by a relative. Admittedly, adoptions within the family, even in Western societies, are largely open adoptions by relatives or step-parents. However, open adoption is not restricted to family adoptions, but is strongly recommended in child welfare adoptions by non-relatives.[366] Tanzania's Adoption of Children Regulations specify the effects of open adoption under regulation 22. The regulation entitles the child in open adoption to maintain ties with the birth family and retain his or her surname unless agreed otherwise. However, it remains unclear whether regulation 22 (a) refers to legal or social ties. The Kiswahili translation of the sub-regulation says *"ukaribu kati ya familia aliyozaliwa na*

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[360] Garner, *Black's Law Dictionary*, above footnote 229, at p. 56; in Australia, the birth parents can select the adoptive family and also the type and level of contact to be maintained, as explained in O'Halloran, *The politics of adoption*, above footnote 74, at p. 436.

[361] J. Demick, S. Wapner, "Open and closed adoption: a developmental conceptualization", Family process 27(2) (1988): pp. 229–49.

[362] O'Halloran, *The politics of adoption*, above footnote 74, at p. 34.

[363] *Ibid.*, at p. 573-574.

[364] *Ibid.*, at pp. 34, 41–42, 239-240, 423 and 462, argues so in the cases of the UK, Australia, and New Zealand.

[365] *Ibid.*, at p. 423.

[366] Countries such as the UK, Australia and New Zealand have laws in place that push for more openness in adoption of an unrelated child; *ibid.*, at pp. 34, 41-42, 52, 422-424 and 462.

mtoto anayeasiliwa utunzwe".[367] In English this would mean closeness with the birth family should be maintained, which refers to maintaining social ties. This is a pertinent question because maintaining legal ties with the birth family will negate the application of section 64 of the Law of the Child Act in open adoptions. Nonetheless, the English version is the original, so the meaning of the subsection remains vague. Regulation 23 of the Adoption of Children Regulations empowers the court to make an order regulating contact between the child and the birth family unless it is against the child's best interest. All other adoptions of an unrelated child in Tanzania are closed adoptions.

Customary law adoptions, on the other hand, are predominantly open adoptions. O'Halloran, describing customary aboriginal adoptions in Canada as inherently open, shows that the child maintains contact not only with their birth family but also with the community.[368] In Africa, and particularly Tanzania, as shown above, customary child adoptions are not a secret; the whole community is aware of the involved familial relations. Contact between the child and the birth family is maintained unless there are strong reasons against it.[369]

2.3.4.5 Adoptions by Relatives/Non-Relatives

Adoption by relatives, also known as family or kinship adoptions, means adoption that keeps the child within the care of his or her family of origin.[370] It includes adoptions by parents, step-parents, grandparents, uncles, aunts, siblings, and other relatives.[371] The relationship between the adoption participants and the motive for adoption determines the role these adoptions play. First, according to section 55(1) (b) of the Law of the Child Act, a father or mother of a child may adopt their child alone or jointly with a spouse. The role of adoption here is to create or strengthen a legal bond between the child and their biological father or mother, alone or with their spouse. Illegitimacy is one of the reasons for a biological parent to adopt their child[372] although the Law of the Child Act makes this unnecessary as it recognises all children equally, born within wedlock or not. However, a parent may still prefer legitimation of a child through adoption to strengthen legal ties and secure the child's rights, especially inheritance rights.

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[367] Kanuni ya 22(a) ya *Tafsiri ya Kanuni za Uasili Watoto za Mwaka 2012*, GN No. 164 of 2016.
[368] O'Halloran, *The politics of adoption*, above footnote 74, at pp. 756-757.
[369] For instance, adoptions meant to save the life of the adopted child, such as adoption of an abnormal child, as described in Okumu-Wengi, "Searching for a Child-centred Adoption Process", above footnote 70, at pp. 238-239.
[370] O'Halloran, *The politics of adoption*, above footnote 74, at pp. 56-61.
[371] See definition of a relative in section 3 of Law of the Child Act, 2009.
[372] See the discussion on a similar provision under section 3(3) of the 1953 Adoption Act in Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 127.

When the father or mother adopts jointly with a spouse, it is known as step-parent adoption. O'Halloran cites Lowe's classification of step-parent adoptions into post-divorce, post-death, and illegitimate step-parent adoptions.[373] These categories depict circumstances that may ordinarily cause a birth parent to adopt their child jointly with a new spouse, in cases of divorce, death of a spouse or co-parent, and 'illegitimacy'. This type of adoption creates a legal parental bond between the step-parent and step-child. Section 64(1) (b) and (2) of the Law of the Child Act stipulates that the adoption order's effect is that the child will be considered as if he or she was born to the birth father or mother and their spouse naturally in lawful wedlock and has never been a child of any other person. Therefore, it completely severs the legal relationship between the child and the other biological parent who is not a party to the adoption. It also affects the right to family life of that parent and their entire side of the family in relation to the adopted child. According to O'Halloran, the legislature in the UK proposed special guardianship orders as an alternative to adoption for such scenarios.[374]

Other relatives are also allowed to adopt a child under the Law of the Child Act, 2009. These include a grandparent, brother, sister, uncle, aunt, or other extended family members. Section 56(1) (b) specifies that persons aged at least 25 years can adopt their relatives' children. Adoptions by relatives are automatically open adoptions in Tanzania. This is because section 54(3) of the Act defines open adoption as child adoption by relatives. Section 55(2) of the Act follows suit in stipulating that a relative may apply for an open adoption order. Thus, the requirements and procedures for open adoption under the Act and regulations 21-24 of the Adoption of Children Regulations, 2012 apply.

Adoptions by non-relatives means adoption undertaken by a person unrelated to the child. Whether or not there is a blood link or *'jus sanguinis'* is the determinant factor in distinguishing these two types of adoption. It implies the existence of certain rights attached to the circumstances of one's birth. For instance, a blood link signifies 'belonging' to the parents, clan, or lineage. Therefore, child adoptions by members of the same bloodline are relative adoptions while the others are non-relative adoptions. Adoptions by non-resident Tanzanians, which this study focuses on, are actually mainly adoptions by relatives.

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[373] N. V. Lowe, "English Adoption Law: Past, Present, and Future", in S. N. Katz, J. Eekelaar, M. MacLean (eds.), *Cross-currents: Family law and policy in the United States and England* (Oxford: Oxford University Press, 2000), at p. 317; cited in O'Halloran, *The politics of adoption*, above footnote 74, at p. 57.

[374] The special guardianship orders have been operative in the UK since 2005 under the Adoption and Children Act of 2002, as explained in O'Halloran, *The politics of adoption*, above footnote 74, at p. 58.

O'Halloran shows that adoptions by relatives have been the leading type of adoption in the UK over the years.[375] This is due to the increasing practice of step-parent adoptions, especially post-divorce step-parent adoptions.[376] This study analyses the motives and effects of adoption by relatives in chapter six, in connection with the categories of adopters under study.

2.3.4.6 Domestic/International Adoption

The African Child Policy Forum conceptualises domestic adoption or in-country adoption as a leading measure among other alternative child care measures. This perspective is based on the idea that domestic adoption has three significant elements: a national, permanent and family-based solution for children in need of parental care.[377] Domestic adoption refers to adopting a child residing within a given country by persons who also reside in that country. It is a type of child adoption governed by the national laws of individual countries. On this ground, the legal framework and practice of domestic adoption vary from country to country.[378] In Tanzania, section 56(3) (a) of the Law of the Child Act restricts child adoption to children and applicants resident in Tanzania, and to Tanzanians living abroad. Besides general provision for adoption by resident Tanzanians, the Act goes further to provide specifically for adoptions by non-resident Tanzanians under section 62 and resident non-Tanzanians (foreigners living in Tanzania) under section 74. Although adoptions by the latter two groups of people involve a foreign element, meaning a foreign residence or nationality, the Act still considers these two forms of adoption to be domestic. There are two main qualifying points in such considerations: residence requirements, and conclusion of the adoption in Tanzania according to Tanzania's child adoption law.

On the other hand, international, intercountry or transnational adoption is the practice of adopting a child from abroad. O'Halloran describes it as a practice whereby people adopt a child from a foreign country while not being resident or domiciled in that jurisdiction.[379] Bartholet defines it as the adoption of a child born in one country by adult citizens of another country with the expectation of raising the child in that other country.[380] Both authors confirm

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[375] She discusses the statistics over the years from 1951 and shows that until 2005, adoptions by relatives still accounted for 50% of the total number of child adoptions in the UK, *ibid.,* at p. 57.

[376] See *ibid.*

[377] African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 91, at pp. 26-27 and 41.

[378] For an example of child adoption practice in different jurisdictions, see O'Halloran, *The politics of adoption*, above footnote 74.

[379] *Ibid.*, at p. 44.

[380] Elizabeth Bartholet, "International Adoption: Overview", in J. H. Hollinger (ed.), *Adoption Law and Practice* (New York: Mathew Bender & Co. Inc., 1988); quoted in Rosanne L. Romano, "Intercountry Adoption: An Overview for the Practitioner", Transnat'l Law 7(2) (1994): pp. 545–82.

that the laws of the child's country of origin determine which children are available and free for adoption, as well as whether the child should be adopted in their own country or return with the adopters to the receiving country so that adoption procedures can be initiated there.[381] Individual countries enact their own laws to govern the practice. However, the UNCRC under Article 21(b), the ACRWC under Article 24(b), and the 1993 Hague Convention on Intercountry Adoption provide an international and regional legal framework to regulate international adoption.

The Conventions conceptualise international adoption as a measure of last resort with reference to the subsidiarity principle and the desirability of continuity in a child's upbringing and ethnic, religious, cultural, and linguistic background. It means that international adoption should be subsidiary to suitable in-country alternative care measures. Chirwa and Mezmur, among others, criticise the subsidiarity principle as impractical and potentially detracting from the child's best interests principle.[382] Cantwell, however, emphasises that the subsidiarity principle should be observed while paying particular attention to the rights and best interests of the child, and to professional assessment based on established and comprehensive criteria in each case.[383] Hague's Guide to Good Practice for implementing the 1993 Convention shows how to implement the subsidiarity principle without compromising the child's best interests.[384]

O'Halloran shows that often international adoption is also transracial. She explains that removing children from their original family, kin, language, and cultural context can lead to identity issues.[385] It is also a form of adoption that leads to racial and cultural tensions and raises discrimination issues, and it is subject to controversy and contention.[386] Agreeing, Cantwell confirms that racial and ethnic background is another layer that complicates international adoption.[387] The subsidiarity principle and desirability of continuity in a child's upbringing and ethnic, religious, cultural and linguistic background can restrict transracial

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[381] O'Halloran, *The politics of adoption*, above footnote 74, at pp. 44-45 and 137-187; and Elizabeth Bartholet, "International Adoption: Current Status and Future Prospects", The Future of Children 3(1) (1993): pp. 89–103.

[382] Danwood M. Chirwa, "Children's rights, domestic alternative care frameworks and judicial responses to restrictions on inter-country adoption: A case study of Malawi and Uganda", African Human Rights Law Journal 16(1) (2016): pp. 117–44; and in Mezmur, "Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child Rather than a Right to a Child", above footnote 102.

[383] Cantwell, *The Best interests of the child in intercountry adoption*, above footnote 89, at pp. 31-35.

[384] Para 51 of the Hague Conference on Private International Law, *The implementation and operation of the 1993 Hague Intercountry Adoption Convention*: *Guide to good practice: under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. Guide no. 1* (Bristol: Family Law, 2008).

[385] O'Halloran, *The politics of adoption*, above footnote 74, at p. 45.

[386] *Ibid.*, at pp. 71, 202, 326-27, 380-82, 424, 463, 505, 538, 616, 652, and 699-700.

[387] Cantwell, *The Best interests of the child in intercountry adoption*, above footnote 89, at p. 53.

adoptions. Some jurisdictions, such as the UK, have attempted regulation at the matching stage and resolved that the child's best interests should be the ultimate determinant in each case.[388] Bartholet, championing international adoption notwithstanding the legal and practical challenges, says,

> "If we will in the future recognize that unparented children should be seen as citizens of the world, with rights to be parented by the first qualified parents that step forward, regardless of their race, ethnicity, and nationality, then we are sacrificing existing children for absolutely no good reason."[389]

International adoption, unlike domestic adoption, has been subjected to additional scrutiny by adoption administrators, practitioners, adjudicators, scholars, and society at large. It thus has diverse conceptualisations. Three perceptions from the critics' camp provide some insights. First, they describe it as a type of exploitation and say that international adoption involves the rich and powerful from industrialised countries permanently taking the children of the poor and powerless from third-world countries across national borders.[390] Second, it is criticised as a form of modern-day imperialism and neo-colonialism whereby developed countries deplete developing countries of their resources, their children.[391] The third criticism is that international adoption is a global trade characterised by child selling and trafficking.[392] Supporters argue against all the criticisms. They say that international adoption should be seen from the standpoint of the child's fundamental right to a family and quality family life. This right requires serving the child's best interest and not that of the parents, community or state. The latter's views are tainted by the post-colonial conception of children as carriers of race, religion and cultural heritage, and condemn them to a life in domestic institutions and foster care. Suppoters recommend finding solutions for existing problems and not baning or

[388] O'Halloran, *The politics of adoption*, above footnote 74, at p. 45.
[389] Elizabeth Bartholet, "International Adoption: A Way Forward", N.Y.L. Sch. L. Rev. 55 (2010/11): pp. 687–99.
[390] Bartholet, "International Adoption: Current Status and Future Prospects", above footnote 381, at p. 90.
[391] African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 91, at p. vi and 2; Mezmur, "From Angelina (To Madonna) to Zoe's Ark: What Are the 'A-Z' Lessons for Intercountry Adoptions in Africa?", above footnote 99, at p. 145; Mezmur, "Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child Rather than a Right to a Child", above footnote 102, at p. 83; Katie Hoffman, "Beyond a two-tier service? Preparation and assessment in intercountry adoption in the UK", Adoption & Fostering 37(2) (2013): pp. 157–70; also see fn. 5 in Chirwa, "Children's rights, domestic alternative care frameworks and judicial responses to restrictions on inter-country adoption: A case study of Malawi and Uganda", above footnote 382.
[392] John Triseliotis, "Intercountry Adoption: Global Trade or Global Gift?", Adoption & Fostering 24(2) (2000): pp. 45–54; and in Jini L. Roby, Stacey A. Shaw, "The African orphan crisis and international adoption", Social work 51(3) (2006): pp. 199–210; African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 91, at p. 36.

over-regulating international adoption, which may be counterproductive and harmful to children.[393]

Child adoptions by non-resident Tanzanians and resident non-Tanzanians, though domestic, have some international elements. First, the adoptive parents may have a permanent home in a country other than Tanzania. Second, they may expect to raise the adopted child in a country other than Tanzania. Third, in the case of adoptions by resident non-Tanzanians, section 74 of the Law of the Child Act applies the subsidiarity principle. And lastly, both types of adoption engage the International Social Service, an international agency, for background investigation before a decision is made. Tanzania Zanzibar also allows for adoptions with an international element but there is a clear provision under section 94 of the Children's Act that bans international adoptions.[394] Tanzania Mainland provides no such clarity. Although Tanzania has submitted reports to the African Committee of Experts on the Rights and Welfare of the Child declaring that the country is involved in consultations towards ratifying the 1993 Hague Convention on Intercountry Adoption, it has not done so to date.[395] Thus, the two types of adoption remain domestic, with international elements.

2.3.5 Concept of the Child's Best Interests

The phrase 'in your own best interest' is in no way novel. Cantwell establishes its historical use as a guiding standard in making decisions for those unable to make their own decisions due to unsoundness of mind or immaturity.[396] Similar phrases such as: 'I did it for your own good/benefit/advantage' or 'I had your best interests at heart' have for a long time been given as grounds for decisions in many communities. Before international recognition of human rights, the concept of best interests was used as a rights-championing standard for people with various incapacities. It applied to, but was not limited to, children and persons living with disabilities. However, the application of the concept was subject to prevailing attitudes and perceptions of a particular time and community. As a result, decisions made 'in the best

[393] For a detailed account of international adoption supporters' views, see Bartholet, "International Adoption: A Way Forward", above footnote 389, in which the author briefly analyses articles by other authors in the volume.
[394] Adoption by Tanzanian citizens not resident in Zanzibar is allowed under section 83 of Zanzibar's *Children's Act, 2011*.
[395] See paras 104 and 233 of United Republic of Tanzania, *Consolidated 2nd, 3rd and 4th Reports on the Implementation of the African Charter on the Rights and Welfare of the Child by the Government of the United Republic of Tanzania*: *Submitted to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)* (October 2015), at pp. 30 and 64 respectively. For details on the current position, see part 6.4.2.2 of this thesis.
[396] Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, at p. 6.

interests of the concerned' were not always so in the future.[397] However, after the development of human rights law, the principle's recognition and binding nature required decisions to be based on recognised human rights and not independently perceived interests.

International human rights law recognised the concept of best interests and applied it exclusively to children. Former beneficiaries of the concept, such as persons living with disabilities, had their rights promoted and protected under general and specialised international human rights instruments. Although Article 3(1) of the UNCRC, 1989 popularised the concept, it does not signify its international debut. The concept had already claimed a place in international law since the 1959 Declaration of the Rights of the Child.[398] Even before then, it existed in one form or another in numerous national legal systems, particularly in family law governing divorce and custody proceedings.[399] Alston finds that an analogous concept has also long existed in different traditions, whether cultural, religious or otherwise.[400] The similarity, however, ends there as interpretations and applications of the concept are quite diverse. Despite its history and wide-ranging application, it is undeniable that the universality of the UNCRC, and especially the assigned status of a cardinal principle, put the concept in the limelight. Among other things, it opened up the concept to profound scholarly interest.

The UNCRC, the ACRWC, and other international instruments enshrining the principle of the child's best interests do not define it. The omission has led to its being criticised as indeterminate.[401] There is a consensus that the gap was deliberate to allow flexibility in individual cases and in line with socio-cultural perceptions.[402] However, the lack of a precise

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[397] *Ibid.*, at pp. 6-9 While providing a history of the concept, Cantwell explains the outcomes of decisions based on the best interests concept such as: removal of children from parents and their forced migration to other countries, and how this was perceived at a later time.

[398] See the Preamble, and principles 2 and 7 of the United Nations, "Declaration of the Rights of the Child" (1959). A detailed chronological advancement of the concept/principle of the best interests of the child in international law is given in chapter five of this thesis.

[399] Alston, Gilmour-Walsh, *The best interests of the child*, above footnote 82, at pp. 3-4; and Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", International Journal of Law, Policy and the Family 8(1) (1994): pp. 1–25.

[400] Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", above footnote 399, at p. 5.

[401] *Ibid.*, at p. 18; Alston, Gilmour-Walsh, *The best interests of the child*, above footnote 82, at p. 15; Freeman, Michael (ed.), *A Commentary on the United Nations Convention on the Rights of the Child, Article 3*: *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff, 2007), at pp. 2 and 27; Jean Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function", The International Journal of Children's Rights 18(4) (2010): pp. 483–99; UN Committee on the Rights of the Child, "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)" (CRC /C/GC/14) (29 May 2013), para 34 at p. 9.

[402] Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, at p. 17; Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function", above footnote 401, at p. 18.

definition renders the principle vague and susceptible to subjectivity.[403] Freeman, quoting Thèry, says that the indeterminate principle provides an alibi for dominant ideologies, personal arbitrariness, and family and general social policies.[404] It allows authorities with the mandate to determine the child's best interests to rely mostly on their discretion and understanding of what constitutes a particular child's best interests in a specified situation. Similar to the earlier application of the concept, outcomes of decisions made while applying the contemporary principle may still not be unquestionably in the child's best interests.

In the quest to conceptualise the concept of the child's best interests, the UN Committee on the Rights of the Child (UN CRC) has classified it as a substantive right, a principle of interpretation, and a rule of procedure.[405] Nevertheless, Zermatten finds that although the principle lays a foundation for a substantive right, it does not constitute a subjective or substantive right in itself, but only a principle of interpretation and a rule of procedure.[406] First, the UN CRC specifies that as a right, the concept requires that whenever authorities consider competing interests, those of the child should be assessed and taken as a primary consideration. Second, as an interpretative principle, it demands that whenever a legal provision is open to more than one interpretation, the one that most effectively serves the child's best interests be applied. Lastly, as a rule of procedure, it necessitates the decision-making process to be governed by procedural guarantees in assessing and determining a child's best interests. Although the three categories shed light on the understanding and application of the principle, they still do not provide its literal meaning.

A literal analysis of Article 3(1) of the UNCRC and 4(1) of the ACRWC based on the constituent elements of the principle may help to throw light on the concept's meaning. Some professionals and institutions dealing with children's matters have provided guidelines, minimum standards and explanations which assist in the literal interpretation of the

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Illustrations of the indeterminacy of the principle based on culture and availability of resources are given in Alston, Gilmour-Walsh, *The best interests of the child*, above footnote 82, at pp. 17-23 and 25-27.

[403] During the drafting process of Article 3(1) UNCRC, 1989, the Venezuelan representative drew attention to the concept's subjectivity and proposed an all-round definition of the best interests of the child which would include the child's physical, mental, spiritual, moral and social development; see Detrick, *The United Nations Convention on the Rights of the Child*, above footnote 403, para 120 at p. 137; Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function", above footnote 401, at p. 27, argues for objectivity while applying the principle because as it stands, there is a risk that any decision could be justified as being in the best interest of the child; and Cantwell, *The best interests of the child in intercountry adoption*, at p. 9 says the indefinite nature of the principle breeds misconception and manipulation.

[404] Freeman, Michael (ed.), *A Commentary on the United Nations Convention on the Rights of the Child, Article 3*, above footnote 401, at p. 2.

[405] UN Committee on the Rights of the Child (CRC), "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)", para 6, at p. 4.

[406] Zermatten refers to the principle as a foundation to a substantive right but not a right per se in Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function", above footnote 401, at pp. 7 and 16.

concept.[407] Scholars, including, but by no means limited to, Parker,[408] Alston,[409] Freeman,[410] Cantwell,[411] and Rwezaura,[412] have written extensively on the principle. Judges have also shed light on the concept through their arguments in judgements.[413] Moreover, institutions such as United Nations agencies and the African Child Policy Forum have contributed to disambiguation of the concept through guidelines, comments, and reports.[414] However, a consensus on the outcome of these efforts is far from being reached, leaving room for subjectivity, manipulation and abuse of the concept in practice.[415]

Further, there exist diverse conceptualisations of the concept from different angles of understanding. For instance, the concept may be understood in terms of a child's needs, raising the question of whether physical or psycho-social needs are more important, currently, in the short term, or in the long term.[416] It can also be interpreted depending on the roles it

[407] UN Committee on the Rights of the Child (CRC), "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)", para 17-40 at pp. 7-10; Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function", above footnote 401, at pp. 8-11; Freeman, Michael (ed.), *A Commentary on the United Nations Convention on the Rights of the Child, Article 3*, above footnote 401, at pp. 44-60; and Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", above footnote 399, at pp. 10-15.

[408] Stephen Parker, "The Best Interests of the Child-Principles and Problems", International Journal of Law, Policy and the Family 8(1) (1994): pp. 26–41.

[409] Alston, *The best interests of the child*, above footnote 82; Alston, Gilmour-Walsh, *The best interests of the child*, above footnote 82.

[410] Freeman, Michael (ed.), *A Commentary on the United Nations Convention on the Rights of the Child, Article 3*, above footnote 401.

[411] Cantwell, *The Best interests of the child in intercountry adoption*, above footnote 89; Cantwell, "Are 'Best Interests' a Pillar or a Problem for Implementing the Human Rights of Children?", above footnote 90.

[412] Rwezaura, "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa", above footnote 88.

[413] For example, in the case of *Zulu v S* (226/2016) [2017] ZASCA 207 (21 December 2016).

[414] UN Committee on the Rights of the Child (CRC), "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)"; UN High Commissioner for Refugees, "UNHCR Guidelines on Determining the Best Interests of the Child" (May 2008); African Child Policy Forum (ACPF), *In the Best Interests of the Child*: *Harmonising Laws in Eastern and Southern Africa* (Addis Ababa: The African child Policy Forum, 2007); and African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 91.

[415] See UN Committee on the Rights of the Child (CRC), "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)", para 34 at p. 9. As an example of manipulation of the best interests principle, some states and authorities have justified corporal punishment as being in the best interests of the child.

[416] Rwezaura argues that, due to economic deprivation in most of Africa, the concept of the best interests of the child is construed as providing for the material needs of the child; see Rwezaura, "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa", above footnote 88, at p. 110; Freeman provides a detailed discussion on which needs or interests may be perceived as more significant, physical, psychological, emotional, developmental, moral or religious. He uses the case law examples of Painter v. Bannister and the Zulu boy's case, given in Freeman, Michael (ed.), *A Commentary on the United Nations Convention on the Rights of the Child, Article 3, above footnote* 401, at pp. 27-31; regarding consideration of short or long term needs, this is well articulated in UN Committee on the Rights of the Child (CRC), "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)", para 84 at p. 18.

plays. Zermatten divides these into two categories: control criterion and solution criterion.[417] He also uses the principle's characteristics as another angle to clarify its meaning.[418] Alston explains the principle based on three roles it plays: a principle that supports, justifies, or clarifies a particular approach concerning issues arising from the UNCRC; a mediating principle in case of conflict between rights under the Convention; and a basis for evaluating the laws and practices of State Parties.[419] According to Alston and Gilmour, the umbrella metaphor can also be used to explain it: the principle creates an overarching framework within which all other substantive child rights should be interpreted, determined and applied.[420] Lastly, Rwezaura, referring to sub-Saharan Africa, finds that the concept can be interpreted using two different lenses: the wide, African, communal, pre-capitalist lens, or the narrower, Western, individualistic, post-capitalist lens.[421]

Children deprived of parental care who are possible candidates for adoption need their best interests to be assessed and determined. The UNCRC and the ACRWC set a high standard for the best interests principle in child adoption. In Articles 21 and 24, respectively, they require that the child's best interests be the paramount consideration in child adoption. Testing how authorities can achieve this requirement in practice is another subject of debate. However, para 7 of the UN Guidelines, 2010 provides a good insight into what should be done:

> "In applying the present Guidelines, determination of the best interests of the child shall be designed to identify courses of action for children deprived of parental care, or at risk of being so, that are best suited to satisfying their needs and rights, taking into account the full and personal development of their rights in their family, social and cultural environment and their status as subjects of rights, both at the time of the determination and in the longer term. The determination process should take account of, inter alia, the right of the child to be heard and to have his/her views taken into account in accordance with his/her age and maturity."[422]

In this study, the best interests principle is used as a yardstick against which Tanzania's child adoption law and practice is measured. The study considers the principle within Tanzania's pluralistic legal framework and assesses how the mandated authorities interpret, determine and apply it in child adoption practices. Aspects of the street-level bureaucracy theory are

[417] Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function", above footnote 401, at pp. 15-16.
[418] *Ibid.*, at pp. 16-18.
[419] Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", above footnote 399, at pp. 15-16.
[420] Alston, Gilmour-Walsh, *The best interests of the child*, above footnote 82, at p. 43-44.
[421] Rwezaura, "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa", above footnote 88, at pp. 100-101.
[422] UN General Assembly, "Guidelines for the Alternative Care of Children", para 7 at p. 3.

taken into account. The interpretation, determination, and application of the principle in Tanzania's child adoption practice is explored in detail in chapter five.

2.4 Child Welfare Institutional Framework in Tanzania

From a literal perspective, the term institutional framework may be defined by looking at the meaning of its constitutive words. The word institution has different meanings depending on its use. This part uses it as a noun referring to an establishment committed to promoting a specified cause of public good.[423] Laws, by function, are aimed towards achieving public good through regulating human conduct.[424] Therefore, institutions, through processes such as interpretation and implementation, give effect to the law. Section 3 of the Law of the Child Act, for instance, provides a relatively narrow and specialised definition of the term institution to include an approved residential home, retention home, approved schools, or institutions for socially deprived children and street children, and includes a person or institution that has care and control of children. The definition gives an inexhaustive list of institutions that implement the Act. Framework, on the other hand, refers to a conceptional structure or structural frame.[425] Therefore, an institutional framework is a set or system of organisational structures and attendant laws, regulations, and procedures for public service delivery.[426] Understanding its composition and operation necessitates studying the legal and policy framework in which it exists. In this sense, institutional and legal frameworks are inseparable. However, in this thesis, the institutional framework is treated separately from the legal framework, in order to lay a foundation for understanding the background to the study, in chapter three. However, this chapter must be read together with chapter four which discusses the legal framework.

Usually, a given law constitutes, mandates, or licenses institutions meant to enforce it. In Tanzania, the Law of the Child Act, 2009 and applicable Regulations made under it establish an institutional framework for the execution of child adoption procedures. This part looks at the institutions in the context of their establishment, constitution, governance, and mandate in the child adoption process. The institutions' specific functions in the child adoption process are not described and discussed in this part but in the following chapters of the thesis.

In order to cover institutions involved in the whole child adoption process, this part describes institutions that are legally mandated to operate in the field of child care and protection. It

[423] Garner, *Black's Law Dictionary*, above footnote 229, at p. 869.
[424] *Ibid.*, at p. 962.
[425] Merriam-Webster.com Dictionary, "framework", https://www.merriam-webster.com/dictionary/framework.
[426] Read online and written in Nina Tomaževič, Silvia Cantele, "Social Entrepreneurship and Social Enterprises in Slovenia", in C. Maher (ed.), *Handbook of research on value creation for small and micro social enterprises* (Hershey, PA: IGI Global, 2019); also defined at IGI Global Publisher of Timely Knowledge, "What is institutional framework", https://www.igi-global.com/dictionary/institutional-framework/14798.

does not limit itself only to those institutions prescribed in the statute book, but takes an inclusive approach that considers institutions found in practice. The primary consideration is the collaboration between governmental and non-governmental institutions in service provision. Thus, the sections below describe the institutions under three labels depending on their relationship with the state—governmental, intergovernmental, and non-governmental institutions.

2.4.1 Governmental Institutions

The Executive, Legislature and Judiciary are three pillars of the state which discharge state authority. Article 4 of the URT Constitution, 1977, prescribes the three pillars vested with the powers to exercise and control state authority in Tanzania. Based on the mandate discharged by each pillar, the state is the leading player in protecting and providing services to its citizens.[427] States are considered actors in the global arena. However, states usually employ agents, called state actors, to execute their mandates. Therefore, state actors are persons, natural or artificial, acting on behalf of the government, the legislative organ or the judiciary of a given state. State actors, in this part, means institutions and their human resources mandated to implement law and policy relating to child care and protection in Tanzania.

All three pillars of the state have a role to play in the subject of this study. The legislature makes the laws the government implements, and the judiciary interprets them and administers justice upon them. However, it is not possible here to fully describe the roles played by these state organs. Instead, the focus is on the state institutions empowered under the Law of the Child Act and Regulations made under it referring specifically to child adoption. Except for courts of law which belong to the judiciary, the other institutions are governmental. This part explains the role of courts of law under the label of governmental institutions considering that it is neither necessary nor feasible to explain here the constitution and functions of each pillar of the state. This part utilises the hierarchical format of ministries, departments (also divisions or units), and agencies (MDAs) to simplify the description of governmental institutions.

2.4.1.1 Courts of Law

Article 107A of the URT Constitution, 1977 vests the judiciary with the final authority to dispense justice. The judiciary in Mainland Tanzania is four-tiered, with the Court of Appeal

[427] Peter Wijninga, Willem T. Oosterveld, Jan H. Galdiga, Philipp Marten, Eline Chivot, Maarten Gehem, Emily Knowles, Matthijs Maas, Menno Schellekens, João Silveira, Michelle Y. Yang, Olga Zelinska, Sijbren de Jong, Pavel Kogut, Esther van Luit, *State and Non-State Actors*: *Beyond the Dichotomy*, edited by Joris van Esch, Frank Bekkers, Stephan De Spiegeleire, and Tim Sweijs, Strategic Monitor 2014: Four Strategic Challenges, (Hague Centre for Strategic Studies, 2014), at p. 142.

at the apex, followed by the High Court of Tanzania, then magistrates' courts divided into Resident Magistrates' Court and District Court, and at the bottom, primary courts.[428]

Jurisdiction to issue adoption orders in Tanzania lies only with the court.[429] Section 3 of the Law of the Child Act and regulation 2 of the Adoption of Children Regulations define the term court. However, for purposes of adoption, the definitions in the two instruments differ. The Regulations define court as "the High Court, the Resident Magistrate's Court or District Court in which a petition for adoption is lodged", while the Act mentions only the High Court. However, section 54 of the Law of the Child Act empowers the High Court, Resident Magistrate's Court and District Court to receive and adjudicate child adoption applications.[430] The High Court deals with closed adoption while the subordinate courts handle open adoption applications. The court's involvement in child adoption does not begin at the time of petitioning for an adoption order only; instead, it may start during child protection proceedings in the Juvenile Court in which a child is declared free for adoption.[431] The court's role in child adoption is discussed in the following chapters while explaining the child adoption procedure in Tanzania.

2.4.1.2 Ministry of Health, Community Development, Gender, Elderly and Children

The fifth phase government, in November 2015, established the Ministry of Health, Community Development, Gender, Elderly and Children (MoHCDGEC) through the instrument gazetted by GN No. 144 of 22nd April 2016.[432] It created the new Ministry by merging the former Ministry of Health and Social Welfare with that of Community Development, Gender, Elderly and Children.[433] Ministerial mandates and functions are established under the instrument creating the Ministry. The two websites maintained by the Ministry detail specific obligations peculiar to its departments and units.[434] This study deals with issues of family welfare and children rights, which do not directly fall on the health

[428] Article 117 of the Constitution establishes the Tanzania Court of Appeal while the High Court is established under Article 108 of the Constitution. The magistrate courts and primary court are established under Magistrate Courts Act, 1984. Jurisdiction of the courts is provided for by different laws such as the Constitution 1977, Judicature and Application of Laws Act 1920, Magistrate Courts Act 1984, Appellate Jurisdiction Act 1979, Law of the Child Act (Designation of Juvenile Courts) Notice 2016 and (Juvenile Courts Procedure) Rules 2016.
[429] Section 59 of the Law of the Child Act, 2009.
[430] Read together with Regulation 4(1) of the Adoption of Children Regulations, 2012.
[431] Regulation 49 and 50 of the Child Protection Regulations 2014 and Rule 99 of the Law of the Child Act (Juvenile Courts Procedure) Rules 2016.
[432] Ministry of Health, Community Development, Gender, Elderly and Children, "About MoHCDGEC", https://www.moh.go.tz/en/about-ministry/about-mohcdgec.
[433] Ministry of Health, Community Development, Gender, Elderly and Children, "Historical Background", http://jamii.go.tz/pages/historical-background.
[434] https://www.moh.go.tz/and http://jamii.go.tz/

division side of the Ministry but rather on the community development side. Thus, it pays particular attention to the mandate and functions of that side of the Ministry.

In its community development, gender, elderly and children division, the Ministry, in collaboration with stakeholders, promotes community development, gender equality and equity, children's rights and family welfare.[435] It does so by formulating, propagating, and coordinating the implementation of policies, strategies, and guidelines for the provision of services. The Ministry collaborates with extra-ministerial departments, parastatal organisations, agencies, programmes, and projects connected to the Ministry. It also works with and coordinates non-governmental organisations operating in the sector. Additionally, the Ministry is required to facilitate collaboration with international organisations such as UNICEF and the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women). Besides the other functions, the Ministry also oversees institutions such as Tengeru Institute of Community Development, Community Development Training Institutes, Elders Homes, Kurasini National Children's Home, Retention Homes, Irambo Approved School, Institute of Social Work (Dar es Salaam), and Kisangara Institute of Social Work. To discharge its mandate and achieve the national development agenda, the Ministry is guided by national, regional, and international laws, policies, plans, strategies, and goals. [436]

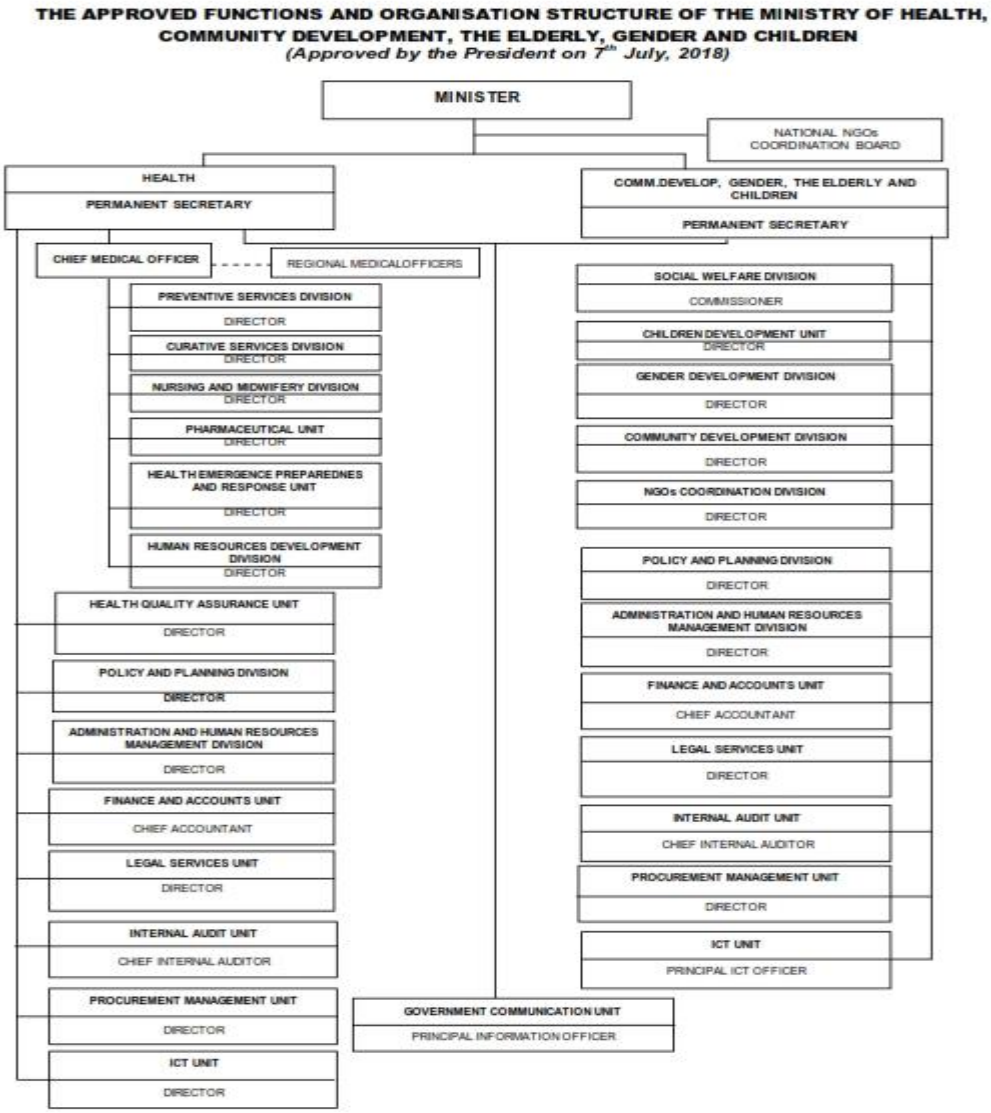
Below is the ministerial structure that may aid understanding of the constitution, chain of command and functioning of the Ministry. It shows a distinct demarcation between health on the one side, and community development, gender, elderly, and children on the other. In essence, the two former ministries have retained their organisational structures and mandates under the umbrella of a single ministry. Only the social welfare division (called a department in the Law of the Child Act and its Regulations) that formerly fell under the Ministry of Health has now moved to the side of community development. This study is concerned chiefly with the Department of Social Welfare (as it is named under the Law of the Child Act and Regulations), but this part also briefly describes the children development department and legal services unit. This is because their work significantly interacts with and complements that of the Department of Social Welfare. The naming of these departments and units has

[435] Ministry of Health, Community Development, Gender, Elderly and Children, "Historical Background", above footnote 433.

[436] These include: Law of the Child Act No.21 (2009); Non-Governmental Organization Act No.24 (2002); Community Development Policy (1996); Women and Gender Development Policy (2000); National Non-Governmental Organizations Policy (2002); National Aging Policy (2003); Child Development Policy (2008); National Plan of Action to End Violence Against Women and Children (NPA – VAWC 2017/18 - 2021/22); National Development Vision 2025, National Five Year Development Plan (2016/17 – 2020/21), Ruling Party Election Manifesto of 2015 and Sustainable Development Goals (2030); and other relevant international and regional instruments as provided at http://jamii.go.tz/pages/historical-background.

changed since 2018 when the organogram was made. However, they remain slightly confusing under the two websites of the Ministry representative of its two distinctive sections.

Figure 2-1: Organisational Structure of MoHCDGEC[437]



2.4.1.2.1 Department of Social Welfare

The Department of Social Welfare,[438] within the new Ministry of Health, Community Development, Gender, Elderly and Children (MoHCDGEC), bears the responsibility of

[437] Found at the Ministry's website, http://www.moh.go.tz/en/about-ministry/organization-structure.
[438] Section 2 of the Child Protection Regulations, 2014 defines it as a Department within the Ministry responsible for social welfare. Before the merger of the two ministries, the Department of Social Welfare was located in the Ministry of Health and Social Welfare where it was known as the Social Welfare Division.

ensuring that equitable, sustainable and quality social welfare and protection services are provided to all vulnerable members of the community.[439] The former assistant commissioner to the Department described it as consisting of four sections with responsibility for people with disabilities and elderly persons; family, child welfare services and early childhood development; juvenile justice and correctional services; and social welfare training and staff development.[440] These sections show the vulnerable groups the Department deals with. In addition, the objectives and functions of the Department listed under the Ministry's website serve to portray its clientele and the type of services they require.[441]

The Department's chain of command in the field of social welfare starts at the top with the Minister of Health, Community Development, Gender, Elderly and Children, followed by the Permanent Secretary responsible for Community Development, Gender, Elderly and Children, as can be observed from the organisational structure above. The Department's direct head is the Commissioner of Social Welfare, under whom there are social welfare officers of different ranks. As will be explained below, these social welfare officers include those who work at the central and local government levels. However, only those who work at the central government level are directly under the Commissioner. Section 2 of both the Foster Care Placement Regulations and the Adoption of Children Regulations define a social welfare officer by place of work, as an officer in the service of the government in charge of a city, town, municipal or district council. However, social welfare officers may also be defined in terms of other factors, such as the duties that they discharge (social, psycho-social or legal) or types of clients they attend (children, broken families, elderly and disabled persons, the chronically ill, substance abusers or persons in conflict with the law).[442]

The officers discharge the Department's mandate. Their work includes developing, revising, supervising, and monitoring the implementation of laws, regulations, guidelines, strategies, and plans relating to vulnerable persons in the country; also, to ensure quality service delivery in the form of building systems, coordinating, and providing care, support, and protection to most vulnerable children, children in need of care, children in conflict or contact with the law or at risk of offending, and children in need of day care services; and lastly, to ensure the

[439] Ministry of Health, Community Development, Gender, Elderly and Children, *Terms of Reference for Social Welfare/Social Protection Technical Working Group (SW/SP TWG) 2015 – 2020.*

[440] Simon B. Panga, *Sectoral Roles and Synergies in Implementing Social Protection Programmes and Building an Integrated Social Protection System in Tanzania.* However, there may have been a restructuring as the Ministry's website currently reflects only two departmental sections pertaining to elderly persons development and juvenile justice and correctional services, see https://www.jamii.go.tz/department.

[441] https://www.jamii.go.tz/department

[442] An observation made during field research at the Ministry Headquarter Offices in Dodoma in March 2018 and 2019, Dar es Salaam Offices in April 2018, and at Kinondoni municipal council in February 2019.

provision of care, support and protection to the elderly in families, communities and as a last resort, in institutions. The department's detailed list of functions involved in discharging its mandate is available on the Ministry's website.[443] This study focuses on the work of social welfare officers in child care and protection, which is discussed in the following chapters.

The Department's operations are guided and regulated by various laws, both principal and subsidiary.[444] In executing their responsibilities, social welfare officers hold a mandate to assist in formulating laws, policies, guidelines, strategies, and action plans to regulate social welfare service delivery, as well as monitoring and evaluating their implementation.[445] The resultant legal and administrative instruments determine the Department's role in various processes, including child adoption. The Law of the Child Act and Regulations under it prescribe the Department as the core institution to oversee the child adoption practice. Thus, the Commissioner and social welfare officers play an essential role in executing the adoption procedure from the application stage to obtaining the court's adoption order. In the following chapters, this study critically analyses the role of the department of social welfare as provided in the statute book and as experienced in practice.

2.4.1.2.2 Children Development Department

The children development department[446] oversees the raising of public awareness on children's rights and their implementation. It ensures that involved stakeholders from the family level onwards are aware of, and implement, children's rights of survival, development, protection, non-discrimination, and participation. The department comprises two sections: child rights and development, and parenting and family care education. The department has functions relating to developing, coordinating, monitoring, and reviewing the implementation

[443] https://www.jamii.go.tz/department

[444] Some of these are: Tanzania Penal Code, 1945; Evidence Act, 1967; Criminal Procedure Act, 1985; The Law of Marriage Act, 1971; The Refugees Act, 1998; Sexual Offences (Special Provisions) Act, 1998; Employment and Labour Relations Act, 2004; Anti-trafficking in Persons Act, 2008; The Law of the Child Act 2009; Persons with Disabilities Act, (2010), and Regulations made under the laws such as those under the Law of Child Act: Foster Care Placement Regulations, 2012; Adoption of Children Regulations, 2012; Law of the Child (Retention Homes) Rules, 2012; Law of the Child (Apprenticeship) Regulations, 2012; Law of the Child (Child Employment) Regulations, 2012 and Law of the Child (Juvenile Court Procedures) Rules 2016.

[445] Some of the current instruments that are developed by or in consultation with the department guiding its operations are: National Ageing Policy (2003); National Policy on Disability (2004); National Health Policy (2007); The National Child Development Policy (2008); The National Guidelines for Improving the Quality of Care, Support and Protection for Most Vulnerable Children (2009); National Costed Plan of Action for Most Vulnerable Children I (2007-2010) and II (2013 – 2017); National Plan of Action on Prevention and Response to Violence Against Children (2013-2016); Five year Strategy for Progressive Child Justice Reform (2013 – 2017); National Strategy for Growth and Reduction of Poverty (MKUKUTA) I (2005/6-2009/10) and II (2010/11-2014/15) linked to the Development Vision 2025 and Health Sector Strategic Plan (HSSP) III (2009-2015) and IV (2015 – 2020); and National Guidelines on Children's Reintegration with Families (2019).

[446] Although the organogram depicts it as a unit, it is a department in the MoHCDGEC as shown on its website at https://www.jamii.go.tz/department.

of national laws, policies, strategies, plans, guidelines, and programmes on children, parenting and family development. It also coordinates, monitors, prepares, and submits implementation reports of international and regional instruments such as the UNCRC and ACRWC. Besides that, the department has the general duty to develop and disseminate educational materials and programmes on child rights, care, and protection to children, parents, caregivers, and the community. In addition, it coordinates efforts dedicated to increasing children's participation (formation of junior councils), research, collection, and dissemination of information (including using a child helpline) to guard against child rights violations and promote sustainable development of children and the family. In discharging its duties, the department networks with development partners within the country and abroad to coordinate the support provided in line with prevailing child laws and policies. The department's sections expand on these functions and deal with each at a deeper level.[447]

The findings of this study will shed light on the efficiency of this department in practice. This is because the effective functioning of this department presupposes a community that is aware of, respects and promotes child rights and laws.

2.4.1.2.3 Legal Services Unit

Social welfare officers and most of the other Ministry officials are not lawyers. Their work, however, revolves around formulating and implementing laws and other instruments of a legal nature. They, therefore, require legal assistance when and where it is needed. It is here that the legal services unit[448] comes in. This unit, headed by the director of legal services, is mandated to provide legal expertise and services to the Ministry's community development, gender, elderly, and children branch.[449] Its functions include the provision of legal advice and interpretation of laws and other legal documents. It also provides technical support in legislative action, including preparation, translation, and revision of legal instruments in liaison with the Attorney General's Office. In addition, the unit participates in negotiations that call for legal expertise in the Ministry and liaise with the Attorney General's Office in handling litigation of civil cases and other claims in which the Ministry is implicated.

The functions of this unit include ensuring that laws and policies are correctly understood and applied by the Ministry's personnel. The study examines how the work of social welfare

[447] For further details of the functions of the department and its sections, visit https://www.jamii.go.tz/department.

[448] The legal services unit is categorised as a department on the MoHCDGEC's website at https://www.jamii.go.tz/department, but is referred to as a unit, which aligns with the naming under the organogram.

[449] https://www.jamii.go.tz/department.

officers reflect the execution of this role in practice, particulary in relation to child adoption law and procedure.

2.4.1.3 President's Office – Regional Administration and Local Government

The United Republic of Tanzania is divided into geographical areas based on criteria such as size, population, and level of development in the area. The largest divisions are called regions which are further subdivided into districts, divisions, wards, streets, villages, and hamlets. These areas are also administratively divided into jurisdictions that fall under central and local government authority. Here, two systems of administration run concurrently; that of the central government and local government authorities. The principal laws governing such divisions and subdivisions are the Regional Administration Act, 1997, Local Government (Urban Authorities) Act, 1982, and Local Government (District Authorities) Act, 1982. These Laws derive their legitimacy from Articles 61, 145, and 146 of the URT Constitution, 1977. The Ministry responsible for regional administration and local government is the chief organ that coordinates the functioning of these administrative divisions.

The Ministry responsible for regional administration and local government has existed in Tanzania in one form or another since independence. Over the years, the Ministry has undergone considerable changes, including being established, abolished, re-established, re-named, and re-positioned within Tanzania's governance structure.[450] Currently, the ministry is in the president's office after its transfer from the prime minister's office in December 2015. Its primary mandate concerns empowering regional administrative and local government authorities to improve the provision of services and the quality of life in the communities. Also, under section 4 of both the Local Government (Urban Authorities) Act, 1982, and the Local Government (District Authorities) Act, 1982, the Ministry is mandated to ensure effective and efficient local government. This study examines the Ministry in so far as the provision of social welfare services is concerned. From the regional administration and local government organisational structures shown on the Ministry's website, it is clear that social welfare is placed either as a section at the regional level or a department at the local government authorities level. Since the Law of the Child Act, 2009 and Child Protection Regulations, 2014 stipulate social welfare provision in connection with children at the local government level (social welfare department), this study investigates its practice at that level. Thus, the study pursues an understanding of the position and work of social welfare officers at

[450] President's Office - Regional Administration and Local Governments, "History of Local Government System in Tanzania", https://www.tamisemi.go.tz/en/historia-ya-taasisi.

the local government level and the Ministry's effectiveness in coordinating the functioning of institutional structures under its mandate.

Below are samples of organisational structures for regional administration and local government meant to aid understanding of administrative divisions and their chain of command. The social welfare department can be traced from the regional level down to local government authorities (the sample organisational structure is for municipal councils). Every regional and local government authority of the same level in the country has similar structures with slight variations. At the regional level, in Dar es Salaam and Arusha, where the field research for this study was conducted, the health and social welfare sections, which fall under the Regional Commissioner's political mandate and the Regional Administrative Secretary's administrative mandate, handle social welfare matters. The regional Chief Medical Officer, who is also the Assistant Administrative Secretary, usually heads these sections. In Arusha, for instance, the direct connection between health and social welfare is apparent as the regional social welfare offices are located in the compound of Mount Meru Regional Hospital. At the regional level, the health and social welfare sections coordinate and oversee rather than implement social welfare laws and policies. Instead, departments of community development, gender, and children found in local government authorities (street-level bureaucracies in the sense described above) are charged with implementation as they directly contact people in their work. Here is where the social welfare departments come in.

Therefore, the study looks at four municipal councils, three in Dar es Salaam (Kinondoni, Ilala, and Temeke) and one in Arusha, and their practice in respect of safeguarding and promoting child welfare.

Figure 2-2: Organisational Structure for Regional Administration[451]

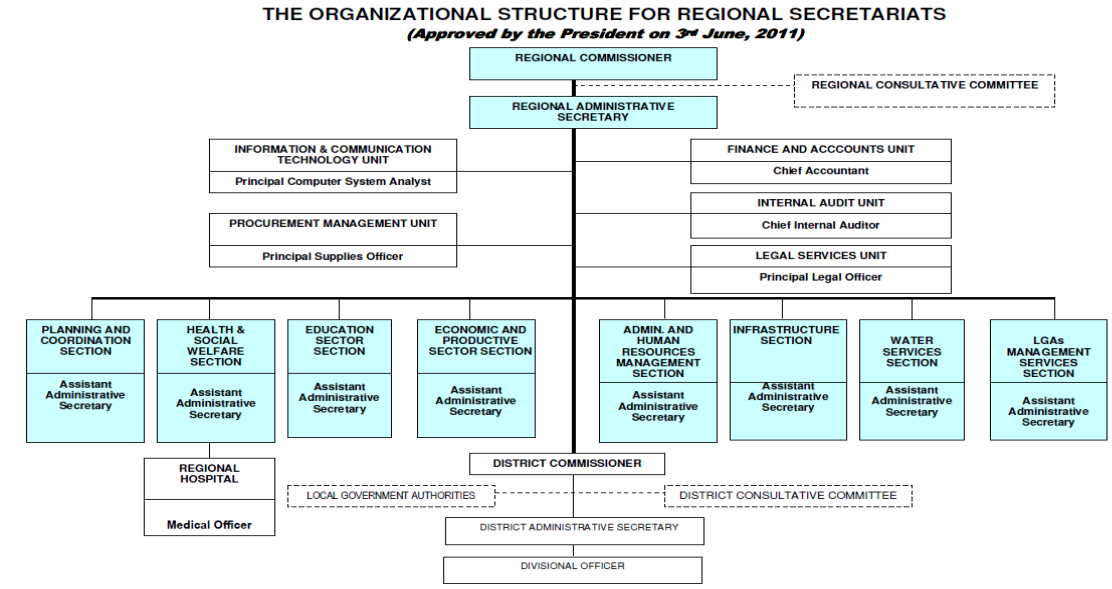
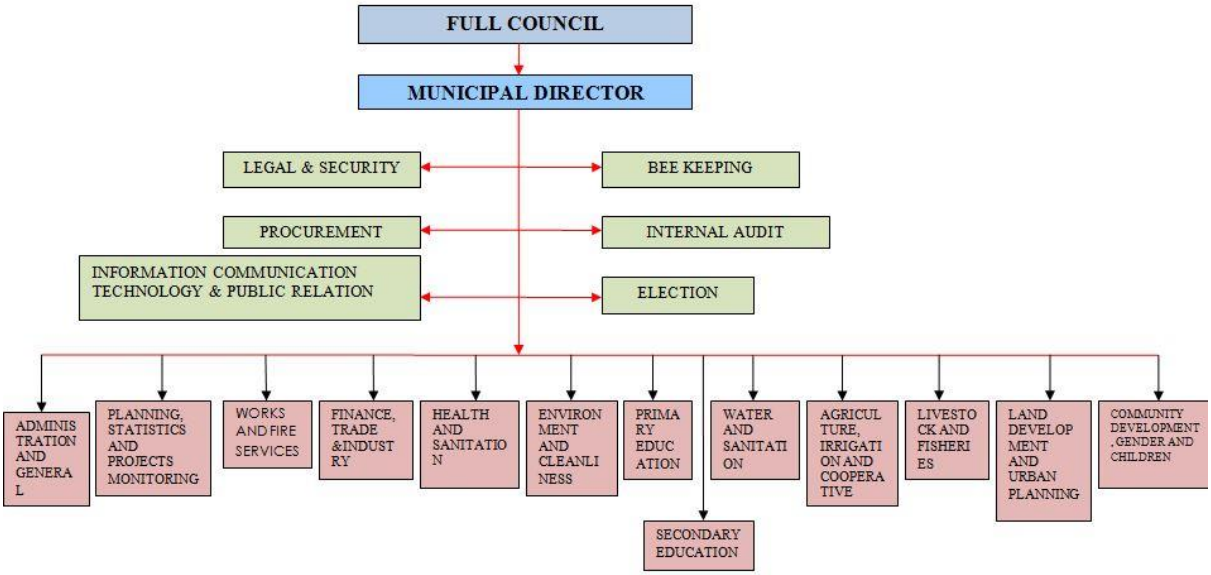


Figure 2-3: Organisational Structure for Municipal Councils[452]



2.4.1.3.1 Local Government Authorities

A local government is a legally established government operating within a defined local area in a given country. It governs through a representative organ, usually a local council

[451] Found on the Ministry's website where a link is provided, among others, to Dar es Salaam Region's website at http://www.dsm.go.tz/organization-structure.

[452] Found on the Ministry's website which provides a link, among others, to Kinondoni Municipal council's website at http://www.kinondonimc.go.tz/organization-structure.

mandated to exercise specific powers only in that jurisdiction.[453] In Tanzania, local government authority is defined as a district or urban authority in the interpretation sections (section 3) of the Regional Administration Act, 1997, Local Government (Urban Authorities) Act, 1982, and Local Government (District Authorities) Act, 1982. The laws also define a district authority as including a district council, township authority or village council, and an urban authority as including a city, municipal or town council. District authorities operate in rural areas, while urban authorities are for urban areas.

Local government in Tanzania has a history dating back to the colonial period. Under German direct rule, there was a slight degree of local administration through communal unions (*Kommunalverbände*) established by the Imperial decree of 29th March 1901, and later town councils (*Stadtgemeinden*) established by the Imperial Chancellor's order of 1910.[454] British indirect rule encouraged local administration and allowed native authorities (such as chiefdoms) from 1926 through the Native Authority Ordinance (Cap. 72) of 1926.[455] It also enacted laws for governing towns, districts and municipalities, such as the Township Ordinance of 1920, Municipalities Ordinance (Cap. 105) of 1946 and Local Government Ordinance (Cap. 333) of 1953.[456] The latter introduced a comprehensive system of local government but with ethnic discrimination. After independence, a more comprehensive and democratic system of local governance was introduced, but due to some challenges, the system collapsed in the early 1970s. Then there was a resolution to attempt decentralisation by deconcentration.[457] It lasted for only a short while, and the local government authorities were reinstated effectively from 1984, regulated by the 1982 local government legislation.[458] Afterwards, local governance still experienced fundamental problems that challenged performance; hence reforms were proposed in 1996.[459]

Since the establishment of local government authorities was based on the need to decentralise power, Tanzania has worked towards strengthening decentralisation initiatives through local government reform as conceptualised in the 1998 Policy Paper on Local Government

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[453] Moses M. D. Warioba, *Management of local government in Tanzania*: *Some historical insights and trends* (Mzumbe: Institute of Development Management, 1999), at p. 1; cited in Mzee M. Mzee, *Local Government in Tanzania: Does the Local Government Law in Tanzania Give Autonomy to Local Government* (Masters Dissertation in Law, University of the Western Cape, South Africa, November 2008), at p. 6.

[454] President's Office - Regional Administration and Local Governments, *History of Local Government in Tanzania* (Dodoma, Tanzania), at p. 5.

[455] *Ibid.*, at p. 6.

[456] *Ibid.*, at pp. 7-9.

[457] See the Decentralisation of Government Administration (Interim Provisions) Act, 1972.

[458] President's Office - Regional Administration and Local Governments, *History of Local Government in Tanzania*, above footnote 454, at pp. 9-13.

[459] United Republic of Tanzania, Prime Minister's Office, *Local Government Reform Agenda 1996-2000* (October 1996).

Reform.[460] In effect, the government initiated and implemented the Local Government Reform Programme (LGRP) in two phases; LGRP I (1998-2008) and LGRP II (2009-2014).[461] The reforms worked on decentralisation by devolution ('D by D'). Decentralisation means that political, administrative, and fiscal authority is not concentrated in the central government only but is transferred to other lower-level government institutions.[462] Decentralisation can be by deconcentration, delegation or devolution. In the case of deconcentration, governmental authority is maintained in the central government and transferred down to its different levels such as regional, district, and ward; in delegation, semi-autonomous agencies are authorised to perform specific functions on behalf of the central government; and in devolution authority is transferred down to local units of governance beyond direct control of the central government.[463] In decentralisation by devolution, the local government becomes autonomous in exercising its authority within legal limits, while the central government retains overriding constitutional authority over it. Thus, to ensure smooth governance, the Ministry responsible for Regional Administration and Local Government is empowered to coordinate central-local government relations and all initiatives by other ministries relating to the PO – RALG.[464]

The rationale for establishing local government authorities in Tanzania, according to Article 146(1) of the Constitution, is to transfer authority to the people. The Article gives force to the fundamental objectives and directive principles of state policy stipulated under Article 8(1) of the Constitution. The Article requires Tanzania's government to be of the people, by the people and for the people. Therefore, the reform programmes which worked towards effective decentralisation in the government were meant to implement this constitutional requirement. Article 146 also provides a local government mandate which does not end at its participation, and that of the people under it, in planning and implementation of development programmes in its immediate area and the country at large, but extends to, among other things, ensuring

[460] Ministry of Regional Administration and Local Government, *Local Government Reform Programme*: *Policy Paper on Local Government Reform* (Dar es Salaam, October 1998).
[461] United Republic of Tanzania, President's Office - Regional Administration and Local Governments, *Local Government Reform Programme I (1998-2008)* (1998); and United Republic of Tanzania, Prime Minister's Office - Regional Administration and Local Governments, *Local Government Reform Programme II (Decentralisation by Devolution)*: *Vision, Goals and Strategy (July 2009-June 2014)* (14 December 2009).
[462] Ministry of Regional Administration and Local Government, *Local Government Reform Programme*, above footnote 460, at pp. v-vi.
[463] Mnyasenga Thobias R.; Mushi Eleuter G., "Administrative Legal Framework of Central-Local Government Relationship in Mainland Tanzania: Is it Tailored to Enhance Administrative Devolution and Local Autonomy?", International Review of Management and Business Research 4(3) (September 2015): pp. 931–44.
[464] Ministry of Regional Administration and Local Government, *Local Government Reform Programme*, above footnote 460, at p. vi.

law enforcement and public safety of the people.[465] In tracking the discharge of the local government mandate, this study considers how local government authorities enforce the Law of the Child Act and Regulations under it, focusing on the organisation and implementation of alternative care for children in need.

Part VIII of the Law of the Child Act establishes the duty of every local government authority to safeguard and promote children's welfare in its jurisdiction. Sections 94-96 of the Act provide that this duty is discharged principally through social welfare officers working at the local government level. The officers can be assisted by personnel from pre-determined local government authorities while collaborating with the police, parents, and other caretakers such as guardians and relatives. Regulation 6 of the Child Protection Regulations, 2014 mandates local government authorities to establish a district social welfare department that shall safeguard and promote the welfare of children in need of care and protection. It also authorises them to appoint the head of the district social welfare department and allocate at least four social welfare officers to each department at the district level and at least one social welfare assistant at the ward level.[466] These officers have to ensure effective service delivery to children in need of care and protection, a reason, among others, for placing them closer to the community at the ward level. Regulation 6(2) stipulates that local government authorities shall refer their mandate and related functions to the social welfare department as far as child welfare is concerned.[467] This means that whenever officers of the social welfare department execute their duties in matters of child care and protection, they are acting on behalf of the local government authority for which they work.

2.4.1.3.2 Social Welfare Departments

The Child Protection Regulations, 2014 make a distinction between the central Department of Social Welfare described above (and written with capital letters) and the local social welfare departments referred to in this part. According to the Regulations, a social welfare department is a department, unit, section, or other administrative body in the local government authority that is responsible for child protection services and acts on behalf of the local government authority to safeguard and promote the welfare of children.[468] Regulation 6 of the Child Protection Regulations, 2014 governs the establishment of social welfare departments. Unlike

[465] See also Article 146(2)(a) - (c) of the Constitution of the United Republic of Tanzania, 1977.
[466] Section 2 of the Child Protection Regulations, 2014, above footnote 277 defines social welfare officer to include a social welfare assistant.
[467] The mandate of the local government authorities in child care and protection is provided for extensively throughout the Child Protection Regulations, 2014. For children in care, the mandate is specifically covered under part XI of the Regulations.
[468] Section 2 of the Child Protection Regulations, 2014.

the Department of Social Welfare, which is only one, social welfare departments are established in every local government authority at the district level. The local government authority can be a district council or a municipal council, as the case may be.

A head social welfare officer manages a social welfare department. The head leads at least four social welfare officers at the district office and a network of at least one social welfare assistant in each ward in the district. Regulation 7(1) sets out the mandate of the head of the social welfare department in each district, which is to take all necessary measures to protect children within their jurisdiction from all forms of harm. Regulation 7 (2) lists the measures to be taken in the discharge of their duties, which in essence, describes the functions of the social welfare department.

The head of the social welfare department, according to regulation 7(2) (l), is answerable to the District Executive Director (DED). Section 3 of the Local Government (District Authorities) Act, 1982 defines a DED as a director in charge of a district council appointed according to section 22 of the Local Government Service Act, 1982. Regulation 7(2) (n) refers to a Council Director as the head of the social welfare department's reporting authority. Since a municipal council is established at the district level as well, the head of a social welfare department becomes answerable to the municipal director as defined under section 3 of the Local Government (Urban Authorities) Act, 1982.

Field research in four municipal councils in Dar es Salaam and Arusha showed that heads of social welfare departments and their officers report to the municipal directors. However, since social welfare officers discharge responsibilities coordinated and overseen by the section responsible for social welfare at the regional level and further up at the ministry level, the chain of command moves up and down in that order. Unfortunately, the main ministry responsible for social welfare, MoHCDGC, does not directly feature in this chain. Thus, although officers in the social welfare department execute functions coordinated by the Department of Social Welfare, there lacks a direct accountability chain between the two. Therefore, the Commissioner of Social Welfare's authority over the officers who discharge his or her department's mandate must be reconciled with the direct authority of DEDs and others. However, the officers are still accountable to the Commissioner as they fulfil their responsibilities in collaboration with the MoHCDGC.[469] The resultant organisational structure

[469] For instance, they receive all child adoption applications but must communicate them to the Commissioner to obtain approval to proceed.

and interactions are confusing not only to a researcher but also to the social welfare officers themselves.[470]

The MoHCDGEC employs social welfare officers working at the local government level through the PO-RALG. Therefore, they have to discharge the mandates of the two Ministries as relating to their jobs. While doing so, they must adhere to and implement the laws, policies and guidelines that govern both Ministries. Because they fall under the framework of the two Ministries, they also have a complicated chain of command to reckon with. However, the Commissioner of Social Welfare remains their primary leader as he or she holds all the legal mandates relating to social welfare in the country. Even when the PO-RALG has a social welfare matter requiring attention, it must refer it first to the Commissioner, who then presents it to the social welfare officers at the local government level. The officers' accountability for the referred matter is directly to the district executives with overall oversight from the Commissioner. The cycle goes on.

Officers, both at the Department of Social Welfare and social welfare departments, implement child adoption processes as stipulated under the Law of the Child Act and Regulations under it. Since the Act and Regulations do not always show the distinction, it is better understood in practice. In the following chapters, this study explains the roles of social welfare officers acting at different levels as established by law and as experienced in the field.

2.4.1.4 Ministry of Constitutional and Legal Affairs – Registration, Insolvency and Trusteeship Agency (RITA)

The history of the Ministry of Constitutional and Legal Affairs dates back to 1961, when the then Prime Minister and later president of Tanzania, the late J. K. Nyerere, established it.[471] The Ministry has subsisted over the years whilst weathering changes in title, leadership, and organisational structure. While compliance with the Ministry's vision and mission may have also been affected by the changes, it has managed to establish efficient and effective constitutional and legal systems that foster the implementation of national development policies and plans. To achieve this, the Ministry works towards providing quality and accessible legal services for the development and prevalence of social justice, equality, and the rule of law in Tanzania. The presidential instrument published under GN No. 144 of 2016 establishing the Ministry in its current form provides for its current mandate. The Ministry is charged with overseeing constitutional affairs, formulation and implementation of policies on

[470] Interview with social welfare officer, Ilala Municipal Council, Dar es Salaam, on 07.02.2019. The officer explained that the constant changes become confusing and may be detrimental to their efficiency.

[471] United Republic of Tanzania, Ministry of Constitutional and Legal Affairs, "Ministry History", https://www.sheria.go.tz/pages/ministry-history.

legal affairs, legislative drafting, law reforms, administration and delivery of justice, and other related legal matters. The Ministry also supervises the performance and development of extra-ministerial departments, parastatals, organisations, agencies, programmes, projects, and human resources under it.

The Minister responsible for Constitutional and Legal Affairs is the political head of the Ministry, assisted by the Deputy Minister, while administrative leadership is by the Permanent Secretary to the Ministry. Under their leadership, ministerial and extra-ministerial departments and other organisations administer the Ministry's mandate. This study focuses on the role played in child adoption by an agency that operates under the framework of the Ministry, the Registration, Insolvency and Trusteeship Agency (RITA).

Authority to register births, deaths, marriages, divorces, and adoptions is vested in the Registration, Insolvency and Trusteeship Agency (RITA).[472] RITA is an executive agency in the Attorney General's Office that falls under the framework of the Ministry of Constitutional and Legal Affairs. The Agency was established in 2006 to replace the Administrator General's Department, which was also under the AG's Office. RITA manages information concerning key life events, incorporates trustees, and safeguards properties of trusts, insolvents, deceased persons, and minors to enable the law to operate efficiently and effectively. A Chief Executive Officer, who is also the Administrator General accountable to the permanent secretary of the Ministry of Constitutional and Legal Affairs, heads the Agency.[473] The Agency is divided into departments, units, and sections with their own heads who report to the chief executive officer. The registration section, headed by a manager, is the part of the Agency that this study focuses on.

The Agency's duty to register key life events has a history that dates back to the colonial period. In 1917, the Germans enacted a law (Proclamation 15 of 1917) to create a register for births and deaths, which was retained by the British and adopted under the Births and Deaths Registration Ordinance, 1920 Cap 108.[474] These two laws did not make it mandatory for people of African descent to register births and deaths. After independence, Tanzania Mainland adopted the Births and Deaths Registration Ordinance and changed it into an Act of Parliament. The Act establishes the position of the Registrar-General, who oversees registration and keeping of register books for all births and deaths in the country.[475] The

[472] Registration, Insolvency and Trusteeship Agency, "Aim and Historical Background", https://www.rita.go.tz/.
[473] Registration, Insolvency and Trusteeship Agency, "Organisation Structure", https://www.rita.go.tz/.
[474] Registration, Insolvency and Trusteeship Agency (RITA), "Aim and Historical Background", above footnote 472.
[475] Section 3 of the Births and Deaths Registration Act, 1920 [Cap 29 [R.E. 2002].

Adoption of Children Act, 1953, required the Registrar-General also to document the change in familial status of adopted children.[476] In 2009, however, the law changed. It is section 69 of the Law of the Child Act, 2009 that now obligates the Registrar-General to keep a register of adopted children. In discharging this duty, the Registrar-General effects changes in the Register of Births or Adopted Children by marking the entry of the adopted child with the word 'adopted' or 're-adopted'.[477] In the end, the Registrar-General issues adoption certificates to replace birth certificates of the adopted children.[478] The registration practice at the RITA offices is discussed further in the chapters explaining the legal framework and findings on child adoption practice.

2.4.1.5 Ministry of Home Affairs

The Ministry of Home Affairs is responsible for maintaining peace, safety, and order in Tanzania in accordance with enacted laws and policies.[479] This is why the Ministry hosts public service forces under its framework, such as the police, prisons, immigration, and firefighting and rescuing forces. These forces form departments under the Ministry together with others that deal with probation and community service, refugees, and national identities.[480] The Ministry also has some other departments and units dedicated to its smooth running, such as those dealing with legal services, human resources, and accounts. These departments and units inform the functions that the Ministry oversees. The Minister responsible for home affairs heads the Ministry, followed by the Permanent Secretary to the Ministry and respective Commissioner Generals and Directors of the forces and departments under the Ministry.

This study looks at the Ministry of Home Affairs' framework as far as the police and immigration departments are concerned. This is because these are the departments that have a role to play in the child adoption process. The study considers them only to the extent of their functions described under the Law of the Child Act, 2009, Regulations made under it, and child care and protection practice in the field.

[476] Section 16(1) of the Adoption of Children Act, 1953.
[477] Sections 69(3) and 70(4)-(6) of Law of the Child Act, 2009.
[478] Information obtained during field research at the RITA offices in Dar es Salaam, February-March 2019. Also available at Registration, Insolvency and Trusteeship Agency (RITA), 'Registration of Adoptions' at http://www.rita.go.tz/ (April 2021).
[479] United Republic of Tanzania, Ministry of Home Affairs, "Who are We", https://www.moha.go.tz/.
[480] *Ibid.*

2.4.1.5.1 Police Department

The establishment of Tanzania's (then Tanganyika's) police force dates back to the British colonial government pronouncement through GN. Vol. 1 No. 21-2583 of 1919.[481] Later, the force was established by law in 1939, under the Police Force and Auxiliary Services Ordinance, 1939.[482] This law is the applicable law to date subject to amendments made from time to time and its change into an Act of Parliament upon Tanganyika's independence in 1961. Since independence, the Police Force has undergone extensive transformation, beginning with customising it to serve the interests of Tanzanians and not the colonial power. Today, the force is dedicated to preserving peace, maintaining law and order, and protecting Tanzanians and their properties by providing quality services that enable prompt detection, prevention, and control of crime in the United Republic of Tanzania.[483] In discharging its mandate, the force is under the command, superintendence, and direction of the Inspector-General of Police (IGP). In the order of command, the IGP is followed by commissioners of police (CP), other gazetted officers, and police officers of different ranks as provided under section 4 of the Police Force and Auxiliary Services Act.

In the Force, there is a special section dealing with gender and child protection which falls under the command of the Commissioner of Police for community engagement.[484] The section is pertinent since the Law of the Child Act and Regulations mandate the Police Force to participate in child care and protection processes. Whenever there are suspicions or a report of child abuse, breach or violation of child rights, or a child in need of care and protection, the police have the duty to collaborate with social welfare officers to investigate and perform other services as authorised by the law.[485] Police officers are also involved in juvenile justice matters in which they may not primarily be exercising their duty to ensure child care and protection but rather discharging their duty to maintain law and order.[486] The role of the Police Force in child care and protection, and specifically in child adoption, is critically discussed in the following chapters of this study.

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[481] United Republic of Tanzania, Tanzania's Police Force Website, "About Tanzania Police Force", https://www.polisi.go.tz/.

[482] Ordinance No. 1 of 1939 and later Police Force and Auxiliary Services Act, 1939 [Cap 322 [Revised Laws of Tanzania].

[483] *Ibid.*, section 5 sets out the duties of the Police Force.

[484] United Republic of Tanzania, Tanzania's Police Force Website, "About Tanzania Police Force: Organisation Structure", https://www.polisi.go.tz/.

[485] See sections 22, 23, 29, 86(3), 94(6) and (7), and 96(1) and (2) of the Law of the Child Act, 2009.

[486] See *ibid.*, sections 101 and 102.

2.4.1.5.2 Tanzania Immigration Services Department

The Ministry of Home Affairs has a department to deal with immigration services in Tanzania.[487] The Immigration Services Department deals, among others, with facilitation and control of people's movements in Tanzania according to enacted laws and regulations in order to safeguard security and promote the economic interests of the country.[488] While executing its functions, the department is guided by the Immigration Act, 1995, Citizenship Act, 1995, Tanzania Passports and Travel Documents Act, 2002, and Regulations made under these laws. According to section 5 of the Immigration Act, the Department's chief executive officer, designated to oversee the discharge of the Department's mandate, is the Commissioner General of Immigration. The Commissioner General, assisted by other commissioners, commands officers of different ranks listed under section 6 of the Immigration Act.[489]

This study considers the role of the Immigration Services Department only in so far as the provision of relevant identification and travel documents for an adopted child is concerned. Section 73 of the Law of the Child Act, subject to given conditions, permits an adopted child to travel out of Tanzania temporarily or permanently with his or her adoptive family. However, the Act and Regulations made under it do not provide the applicable procedure until the adopted child is legally eligible to travel with the new family. The study, therefore, considers what happens in practice and discusses the findings.

2.4.2 Intergovernmental Institutions

Intergovernmental organisations (IGOs) are treaty-established entities comprising two or more sovereign states that have resolved in good faith to work together on issues of common interest.[490] A group of two or more IGOs also makes an IGO.[491] During the current era of increased globalisation and interdependence of nations, the rationale for creating IGOs is to build a platform for successful international collaboration to deal with economic and social issues, as well as to preserve peace and security.[492] Since IGOs involve the commitment of various state governments, they are state-based actors. Examples of socio-political and economic IGOs that operate in Tanzania in the area of child care and protection include the

[487] Section 4 of the Immigration Act, 1995, Act No. 7 of 1995, [Cap. 54 R.E 2016] establishes the Department by converting the former Office of the Director of the Immigration Services into the Tanzania Immigration Services Department.

[488] United Republic of Tanzania, Ministry of Home Affairs, Immigration Department, "Mission", https://www.immigration.go.tz/.

[489] See sections 6, 9 and 10 of the Immigration Act, 1995.

[490] Bernard Koteen, "Intergovernmental Organizations (IGOs)", https://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-service-practice-settings/public-international-law/intergovernmental-organizations-igos/.

[491] Union of International Associations, "What is an Intergovernmental Organisation (IGO)?", https://uia.org/faq/yb3.

[492] Koteen, "Intergovernmental Organizations (IGOs)", above footnote 490.

UN and the UN system, which include agencies such as UNICEF, UNHCR, UNESCO, WHO, World Bank and IMF, and other organisations such as International Committee of the Red Cross (ICRC), and African Development Bank. There also exist in Tanzania other state-based organisations that provide support in the area but are not intergovernmental. These form part of Tanzania's development partners group, including GIZ, CIDA, SIDA, and USAID.[493] Tanzania works together with these organisations since it has signed treaties or other bilateral or multilateral agreements for cooperation. The organisations, therefore, obtain legitimacy and guidance for their operation from these enforceable agreements. This study focuses on the operation of UNICEF Tanzania and its role in child care and protection practice. Tanzania was admitted as a UN Member State and became a party to the United Nations Charter in 1961 as Tanganyika, and in 1964 as the United Republic of Tanzania.[494] By being a member of the UN, Tanzania also became a member of UNICEF. This Agency's mandate is to safeguard children's rights as stipulated under the UNCRC, and as referred to in the sustainable development goals 2015. UNICEF is involved in numerous programmes in Tanzania. Of relevance to this study is their work in child protection and social policy. For instance, UNICEF works towards building a comprehensive and effective child protection system in Tanzania through raising the government's awareness and commitment to child protection and providing financial and technical support to realise this goal.[495] The agency co-operates closely with the Department of Social Welfare at the ministerial level and substantially impacts the social welfare departments in each district. Mainly it assists in law and policy formulation and the training of social welfare staff and other child protection stakeholders. UNICEF's website documents its achievements in Tanzania so far.[496] In this study, a brief discussion of its role in child adoption practice is given in the following chapters.

2.4.3 Non-Governmental Institutions

The Law of the Child Act under section 3 defines Non-Governmental Organisations by reference to the Non-Governmental Organizations Act, 2002. The definition reads, ""Non-Governmental Organization" also known in its acronym "NGO" means,

> "a voluntary grouping of individuals or organization which is autonomous, non-partisan, non profit making which is organized locally at the grassroot,

[493] For more information on development partners, visit Development Partners Group Tanzania, "DPG Members", http://www.tzdpg.or.tz/dpg-website/dpg-tanzania/dpg-members.html.
[494] United Nations Website, "Member States on the Record", https://www.un.org/en/library/unms?.
[495] UNICEF, United Republic of Tanzania, "What we do: Child protection", https://www.unicef.org/tanzania/what-we-do/child-protection.
[496] https://www.unicef.org/tanzania/.

> national or international levels for the purpose of enhancing or promoting economic, environmental, social or cultural development or protecting environment, lobbying or advocating on issues of public interest of a group of individuals or organization, and includes a Non-Governmental Organization, established under the auspices of any religious organization or faith propagating organization, trade union, sports club, political party, or community based organization; but does not include a trade union, a social club or a sports club, a political party, a religious organization or a community based organization."[497]

The Act, under section 2, also defines two types of NGOs, national and international. National NGOs are those established according to the Non-Governmental Organizations Act, 2002 with a scope of operation in more than two regions in the country, while an international NGO is that which is established outside Tanzania Mainland. The scope of operation determines an NGO's registration. According to section 23 of the Act, they may be registered at the district, regional or national level. Every NGO must be registered under the Act and obtain a certificate of registration. If not established under the Act, it must be registered under the law establishing it and a compliance certificate must be obtained according to the Non-Governmental Organizations Act, 2002.[498] If unregistered, an NGO's operation in Tanzania is illegal.

The MoHCDGEC is responsible for the regulation of NGOs. Section 3 of the Non-Governmental Organizations Act, 2002 stipulates that the Director of NGOs, who is also their Registrar, is in charge of their coordination, registration, and connection with the government. The Director heads the NGOs Coordination Division in the Ministry. NGOs are the leading stakeholders in child care and protection in Tanzania. Although the Law of the Child Act, 2009 refers to them, it does not explicitly provide for their operation. Only the International Social Service (ISS), an international NGO that promotes child protection and welfare, is specified under regulation 20(5) of the Adopted Children Regulations.[499] The Department of Social Welfare works with ISS in international social investigations in respect of child adoption applications by resident non-Tanzanians and non-resident Tanzanians, and post-adoption monitoring. Other NGOs, be it national or international, work with the department in numerous areas of child protection but are not directly featured in the statute book. During field research, the researcher found that there are several civil society organisations, community-based and faith-based organisations, and individual persons that have established and run NGOs working in the field of child protection in the country. Some that were

[497] Section 2 of the Non-Governmental Organizations Act, 2002, Act No. 24 of 2002 [Cap. 56 R.E. 2002].
[498] *Ibid.*, section 11.
[499] For details of ISS, see The International Social Service, "General Secretariat", https://www.iss-ssi.org/index.php/en/.

contacted and researched are Tanzania Child Rights Forum, Save the Children Tanzania, SOS Tanzania in Dar es Salaam, and Pastoral Activities and Services for People with AIDS Dar es Salaam Archdiocese (PASADA). Other organisations investigated for this study run approved residential homes for children in need of care. These are explained in detail under institutionalised care in chapter three.

NGOs and private persons who are stakeholders of child protection in Tanzania but who do not directly receive orders from the government and are not funded by the government are non-state actors. They function in Tanzania in compliance with the law that regulates their operations: the Non-Governmental Organizations Act, 2002, and any other law under which they are established or regulated. Beyond that, their activities are regulated by their constitutions or other governing documents that have force of law, contrary to which they cannot function.[500] There is thus a multiplicity of laws (national, international, or organisation-based) governing the network of NGOs constituting the child protection system in Tanzania, which cannot be addressed fully in this study.

2.5 Conclusion

The theories of legal pluralism and street-level bureaucracy are pivotal analytical tools applicable to the subject of the study and the questions that the study poses. Tanzania's pluralistic legal setting and the involvement of street-level bureaucrats in child adoption practice were critical determinants for using these theories. Their advanced theoretical perceptions are used to explain the legal and social phenomena studied here. These phenomena are discussed in the framework of particular concepts to establish their meaning and application globally and specifically in Tanzania. The above discussion shows that some of the concepts have a subjective meaning and application in Tanzania, for instance, open adoption. Also, in the Tanzanian context most of the concepts have acquired unique aspects due to prevailing customary and religious laws.

The above account of the institutional framework shows the state and non-state actors involved in child welfare practices in Tanzania. It describes in detail their constitution, governance, and mandate. The social welfare offices and the courts of law are the central pillar of the institutional framework as far as child adoption is concerned. A child cannot be adopted without their participation. Because of the extensive mandate of the Department of Social Welfare in child care and protection, no institutions involved in the child adoption process can function without its cooperation. The constitution and functional ability of the

[500] See section 30 of the Non-Governmental Organizations Act, 2002.

department is therefore critical in child adoption practice. However, the decentralisation by devolution reform has made the position and work of social welfare officers at the local government level unclear. Their responsibilities and accountability fall under the control of two different Ministries: the MoHCDGC and PO-RALG. This study investigates the functioning of social welfare officers in practice, especially regarding child adoption.

Chapter 3: The Situation of Children in Need of Care and Protection in Tanzania

> "No child should be without the support and protection of a legal guardian or other recognised responsible adult or competent public body at any time."[501]

3.1 Introduction

Children, at all times, due to their physical and mental immaturity, need care and protection in the hands of legally recognised persons.[502] Parents and legal guardians have the primary responsibility for the upbringing and development of their children.[503] The UNCRC and the ACRWC recognise the family as the fundamental unit of society designed to provide an environment for children to grow up in while receiving care and protection.[504] However, there are instances in which parents or legal guardians are unable or unwilling to care for and protect their child, which makes that family environment unavailable to the child. Under their Articles 20 and 25, respectively, these two Conventions refer to a child in that circumstance as a child deprived of his or her family environment. Other legal instruments on the child use a different formulation to refer to the same group of children. For instance, the UN Guidelines on the Alternative Care of Children, 2010, have two alternative labels for them, children without parental care[505] and children deprived of parental care[506]. The Law of the Child Act, 2009 refers to them as children in need of care and protection.[507] This chapter explores which children belong to this group in Tanzania and discusses the grounds leading to their being in this situation.

[501] Section 19 of the UN General Assembly, "Guidelines for the Alternative Care of Children".
[502] Preamble statements No. 9 of the Convention on the Rights of the Child, UNCRC (20 November 1989) and No. 5 of the African Charter on the Rights and Welfare of the Child, 1990.
[503] Article 18 of the Convention on the Rights of the Child, UNCRC (20 November 1989); Article 20 of the African Charter on the Rights and Welfare of the Child, 1990; and sections 7-9 of the Law of the Child Act, 2009.
[504] See preamble statements No. 5 and 6 of the Convention on the Rights of the Child, UNCRC (20 November 1989); and preamble statement No. 5 and Article 18(1) of the African Charter on the Rights and Welfare of the Child, 1990.
[505] See the references under sections 16, 18, 29, 53, 69, 70, 75, 115, 121, 130, and 153 of the UN General Assembly, "Guidelines for the Alternative Care of Children". The Guidelines define a child without parental care under section 29(a) as a child not in the overnight care of one of his or her parents for whatever reason or under whatever circumstance.
[506] *Ibid*. See references under preamble statements No. 1 and 3, and sections 7 and 130(b).
[507] Section 16 of the Law of the Child Act, 2009.

A child without the care and protection of a legally recognised person needs alternative care.[508] The state or community may arrange for the required substitute care on the basis of the applicable laws, whether statutory, customary, or religious. Also, the care may be temporary or permanent, family-based or institutional, depending on the circumstances of each case. This chapter details the process through which a Tanzanian child in need of care and protection goes until alternative care placement. It delves into the relevant legal requirements, procedures and principles involved. Further, the chapter studies the role of mandated authorities in the process and briefly provides field research findings on alternative child care practices in Tanzania.

The discussion in this chapter builds the background for understanding child adoption law and practice in Tanzania. First, it lays out the child protection measures that are applied before a child is declared free for adoption. Second, it discusses which children are eligible for adoption. This is because child adoption is not necessarily suitable for all children in need of care and protection. Lastly, it considers the other alternative care measures available in Tanzania and discusses the justification for research on child adoption.

3.2 Children in Need of Care and Protection

Children are entitled to enjoy parental care and protection and, whenever possible, live with and not be separated from their parents.[509] The Law of the Child Act, 2009 under section 3 gives the word parents a broad interpretation. According to it, any person who cares for a child is a parent, not limited to the traditional perception of the child's biological or adoptive father or mother. Following suit, in section 7(2) of the Act, unlike Article 9 of the UNCRC and 19 of the ACRWC, the right to grow up with parents is extended to include guardians and family. Section 3 of the Act defines these two terms. Family combines the definitions of a parent and relative.[510] Thus it includes children with their biological or adoptive parents and members of the extended family. On the other hand, a guardian is a person who oversees the child's care and manages the child's rights and property, including those appointed by deed, will, or court order. It, therefore, means that a child who resides with any person responsible

[508] Article 20 of the Convention on the Rights of the Child, UNCRC (20 November 1989); Article 25 of the African Charter on the Rights and Welfare of the Child, 1990; and sections 7(3), 9(3) and (4) of the Law of the Child Act, 2009, which specify that children without the care of their parents or guardians need substitute care.

[509] Section 7(1), Law of the Child Act, 2009 enacted in the spirit of Articles 9(1) of the Convention on the Rights of the Child, UNCRC (20 November 1989) and 19(1) of the African Charter on the Rights and Welfare of the Child, 1990.

[510] It seems to the researcher that the term family could have been used in place of the word relative. Such a finding is based on the repetitive inclusion of parents and on the phrase 'parent, guardian or relative' used extensively in the Act.

for his or her care, be it the biological or adoptive parents, guardians, or relatives, is considered to have parental care as per section 7 of the Law of the Child Act, 2009.

However, the right to grow up or live with parents does not simply end there. A child is entitled to enjoy this right without separation from the parents against his or her will. Hence, a child must reside with parents or caregivers as long as he or she is in a caring and peaceful environment devoid of any harm, abuse, or neglect. Children who lack such an environment may voluntarily leave their home to receive care and protection elsewhere, or they may be involuntarily separated from their parents if the parents exclude them from their home.[511] Involuntary separation also occurs when a competent authority or court determines, according to the applicable laws and procedures, that continued care under the parents, guardians, or relatives may cause the child to suffer significant harm or is not in the child's best interest.[512] In addition, acts of state against the parent, such as detention, imprisonment, deportation, exile, or death may involuntarily separate a child from his or her parents.[513] The outcome of all these situations, whether voluntary or involuntary, is that the child is deprived of parental care.

Section 16 of the Law of the Child Act, 2009 provides an inexhaustive list of circumstances that may lead to a child being in need of parental care and protection. The conditions referred to do not make the child's status a foregone conclusion; rather, this must be determined by a competent authority or court of law. The authority or court refers to a set of criteria under regulation 4 of the Child Protection Regulations, 2014 to determine whether a child is in need of care and protection due to ascertained suffering or risk of suffering significant harm. The list under section 16 of the Act is where the determination procedure begins. The contents of the section are reproduced below for ease of reference:

> "For the purposes of this Act, a child is in need of care and protection if that child –
>
> (a) is an orphan or is abandoned by his relatives;
>
> (b) has been neglected or ill-treated by the person who has the care and custody of the child or by his guardian or parents;
>
> (c) has a parent or guardian who does not exercise proper guardianship;

[511] Child Protection Regulations (2014) under section 2 define children excluded from home as those without parental care as a result of parents forcing them out of their homes or behaving in a way that the children have no other option but to leave their homes.

[512] Section 7(2) and (3) of the Law of the Child Act, 2009 in line with Articles 9(1) of the Convention on the Rights of the Child, UNCRC (20 November 1989) and 19(1) of the African Charter on the Rights and Welfare of the Child, 1990.

[513] Section 9(4) of the Law of the Child Act, 2009, together with Articles 9(3) of the Convention on the Rights of the Child, UNCRC (20 November 1989) and 19(3) of the African Charter on the Rights and Welfare of the Child, 1990.

(d) is a destitute;

(e) is under the care of a parent or guardian who, by reason of criminal or drunken habits, is unfit to have the care of the child;

(f) is wandering and has no home or settled place of abode;

(g) is begging or receiving alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise, or is found in any street, premises or place for the purpose of begging or receiving alms;

(h) accompanies any person when that person is begging or receiving alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise;

(i) is under a care of a destitute parent;

(j) frequents the company of any reputed criminal or prostitute;

(k) is residing in a house or the part of a house used by any prostitute for the purpose of prostitution, or is otherwise living in circumstances calculated to cause, encourage or favour the seduction or prostitution of, or affect the morality of the child;

(l) is a person in relation to whom an offence has been committed or attempted under the Anti-Trafficking of Persons Act;

(m) is found acting in a manner from which it is reasonable to suspect that he is, or has been, soliciting or importuning for immoral purposes;

(n) is below the age of criminal responsibility and is involved in an offence other than a minor criminal matter;

(0) is otherwise exposed to moral or physical danger;

(p) is under a care of a person with disability and such disability hinders such person from exercising proper care or guardianship; or

(q) in any other environment as the Commissioner may determine."[514]

Determination of significant harm suffered or to be suffered by a child in any of the above circumstances is the next step. The Child Protection Regulations under regulation 4(2) define harm as ill-treatment and impairment of a child's health and development inflicted directly on the child or on another person but witnessed by the child.[515] It specifies that ill-treatment includes any form of physical, emotional or sexual abuse and neglect.[516] Also, it defines harm as any damage to a child's physical or mental health and weakening of his or her physical, intellectual, emotional, social and behavioural development. What connotes significant harm

[514] Section 16 of the Law of the Child Act, 2009.

[515] Department of Social Welfare, "Guidelines to the Child Protection Regulations" (May 2013) gives an example of witnessed spousal domestic violence which may cause significant emotional and psychological harm to a child.

[516] Regulation 4(4) (a)-(d) of the Child Protection Regulations explains elements that constitute physical, emotional, sexual abuse and neglect of a child.

is, however, not clarified under the Regulations.[517] Nonetheless, the Regulations provide guiding factors for determining whether a child has suffered or is at risk of suffering significant harm. These include the nature of harm; its impact on the child's health and development; the child's development in the context of his or her family and the wider community; any special needs which may impact the child's development and care in the family; and the capacity of parents, guardians or carers to protect the child and meet his or her needs.[518]

Any child facing the dire circumstances listed under section 16 (reproduced above) and who is determined by a competent administrative or judicial authority to be suffering or at risk of suffering significant harm, needs care and protection. Actions to be taken following such determination depend on the nature and extent of harm and the most suitable solution for the child. An account of determination procedures, authorities involved, and their roles is given below in part 3.5. Also explicated are the types of decisions made and actions taken to address the various situations of children in need of care and protection.

3.3 Statistics and Factors for Existence of Children in Need of Care and Protection

Children suffering or at risk of suffering significant harm who require state intervention to provide care and protection exist in Tanzania. Some of these children leave the family environment of their own volition, while others are either forcefully expelled or, for their own best interests, removed. However, competent authorities or courts do not determine all cases or identify all children in need of care and protection. Also, not all of those identified go through the determination process. Therefore, statistical data available on children in need of care and protection may include only those identified and not necessarily determined.

Integrated data on children deprived of parental care is not available in Tanzania. For this study, the researcher contacted several authorities with a mandate to determine such cases in search of first-hand official statistics. None of the authorities had systematic physical or electronic data storage.[519] Therefore, the only hope was the National Bureau of Statistics (NBS), an institution charged with statistical data management in Tanzania. NBS issues

[517] Department of Social Welfare, "Guidelines to the Child Protection Regulations" define significant harm as a specific or over-time accumulation of incidents which interrupt, alter or impair the development of a child.
[518] Regulation 4(5) of the Child Protection Regulations.
[519] Authorities responsible for determination, including the Department of Social Welfare, local government authorities and the Juvenile, District, Resident Magistrate and High Courts, were visited during field research in Tanzania from January to March 2018 and 2019. They had no unified data on children that they had determined to be in need of parental care and protection.

readily available official and reliable statistics in a wide range of demographic fields.[520] Regrettably, NBS had no unified statistics regarding children without parental care. Nevertheless, bits and pieces of demographic data published by the Bureau provide insight into the existence of children in need of care and protection. Also, several child care institutions and individuals have, at various times, researched on children in need of care and protection in Tanzania. Their reports present information on the subject, albeit fragmented and inconsistent. This study uses the reported information to show the existence of children in need of care and protection in Tanzania.

This part, therefore, presents non-conclusive statistics of children in need of care and protection gathered from various reports published in the period ranging from 2009 to 2019. The part below presents the statistics to support the discussion on factors leading to the existence and increase of children in need of care and protection in Tanzania.

3.3.1 Rapid Population Growth

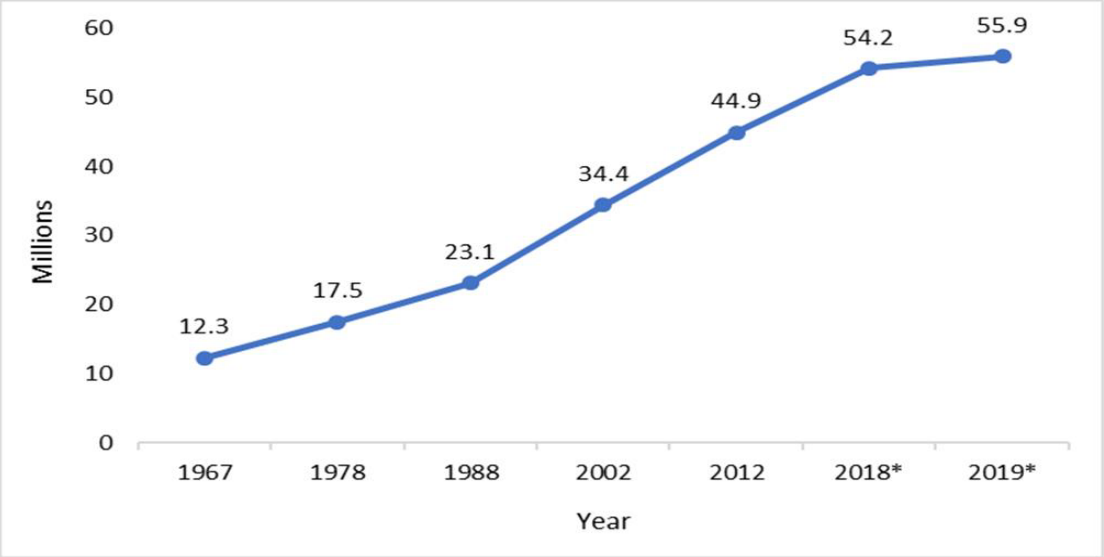
Tanzania's population more than quadrupled from 12.3 million in 1967 to 55.9 million in 2019.[521] The 2012 National Population and Housing Census depicted a 3.1% average annual intercensal growth rate.[522] Such rapid growth is attributable to the high fertility rate in Tanzania. Tanzania's Demographic and Health Survey (TDHS) of 2015/2016 reported a total fertility rate of 5.2 births per woman with 3.8 births per woman in urban areas and 6.0 births per woman in rural areas.[523] The same survey found a decrease in the infant mortality rate, which stood at 43 infants per 1,000 births compared to 46 in 2012 and 51 in 2010.[524] The statistics show a constant increase in the child population in Tanzania.

Children constitute approximately half of the total population.[525] Children in the age group 0-4 constitute the most significant percentage of the population by age group.[526] An increase in the percentage of children in this age group (0-4) can be seen between the 2012 National Population and Housing Census (NPHC) and the 2018 population projections.[527] Although life expectancy at birth has increased from 61.8 in 2012 to 65.5 in 2019, there is a steady

[520] NBS's publications are accessible at www.nbs.go.tz. The Bureau was a respondent institution in this study during field research conducted in Tanzania from January to March 2019.
[521] National Bureau of Statistics, *Tanzania in Figures 2018* (Dodoma, 2019), at p. 18. It presents a compilation of series of data from 2013 to 2019.
[522] *Ibid.*, at p. 18.
[523] *Ibid.*, at p. 26.
[524] *Ibid.*, at p. 27.
[525] National Bureau of Statistics, *Population Distribution by Age and Sex* (2013) shows in Table 1.1 at p. v that the child population aged 0-17 constitutes 50.1% of the total population. The same statistics are reflected in the; National Bureau of Statistics, *Tanzania in Figures 2018*, above footnote 521.
[526] See population distribution by age and sex as reproduced below based on projections from National Bureau of Statistics, *Tanzania in Figures 2018*, above footnote 521, at p. 21.
[527] *Ibid.*, at pp. 20 and 21.

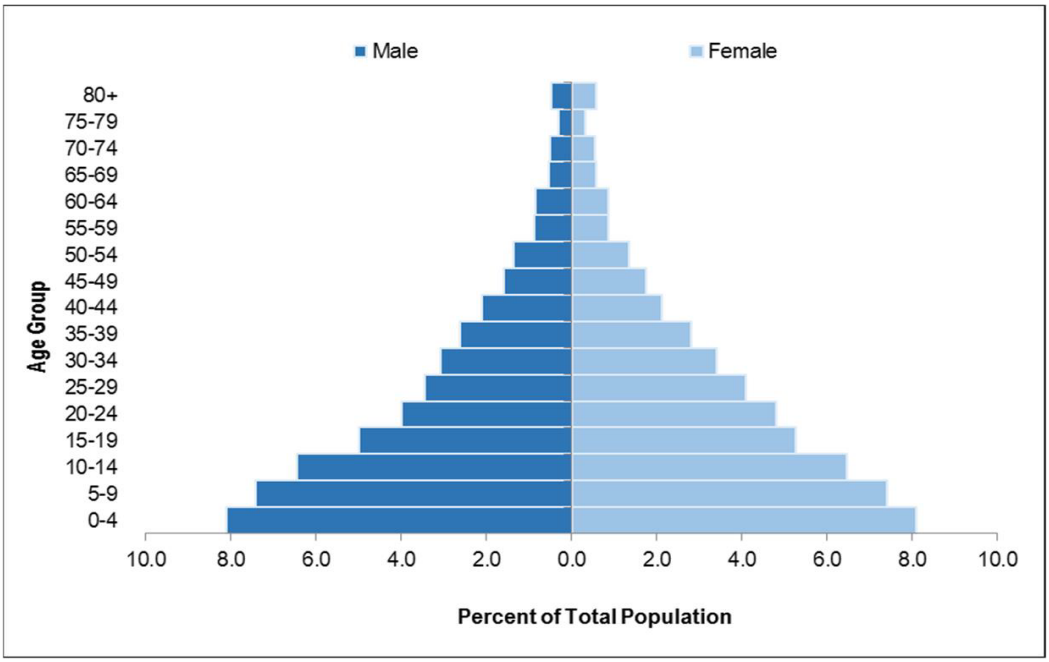
percentage decrease moving up the population age pyramid, which is evidence of challenged survival in Tanzania.[528] The shrinking adult population is one explanation for the existence of children without care and protection due to the loss of parents, guardians or relatives.

Figure 3-1: Tanzania's Population Trend in Millions, 1967-2019



Source: National Bureau of Statistics, Tanzania in Figures 2019[529]

Figure 3-2: Percentage Distribution of the 2019 Projected Population by Age Group and Sex, Tanzania



Source: *National Bureau of Statistics, Tanzania in Figures 2019*[530]

[528] *Ibid.*, at p. 22 and 23; and United Nations Development Project, *Human Development Indices and Indicators: 2018 Statistical Update for United Republic of Tanzania* (UNDP, 2018).
[529] Population trend based on Population Censuses of 1967, 1978, 1988, 2002 and 2012 in National Bureau of Statistics, *Tanzania in Figures 2018*, above footnote 521, at p. 18.

3.3.2 Poverty

Tanzania is among the poorest countries in the world. Although the United Nations Development Project (UNDP) in 2017 reported an increase in the country's human development value from 0.370 in 1990 to 0.538 in 2017, it still dwells in the low human development category at number 154 out of 189 countries and territories.[531] In 2019 it fell even lower to number 163.[532] The World Bank found Tanzania to have sustained a steady economic growth averaging 6-7% a year over the past decade.[533] It also reported a decline in the poverty rate from 34.4% in 2007 to 28.2% in 2012 and 26.8% in 2016. Despite the economic growth and decline in poverty rates, the total number of poor people did not decrease. The World Bank cites Tanzania's high population growth rate as the reason behind persistent poverty among citizens. About 70% of Tanzanians live below $2 a day, which stands close to the international poverty line at $1.90 based on Purchasing Power Parities (PPP).[534]

In 2016, the NBS, in collaboration with UNICEF, published a report on child poverty in Tanzania.[535] It found that 74% of the total child population in Tanzania live in multidimensional poverty, meaning deprivation in at least three dimensions. The dimensions considered were nutrition, health, protection, education, information, sanitation, water, and housing. The report also said that 29% of all children resided in households living below the monetary poverty line. It found that 81% of children in rural areas compared to 40% in urban areas lived with three or more deprivations, while in the case of monetary poverty, 33% of rural children compared to 10% of urban children lived in poverty.

Poverty weakens the ability of the family and community to take care of its children. It is in many ways a root factor in cases of children being deprived of parental care and protection.[536] Persistent poverty deprives children of an adequate standard of living, forces them to engage in harmful commercial activities, including sex work, escalating chances of contracting HIV

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[530] United Republic of Tanzania, National Bureau of Statistics, "Tanzania in Figures 2019", https://www.nbs.go.tz/nbs/takwimu/references/Tanzania_in_Figures_2019.pdf, at p. 21.

[531] United Nations Development Project, *Human Development Indices and Indicators: 2018 Statistical Update for United Republic of Tanzania* (UNDP, 2018).

[532] *Ibid.*

[533] The World Bank, "Overview: The World Bank in Tanzania", https://www.worldbank.org/en/country/tanzania/overview.

[534] The World Bank, "Tanzania Mainland Poverty Assessment: A New Picture of Growth for Tanzania Emerges", https://www.worldbank.org/en/country/tanzania/publication/tanzania-mainland-poverty-assessment-a-new-picture-of-growth-for-tanzania-emerges.

[535] National Bureau of Statistics (NBS) and United Nations Children's Fund (UNICEF), *Child Poverty in Tanzania* (Dar es Salaam, June 2016).

[536] Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2007-2010" (NCPA I) (2008) at p. 31 cites poverty as the leading exacerbator of children's vulnerability.

infections, and exposes children to violence due to increased tensions within the household and community.[537] It also pushes children to the streets to evade abuse, where they beg or steal for a living, and are at a higher risk of trafficking.[538]

3.3.3 Prevalence of HIV/AIDS

Tanzania is one of the sub-Saharan countries severely hit by the HIV/AIDS epidemic.[539] The National AIDS Control Programme established in 1988 reported the first three diagnoses of HIV/AIDS in the country at Ndolage hospital, Kagera Region, in November 1983.[540] From that time, the disease ravaged people of all ages and sexes across all regions in Tanzania. The prevalence of HIV/AIDS in the country varies substantially depending on age, gender, sexual preferences, socio-economic status, and geographical location.[541] The Tanzania HIV Impact Survey (THIS) 2016-2017 published HIV infection prevalence rates among persons aged 15 years and older, with an average of 4.9% (6.3% among females and 3.4% among males).[542] The rate corresponds to an estimated 1.4 million people of 15 years and above living with HIV/AIDS in Tanzania. The prevalence rate varies drastically among regions, with 11.4% recorded in Njombe and below 1% in Lindi. The Survey also reported a general annual new HIV infection incidence of 0.24%, which translated to approximately 72,000 new infections yearly (48,000 among females and 24,000 among males). It estimated HIV infection prevalence among children of 0-14 years at 0.4%. The estimate was based on parents' reports and ARV detection data, revealing that only 50.1% of children living with HIV/AIDS in Tanzania had been diagnosed. Women, adolescents, children, and key populations, such as female sex workers, are the most affected by the epidemic in Tanzania. A fact sheet published by UNICEF showed that women comprise about 60% of people aged 15-49 infected with HIV. It also showed that Tanzania has 5% (98,000) of the total world adolescent population (10-19 years) living with HIV, and that infection among key populations is high. For instance,

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[537] United Nations Children's Fund (UNICEF), *Is Tanzania a Better Place for Children?* (Dar es Salaam, November 2014), at p. 23.
[538] *Ibid.*
[539] Eastern and Southern Africa is the region with the world's highest HIV/AIDS new annual infections rate of 30% amounting to about 800,000 new infections recorded in 2017. Information obtained from "Global HIV and AIDS statistics", https://www.avert.org/global-hiv-and-aids-statistics, 14/10/2019.
[540] Ministry of Health, Community Development, Gender, Elderly and Children, National Aids Control Programme, "HIV/AIDS in Tanzania", http://nacp.go.tz/site/about/hiv-aids-in-tanzania.
[541] United Republic of Tanzania, Ministry of Health, Community Development, Gender, Elderly and Children, National Aids Control Programme, "National Guidelines for the Management of HIV and AIDS", http://nacp.go.tz/site/NATIONAL_GUIDELINES_FOR_THE_MANAGEMENT_OF_HIV_AND_AIDS_2019.pdf (April 2019) at p. 5.
[542] Tanzania Commission for AIDS (TACAIDS) and Zanzibar AIDS Commission (ZAC), *Tanzania HIV Impact Survey (THIS) 2016-2017: Final Report* (Dar es Salaam, Tanzania, December 2018).

an estimated 26% of female sex workers lived with HIV and AIDS in mainland Tanzania.[543] Also, by 2015 there were approximately 250,000 children aged 0-14 living with HIV and AIDS.[544]

UNAIDS reports that annual HIV/AIDS-related deaths decreased from 48,000 in 2010 to 24,000 in 2018.[545] This decrease goes along with the reduction in new annual HIV infections from 83,000 in 2010 to 72,000 in 2018. The lessening effects of the HIV/AIDS epidemic are the result of considerable efforts by state and non-state actors to end it, recently by striving to accomplish the 90-90-90 UNAIDS Global Target by 2020.[546] The Target was that by 2020 90% of people living with HIV should know their HIV-positive status, 90% of people who know their HIV-positive status should have accessed treatment, and 90% of people on treatment should have suppressed viral loads. In 2018 UNAIDS reported that of the people living with HIV/AIDS in Tanzania, 78% knew their status, 71% were on treatment, and 62% had achieved viral suppression.[547] Despite good progress reported, the number of persons living with HIV/AIDS keeps increasing, for instance from the 1.4 million reported in the 2016-2017 survey to 1.6 million reported in 2018.[548] Thus, the epidemic remains a threat to the social and economic development of the country.[549]

From the statistics above, it is evident that the number of HIV/AIDS-related orphans and vulnerable children has been increasing in Tanzania since the 1980s.[550] In 2012, a child-rights-based situational analysis reported that Tanzania had about 3 million HIV/AIDS-

[543] Information obtained from United Nations Children's Fund (UNICEF) Tanzania, "HIV and AIDS Fact Sheet", https://www.unicef.org/tanzania/media/566/file/UNICEF-Tanzania-2017-HIV-fact-sheet.pdf.

[544] United Nations Children's Fund (UNICEF), *Is Tanzania a Better Place for Children?*, above footnote 537 at p. 14.

[545] UNAIDS, "United Republic of Tanzania country report 2018", https://www.unaids.org/en/regionscountries/countries/unitedrepublicoftanzania.

[546] Affirmed in Tanzania Commission for AIDS (TACAIDS) and Zanzibar AIDS Commission (ZAC), *Tanzania HIV Impact Survey (THIS) 2016-2017: Final Report*, above footnote 542; and in United Republic of Tanzania, Ministry of Health, Community Development, Gender, Elderly and Children, National Aids Control Programme, "National Guidelines for the Management of HIV and AIDS".

[547] UNAIDS, "United Republic of Tanzania country report 2018", above footnote 545; Data Comparison can be made with the Tanzania Commission for AIDS (TACAIDS) and Zanzibar AIDS Commission (ZAC), *Tanzania HIV Impact Survey (THIS) 2016-2017: Final Report*, above footnote 542, which at pp. 18-19 reports 60.6%, 93.6% and 87.0% in the same order.

[548] Tanzania Commission for AIDS (TACAIDS) and Zanzibar AIDS Commission (ZAC), *Tanzania HIV Impact Survey (THIS) 2016-2017: Final Report*, above footnote 542; and UNAIDS, "United Republic of Tanzania country report 2018", above footnote 545.

[549] Tanzania Commission for AIDS (TACAIDS) and Zanzibar AIDS Commission (ZAC), *Tanzania HIV Impact Survey (THIS) 2016-2017: Final Repor*t, above footnote 542 at p. 22. See also Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2007-2010" at p, 1.

[550] See statistics provided in B. A. Rwezaura, "'This is not my child': integrating orphans into the mainstream of Tanzania's society", Eastern Africa Law Review 20-27 (2000): pp. 59–87.

related orphans.[551] An HIV/AIDS and Malaria Indicator Survey published in 2013 reported that 9% of persons below 18 years (over 2 million children) in Tanzania were orphaned by the death of either one or both parents due to HIV/AIDS.[552] In 2015, some reports said that about 1.3 million children were orphaned due to HIV/AIDS in Tanzania.[553] The orphaned children become especially vulnerable as they remain with ailing relatives, old and weak grandparents, in child-headed households, or within a community incapable of caring for them due to illness, poverty, deteriorating living conditions, as well as stigma.[554] In addition to being orphaned, many young and adolescent children also live with HIV. Lack of adequate care through incapacity, neglect or abandonment by caregivers place these children in the category of children deprived of parental care. The epidemic has considerably weakened Tanzania's families and communities, mainly in their ability to care for their children, which leads to the increase of children in need of care and protection.[555]

3.3.4 Family/Social Disintegration

Several reports cite family and social disintegration as one reason for the increase of most vulnerable children in Tanzania.[556] The term disintegration means two things. First, the breakdown of the nuclear unit, the family, where parents and children end up separated. Second, the overextension and ultimate snapping of the traditional care safety net that has guaranteed care and protection of children within the extended family and community for centuries. The vicious cycle of poverty, the impacts of HIV/AIDS, a rise in domestic and social violence and abuse, tensions between traditional and modern values and structures (e.g., upsurge of divorce, marital separation and single parenthood), the effects of globalisation and increased migratory movements (e.g., rural-urban migration) have all played

[551] SOS Children's Villages Tanzania, *Child Rights Based Situational Analysis of Children without Parental Care and at Risk of Losing Parental Care* (Dar es Salaam, 2012), at pp. 13 and 34.
[552] Tanzania Commission for AIDS (TACAIDS), Zanzibar AIDS Commission (ZAC), National Bureau of Statistics (NBS), Office of the Chief Government Statistician (OCGS), and ICF International, *Tanzania HIV/AIDS and Malaria Indicator Survey 2011-12* (Dar es Salaam, Tanzania, 2013), at p. 11.
[553] Tanzania Ministry of Community Development, Gender and Children, UNICEF and Global Affairs Canada, *Building a holistic child protection system, step by step, in the United Republic of Tanzania* (2015), at p. 3; also United Nations Children's Fund (UNICEF), *Is Tanzania a Better Place for Children?*, above footnote 537, at p. 14.
[554] SOS Children's Villages Tanzania, *Child Rights Based Situational Analysis of Children without Parental Care and at Risk of Losing Parental Care*, above footnote 551, at p. 34.
[555] Ministry of Health and Social Welfare, Department of Social Welfare, "National Guidelines for Improving Quality of Care, Support, and Protection for Most Vulnerable Children in Tanzania" (September 2009), at p. 1; and SOS Children's Villages Tanzania, *A Snapshot of Alternative Care Arrangements in Tanzania* (Innsbruck, Austria, 2013), at p. 5.
[556] Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2007-2010", at pp. i and 26; Ministry of Health and Social Welfare, Department of Social Welfare, "National Guidelines for Improving Quality of Care, Support, and Protection for Most Vulnerable Children in Tanzania", at p. iii; and Mmasa Joel and Mbaula Walter, *Social Protection Targeting the Most Vulnerable Children: The Case Study of Tanzania* (Dar es Salaam, 2016), at pp. 1 and 5.

significant roles in breaking up families and communities in Tanzania. Family-, kinship- and community-based child care have sustained a big blow due to the breakdown, adding to the number of children in need of substitute care and protection.[557]

Family and social disintegration have, for instance, become one of the reinforcing agents of practices such as child abandonment. The weakening capacity of the family and community to absorb and care for unwanted children or children with disabilities, children born out of wedlock, born to teenage girls, destitute parents or sex workers and the like, has spiked up child abandonment rates.[558] There is a tendency in Tanzania for mothers to leave children in pit latrines, damp sites, bus stands, other people's doors, and such other places.[559] People who do this range from teenage girls to grown women who abandon their newborn babies or young children in such locations. During field research in Tanzania between January and March of 2018 and 2019, child abandonment was one of the leading reasons for the upsurge in children deprived of parental care.[560] For example, a privately owned children's home reported having facilitated about 100 adoptions, in most cases of children who had been abandoned.[561]

Children living on the streets is another consequence of family or social disintegration. Admittedly, there are complex reasons why a child should live on the streets, such as relating to urbanisation and its effects. Nevertheless, lack of adequate parental care and protection within the biological/extended family or community is the main reason. The exact number of children living in the street in Tanzania is unknown. Various published survey reports cover different parts of the country at different times. A survey of 95 districts in 2012 found 33,952 children living on the street in Tanzania.[562] In Dar es Salaam alone in 2012, an estimated

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[557] It is significant to note that these agents of disintegration have not devastated traditional alternative child care systems in all societies in Tanzania. A former social welfare officer at Monduli, Arusha, explained in an interview that in his 8 years work experience in the area he did not come across orphans or street children who originated from the Maasai communities of Longido, Ngorongoro and Monduli, three out of the seven district councils in Arusha. Interview with social welfare officer 1-Arusha, social welfare regional office, Arusha, on 19.03.2019.

[558] Tanzania Child Rights Forum, *Tanzania Child Rights Status Report* (Dar es Salaam, Tanzania, 2013) at p. 39.

[559] Story of Atuganile (not her real name) written by Buguzi Syriacus, "Foster Care: A New Home for Those Abandoned", The Citizen (Monday, 26th July 2016); also covered by Frisone Chiara, "Working a System to Protect Children in Tanzania", https://blogs.unicef.org/blog/working-system-works-well-protect-children-tanzania/.

[560] Social welfare officers, managers of approved residential homes, advocates and child adopters interviewed said that many children deprived of parental care had been abandoned by their biological parents and relatives and the surrounding community did not take them in.

[561] Since its establishment in 2006 up to February 2019 when the interview was conducted, the home has facilitated over 100 child adoptions most of which were of abandoned children whose families and relatives could not be found.

[562] Abdulwakil Saiboko, "Number of Street Children on the Increase", Tanzania Daily News (21st April 2012). A more recent report is available in Malanga Alex, "Over 800,000 Tanzanian Children Living in High Risk Conditions - Government", The Citizen (Wednesday, 30th January 2019).

5,580 children were living on the streets.[563] In Mwanza, a newspaper reported over 2,500 children living on the street in 2016.[564] The highest number of children living on the street ever reported in Tanzania is 437,500.[565] Life on the street is hazardous, so that these children are in urgent need of care and protection.[566]

3.3.5 Compliance with Child Protection Laws

In 2009, Tanzania's Legislature enacted a long-awaited comprehensive law of the child.[567] The Law of the Child Act, 2009 domesticates both the UNCRC, 1989 and the ACRWC, 1990. To operationalise the law, the Minister responsible for social welfare enacted several regulations as empowered by section 157 of the Act.[568] Together with other legislation relating to matters affecting children, the Act establishes a protective legal framework for the child.[569] Despite the existing legal framework, which could considerably improve the situation, levels of child abuse, violence, exploitation, and neglect are still high in Tanzania.[570] Non-compliance with the law is a contributing cause of the problem.

Three main points may explain persistent non-compliance with the child laws in Tanzania. First, lack of knowledge and understanding of the laws and their operation. In 2008 the National Costed Plan of Action (NCPA) I reported that legislators, policymakers and judicial

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[563] *Dar es Salaam Counts over 5,000 Homeless Children*, Wanted in Africa (19th May 2013).

[564] *The Plight of Mwanza Street Children in Tanzania*, The Sunday Mail (04th December 2016).

[565] This number is given in various writings relating to street children in Tanzania since 2012. It is given in Consortium for Street Children, "Tanzanian Street Children", https://www.globalgiving.org/projects/tanzanian-street-children/; and in Navuri Angel, "Removing Children from Streets is everybody's responsibility", The Guardian (18th January 2018).

[566] More on the experiences of street children in Tanzania can be found in Joe L. P. Lugalla, Jesse K. Mbwambo, "Street Children and Street Life in Urban Tanzania: The Culture of Surviving and its Implications for Children's Health", International Journal of Urban and Regional Research 23(2) (1999): pp. 329–44; Ruth Evans, "Poverty, HIV, and Barriers to Education: Street Children's Experiences in Tanzania" Gender and Development 10(3) (2002): pp. 51–62; Amury Zena and Komba Aneth, *Coping Strategies Used by Street Children in the Event of Illness*, Research Report 10/1 (Dar es Salaam: REPOA, 2010); and Maryknoll Sisters, "The Life of Street Children in Dar Es Salaam, Tanzania", https://www.maryknollsisters.org/2015/07/24/the-life-of-street-children-in-dar-es-salaam-tanzania/.

[567] The push to have a comprehensive child protective law can be traced in various texts such as Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at pp. 160-161; and Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2007-2010", at pp. 30-31.

[568] Foster Care Placement Regulations (2012); Adoption of Children Regulations (2012); Children Homes Regulations: GN. No. 155 of April 2012 (2012); Law of the Child (Retention Homes) Rules (2012); Law of the Child (Apprenticeship) Regulations (2012); Law of the Child (Child Employment) Regulations (2012); Child Protection Regulations, above footnote 511; and Law of the Child (Juvenile Court Procedure) Rules (2016).

[569] Law of Marriage Act, 1971; Employment and Labour Relations Act (2004); Penal Code (1945); Sexual Offences Special Provision Act (1998); Criminal Procedure Act (1985); Tanzania Evidence Act (1967); Anti-trafficking in Persons Act (2008); Refugee Act (1998); Persons with Disabilities Act, and many others.

[570] United Republic of Tanzania. Ministry of Health, Community Development, Gender, Elderly and Children, "National Plan of Action to End Violence Against Women and Children in Tanzania (NPA-VAWC) 2017/18 – 2012/22", http://www.mcdgc.go.tz/data/NPA_VAWC.pdf (2016), at pp. 2-3; and African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*: *Background paper to the African Report on Child Wellbeing 2016* (Addis Ababa: The African Child Policy Forum, 2016) at pp. 14-15.

officers lacked knowledge of laws and policies relating to children's issues.[571] In 2016 the African Child Policy Forum found that district councillors and officials concerned with child matters had no knowledge or awareness of the law, making them unaccountable.[572] During field research in Tanzania from January to March of 2018 and 2019, a lack of knowledge and understanding of the law of the child was a constant finding across respondent ministries, departments, agencies, and individuals. Social welfare officers, who to a large extent implement child laws in Tanzania, are trained in social work rather than law. They reported that courses tailored specifically to raising their legal awareness were rare. When government officials with the mandate to make, change and implement law and policy lack knowledge of the law and policy in the first place, how then can the general public comprehend, let alone comply with such laws?

Second, Tanzanians have yet to develop a culture to comply with the law without force. In 2014 UNICEF argued that compliance with the law is not a virtue inbred in the Tanzanian community.[573] It further submitted that non-compliance with child laws in Tanzania is rooted in the customary lack of respect towards children and their rights. The African Child Policy Forum (ACPF) also named traditional beliefs and practices as hindrances to implementing child laws and rights in Tanzania.[574] Similarly, NCPA I and II and National Plan of Action to End Violence Against Women and Children (NPA VAWC) call for a change in existing social norms that do not foster child protection in Tanzania.[575] Thus, Tanzanians need to cultivate a national culture of complying with child laws rather than clinging to prevailing traditional norms that derogate from children's rights. Having a legal framework for child protection does not help much if people do not abide by the laws.

Third, there are challenges in respect of law enforcement. Limited capacity in terms of human, financial and infrastructural resources are the leading encumberment to implementation of the law. Only a small fraction of the required number of social workers are

[571] Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2007-2010" at p. 32.
[572] African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*, above footnote 570, at p. 44.
[573] United Nations Children's Fund (UNICEF), *Is Tanzania a Better Place for Children?*, above footnote 537, at p. 27.
[574] African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*, above footnote 570, at p. 51.
[575] Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2007-2010", at pp. 34, 35 and 44; Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2013-2017" (NCPA II) (2013), at pp. 15, 18 and 19; and United Republic of Tanzania. Ministry of Health, Community Development, Gender, Elderly and Children, "National Plan of Action to End Violence Against Women and Children in Tanzania (NPA-VAWC) 2017/18 – 2012/22", at p. 4.

available in Tanzania. For instance, an assessment of the social welfare workforce in 2012 found an estimate of 437 officers working nationwide, with a deficit of 3,367 officers from national to ward level.[576] And the available officers still needed education and training.[577] Also, governmental ministries, departments and agencies do not work in sync with non-governmental organisations responsible for children.[578] They make separate, uncoordinated and sometimes duplicated or counterproductive efforts to implement the law. Budget discussions and allocations give low priority to institutions dealing with children. The ACPF found that funding for children's programmes at the local government level has become almost entirely the responsibility of external funders.[579] Besides, the ministry responsible for children's budget allocation (MHCDGEC) largely focuses on health rather than child welfare. Consequently, work-enhancing infrastructures like computers, telephones, photocopiers, printers, scanners, vehicles, and the like are not standard fixtures in the offices or working environment of social welfare officers in Tanzania.[580] Under such circumstances, ensuring compliance with the law becomes a struggle.

3.3.6 Respect for Human and Child Rights

Tanzania has national, regional, and international obligations to respect, promote and protect human rights within its territory. The responsibilities arise from the Constitution, national laws and multiple international and regional instruments to which Tanzania is a party. With specific regard to children, Tanzania has signed, ratified, and domesticated the United Nations Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the child, 1990. Despite the existing framework, the country struggles with persistent violations of children's rights.[581] Such violations augment the odds of children needing substitute care and protection.

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[576] United Republic of Tanzania, Ministry of Health and Social Welfare, Department of Social Welfare, *Assessment of the Social Welfare Workforce in Tanzania* (June 2012), at pp. 17-19.

[577] *Ibid.*, at pp. 26-32; and African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is no*t, above footnote 570, at p. 56.

[578] African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*, above footnote 570, at pp. 52-53; and United Republic of Tanzania. Ministry of Health, Community Development, Gender, Elderly and Children, "National Plan of Action to End Violence Against Women and Children in Tanzania (NPA-VAWC) 2017/18 – 2012/22", at pp. 4, 5 and 18, showing coordination challenges in the previous children's programmes.

[579] African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*, above footnote 570, at p. 52.

[580] Observed during field research in Tanzania, January – March 2018 and 2019 in district and ward social welfare offices in Dar es Salaam and Arusha Regions in the Districts of Kinondoni, Temeke, Ilala and Arusha Town.

[581] Children's rights violations are worsening within the country, as reported by the Legal and Human Rights Center, "African Child Day: Leave No Child Behind in Fighting Violence Against Children", https://www.humanrights.or.tz/assets/images/upload/files/LHRC%20THRR%202017(2).pdf.

In 2009, a national survey of violence against children in Tanzania found that three out of ten females and one out of seven males aged 13-24 years had experienced sexual violence before reaching 18.[582] Similarly, for both males and females, three quarters experienced physical violence and one quarter experienced emotional violence from an adult or intimate partner before the age of 18. A human rights report published in 2018 showed that sexual violence against children was on the rise, with 10,551 and 13,457 police-reported cases in 2016 and 2017, respectively.[583] A national child labour survey conducted in 2014 found that among 14.7 million children aged 5-17 years, 4.2 million, 28.8% of children in that age group, were engaged in child labour.[584] Further, 74.7% of the children in child labour were doing hazardous work.[585] Child labour persists despite the existence of a comprehensive legal framework to prevent harmful child labour in Tanzania.

Similarly, traditional harmful practices such as Female Genital Mutilation (FGM) continue despite being illegal in Tanzania.[586] About 8% of female respondents in the 2009 violence against children survey reported having gone through FGM.[587] Child trafficking is also a violation of children rights in Tanzania. Although efforts to identify and protect victims are still low, in 2016, the government identified, and referred to an NGO, 80 domestic child trafficking victims.[588]

Efforts to ensure children's rights are promoted and protected are ongoing in Tanzania. The ACPF found the proliferation and diversity of national plans of actions towards implementing children's rights as a success factor because they cover all child rights.[589] They are also comprehensive and well-executed; thus, their effective implementation may bring about a change in the child rights story in Tanzania.[590] However, the required implementation remains far beyond reach.

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[582] UNICEF Tanzania, *Violence against children in Tanzania*: *Findings from a national survey 2009* (Dar es Salaam: Multi Sector Task Force on Violence Against Children, Secretariat: UNICEF Tanzania; United Republic of Tanzania, August 2011), at pp. 2, 29-37 and 107-109.

[583] Legal and Human Rights Centre (LHRC) and Zanzibar Legal Services Centre (ZLSC), *'Unknown Assailants': A Threat to Human Rights* (April 2018), at p. 141, para 7.2.1.

[584] *Tanzania mainland child labour survey 2014*: *Analytical report* (Dar es Salaam: National Bureau of Statistics, February 2016), at pp. 61-78.

[585] *Ibid.*, at p. 67. List of hazardous work in the National Legislation (Official Notification) on Hazardous Work Prohibited to Persons below 18 Years of Age is reproduced; Annex 2 at pp. 133-134.

[586] FGM, child marriage and corporal punishment are still prevalent practices in Tanzania as reported in Legal and Human Rights Centre (LHRC) and Zanzibar Legal Services Centre (ZLSC), *'Unknown Assailants': A Threat to Human Rights*, above footnote 583, at pp. 149-151, para 7.2.2.

[587] Tanzania, *Violence against children in Tanzania*, above footnote 582, at pp. 87-88.

[588] United States Department of State, *Trafficking in Persons Report - Tanzania*.

[589] African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*, above footnote 570, at p. 53.

[590] *Ibid.*, at p. 54.

3.3.7 Child Protection System Coordination

The child welfare mandate in Tanzania is spread across multiple administrative organs at national, regional, district and community levels. At different levels, there are state and non-state actors. State actors comprise ministries, departments, agencies, desks, units and officers from the top national level to the lowest street-level bureaucrat.[591] Non-state actors include national and international non-governmental organisations (NGOs), community and faith-based organisations (CBOs and FBOs), development partners, and donor groups operating in the country. All these actors form part of the child protection system.

The quantity and diversity of actors constituting the child protection system require impeccable coordination. The Ministry of Health, Community Development, Gender, Elderly and Children (MoHCDGC) is the national coordinator of matters on child welfare. Nevertheless, the President's Office – Regional Administration and Local Government (PO-RALG) is the implementer of law and policy on child welfare. The chain of command from PO-RALG moves from regional administration to local government authorities at the district level headed by district council or municipal council directors. At the bottom, it moves to ward, village or *mtaa* (street) executives who directly handle children's issues in their local communities. However, coordination of all state and non-state actors from the top rank of the MoHCDGC is poor. The Ministry has a mandate over a wide range of the most sensitive issues in society. Health has almost overrun all other responsibilities of the Ministry in terms of budget and focus.[592] The Ministry also lacks a smooth chain of command down to local government authorities. Social welfare officers at that level report to their immediate district/municipal council directors, who are not directly accountable to the MoHCDGC but the PO-RALG. Hence there is a break in coordination.

Further, responsibility for issues concerning child welfare is not exclusively vested in the MoHCDGC; rather, it is scattered across multiple ministries, departments and agencies (MDAs).[593] Coordinating the implementation of numerous national policies, plans of action,

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[591] Michael Lipsky, *Street-Level Bureaucracy*: *The Dilemmas of the Individual in Public Service* (New York: Russell Sage Foundation, 1980), at pp. xi-xvi, describes street-level bureaucrats as public officers who directly interact with citizens, thus establishing a point of encounter between a government and its people.

[592] Ministerial budget projections presented in the Parliament of Tanzania provide indications of this circumstance. For more details, see United Republic of Tanzania, Ministry of Health, Community Development, Gender, Elderly and Children, *Hotuba ya Waziri wa Afya, Maendeleo ya Jamii, Jinsia, Wazee na Watoto, Mhe. Ummy A. Mwalimu (Mb), Kuhusu Makadirio ya Mapato na Matumizi ya Fedha kwa Mwaka 2018/2019* (2018) and budget projections for 2019/2020 available at http://www.mcdgc.go.tz/data/HOTUBA_WAMJJW_2019_20.pdf.

[593] Children's matters are dealt with by the Ministries of Education, Science and Technology, Constitutional and Legal Affairs, Finance and Planning, Home Affairs and Prime Minister's Office - Labour, Youth, Employment and People with Disability, together with diverse departments under these ministries.

and strategies relating to child welfare spread out across the MDAs is a challenge.[594] Coordination, support, monitoring, evaluation, inspection, and supervision of all actors constituting the child protection system is difficult to achieve.[595] For instance, in the absence of proper monitoring, some child welfare institutions operate without a legal licence in the country.[596] Thus, the weak coordination of child welfare services leaves children without the needed care and protection.

3.4 Alternative Care for Children Deprived of Parental Care

Alternative care means care provided to a child whose own family, even with support, is unable or unwilling to provide adequate care.[597] The state is vested by the international community with the responsibility to ensure that a child receives appropriate alternative care when needed.[598] According to their national laws, states must ensure that children are given special protection and assistance, including alternative care for parentless children, children temporarily or permanently deprived of their family environment, and those who in their own best interests cannot remain in their family environment. Section 1 of the UN Guidelines for the Alternative Care of Children, 2010 categorises these children as deprived or at risk of being deprived of parental care.

As used in the UNCRC and the ACRWC, family environment refers to a wide range of child care arrangements within the family. Wanitzek affirms that in the African context, it includes care within the extended family.[599] It aligns with the definition of the family under section 2 of the Law of the Child Act, 2009, which encompasses close relatives. Parental care, on the other hand, may be construed in different ways depending on the context. The UN Guidelines,

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[594] United Republic of Tanzania. Ministry of Health, Community Development, Gender, Elderly and Children, "National Plan of Action to End Violence Against Women and Children in Tanzania (NPA-VAWC) 2017/18 – 2012/22" attempts construction of a harmonised coordination structure. However, while analysing it, the ACPF comments that the coordination mechanism needs to have adequate resourcing coupled with a robust accountability mechanism; see African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*, above footnote 570, at pp. 38-40.

[595] Inter-ministerial or inter-departmental monitoring and supervision is a challenge even among MoHCDGC's own departments. Capacity to carry out such functions in non-governmental child welfare institutions is severely limited. See SOS Children's Villages Tanzania, *A Snapshot of Alternative Care Arrangements in Tanzania*, above footnote 555, at p. 5; and African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*, above footnote 570, at pp. 25-33 and 44-50.

[596] SOS Children's Villages Tanzania, *A Snapshot of Alternative Care Arrangements in Tanzania*, above footnote 555, at p. 7. It was found, out of 294 institutions providing alternative care to children, that 97 were registered and 188 were unregistered. During field research in January-March 2018 and 2019, social welfare officers reported progress in identifying institutions operating without licences. As a result of the exercise, in Arusha for instance, about 15 children's homes were found to be operating without licences.

[597] Section 5 of UN General Assembly, "Guidelines for the Alternative Care of Children".

[598] Article 20 (1) and (2) of the UNCRC, 1989; Article 25 (1) and (2) (a) of the ACRWC, 1990 and section 5 of the UN Guidelines for the Alternative Care of Children, 2010.

[599] Wanitzek, "Child Adoption and Foster Care in the Context of Legal Pluralism: Case Studies from Ghana", above footnote 18 at p. 226; for further discussion on differences between 'family environment' and 'parental care', see Jini L. Roby, *Children in Informal Alternative Care*: *A Discussion Paper* (New York, 2011), at p. 9.

2010 do not define parental care. However, under sections 29(a), (b) and 30(b) defining children without parental care, the Guidelines narrowly construe parental care as care provided by a child's parents, either natural or adoptive.[600] In the Tanzanian context, because the law perceives parental care in a broader sense, a child deprived of a family environment or parental care refers to a child without adequate care by any competent person. Section 7(3) of the Law of the Child Act, 2009 establishes the right to alternative care for such a child pursuant to a determination by a competent authority or court of law.

Alternative care takes different forms. The measures proposed under Article 20(3) of the UNCRC, 1989 include "*inter alia"* foster placement, *kafala* under Islamic law, adoption, and placement in suitable child care institutions. The ACRWC, 1990 under Article 25(2) (a) prioritises alternative family care, including, "among others", placement in foster care or suitable institutions. The provisions of both Conventions use phrases that indicate they have not exhausted the list of possible care arrangements. While considering alternative care solutions, they both require that proper regard be paid to the desirability of continuity in a child's upbringing and the child's ethnic, religious, cultural and linguistic background.[601] This standard, teamed with the inclusion of the Islamic *kafala*, cultural background considerations, and the phrase *inter alia*, demonstrate that the treaties do not take cognisance of only statutory forms of alternative care but also those under customary and religious laws. This is evident under the UN Guidelines, which specify forms of alternative care as formal and informal.[602] The Law of the Child Act, 2009 also recognises both formal and traditional arrangements for alternative care of children.[603]

The process of placing a child in alternative care depends on the child's needs and available care arrangements. Competent public or private bodies organise placement in collaboration with public or private caregivers.[604] Prior to placement, the principles and standards of alternative care must be applied to determine whether the child should be placed in care and in which care setting.[605] The UN Guidelines, 2010 set up three pillars on which alternative

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[600] Wanitzek, "Child Adoption and Foster Care in the Context of Legal Pluralism: Case Studies from Ghana", above footnote 18 at p. 228.

[601] Articles 20 (3), UNCRC, 1989 and 25(3) ACRWC, 1990.

[602] Section 29 (b) (i) and (ii) of the UN Guidelines for the Alternative Care of Children, 2010. The Guidelines include kinship- or community-based care on the informal side, and foster care, adoption, other family-based care measures, residential care, and supervised independent living arrangements on the formal side, as formulated in section 29(c) (i) – (v).

[603] Section 9(3) and (4) of the Law of the Child Act, 2009.

[604] Section 29(d) (i) and (ii) of the UN Guidelines for the Alternative Care of Children, 2010 uses the term 'agencies' for the organisers and 'facilities' for the care providers.

[605] Articles 20 and 21 of UNCRC, 1989; Articles 24 and 25 of the ACRWC, 1990 and Part II, sections 3-26 of the UN Guidelines for the Alternative Care of Children, 2010.

child care should rest: the principles of necessity, suitability, and the child's best interests. Other general principles are also named to govern alternative care practice. It is significant that these principles and standards do not apply directly to informal alternative care. For this reason, section 27 of the UN Guidelines, 2010 sets the scope of the guidelines as limited to formal care with a caveat that they may apply to informal care where indicated (for instance, under sections 56 and 76-79).

In order to capture a picture of the practice of care for children deprived of parental care in Tanzania, alternative care forms, principles and placement laws and procedures are discussed below. The UN Guidelines are used as a model to guide the discussion.

3.4.1 Forms of Alternative Care

Alternative child care can be formal or informal. Care is formal if it is provided in a family environment as ordered by a competent administrative or judicial authority or in a residential environment provided by a public or private facility, whether or not resulting from administrative or judicial action.[606] In other words, all placements with a state-recognised caregiver are formal. Once the placement is an outcome of administrative or judicial action, even in kinship care, then it is formal.[607] However, placements in residential facilities are formal, regardless of whether they are by order of a competent authority or by direct request of a parent or guardian. Under sections 18(6) and 133 of the Law of the Child Act, 2009, all residential facilities must be approved and licensed before operating; hence they are state-recognised and regulated.[608] Formal care provision and regulation is under state law. In Tanzania, the Law of the Child Act, 2009 and Regulations under it are the applicable law.

Informal care is a private arrangement for the care of a child in a family setting by a relative, close friend of the family or any other person in their individual capacity, not ordered by any administrative, judicial, or accredited body.[609] Provision of informal care is usually open-ended. The arrangement may be at the initiative of the child, his or her parents or any other person. In many countries globally, and especially in Africa, most children without the care of their parents are informally cared for by their relatives, family friends, neighbours, or

[606] Section 29(b) (ii) of the UN Guidelines for the Alternative Care of Children, 2010.

[607] Section 29(c) (i) of the UN Guidelines for the Alternative Care of Children, 2010 defines kinship care as a formal or informal care measure. The Law of the Child Act, 2009 under section 18(3) (d) lists placement with relatives as a formal care measure.

[608] Cantwell, Nigel; Davidson, Jennifer; Elsley, Susan; Milligan, Ian; and Quinn, Neil *Moving forward*: *Implementing the 'Guidelines for the alternative care of children'* (Glasgow: Centre for Excellence for Looked After Children in Scotland [CELCIS], 2012), at p. 32.

[609] Section 29(b) (i) of the UN Guidelines for the Alternative Care of Children, 2010.

members of the community.[610] Informal care is regulated mainly by customary law. For instance, in Tanzania, the 1963 Local Customary Law (Declaration) (No. 4) Order under its first schedule provides directions for the guardianship of children without parental care within the extended family or the lineage.[611]

Alternative care can be family-based or residential. According to the wording of Article 20(3) of the UNCRC and Article 25(2) (a) of the ACRWC, family-based arrangements such as foster care, Islamic *kafala*, and adoption should be given priority over residential arrangements. Regulation 3(3) (a) of Tanzania's Child Protection Regulations, 2014 states that placement should be family-based rather than institutional. It means that placement in an alternative family is preferable to placement in a residential facility. The UN Guidelines, 2010 expanded the list of alternative care measures under the treaties by incorporating other measures, including informal ones, which are largely family-based. The Moving Forward Handbook categorises the alternative care measures in two main groups: placement in an existing family and placement in residential care.[612] Kinship care, foster care, and other family-based care measures such as care by a fit person or family as practised in Tanzania (section 18(3) (b), Law of the Child Act, 2009) belong to the first category. In the second category, there is family-like care, where children in a residential facility are grouped into households under a caregiver who acts as their parent. In Tanzania, SOS Children's Village and Kijiji cha Furaha in Dar es Salaam provide an example of family-like care.[613] Other examples are large-scale group residential care common in many residential facilities and, lastly, supervised independent living arrangements typical for those transiting from a care setting to independent living in the community.

Alternative care can also be permanent or temporary. Children need stability. The requirement to consider the desirability of continuity in a child's upbringing and the child's ethnic, religious, cultural and linguistic background when selecting a suitable alternative care measure is based on this need. On this ground, permanent alternative care solutions are preferable to temporary arrangements. For instance, sections 2(a), (b) and 12 of the UN Guidelines, 2010 advocate for permanency-oriented alternative care solutions. The term permanency under the Guidelines refers not to perpetuity but rather to the stable nature of the

[610] Section 18 of the UN Guidelines for the Alternative Care of Children, 2010.
[611] Local Customary (Declaration) (No. 4) Order, 1963 (GN No. 436 of 1963).
[612] Cantwell *et al.*, *Moving forward*, above footnote 608, at p. 33.
[613] Structure of alternative care provision observed during field research in Tanzania, January-March 2018 and 2019.

care setting.[614] Section 60 emphasises a stable environment, whether the child is reintegrated in his or her family or placed in family-based or residential care. According to section 2(b) of the Guidelines, a child should be in temporary care only when permanent solutions are being sought, are not possible, or are not in the child's best interest. Tanzania's Child Protection Regulations, 2014 under Regulation 3(3) (b) have it as a general principle that placement of a child should be permanent rather than temporary. Of course, there are exceptions depending on the circumstances of each case and on the consideration of other principles and standards of alternative care. Alternative care measures perceived as permanent are generally family-based, such as adoption, *kafala* and sometimes kinship care. However, foster care placement, although family-based, is not regarded as permanent. It ranges from short-term to long-term care, which concludes when a child attains the age of majority.[615] Residential care arrangements are temporary and are supposed to be measures of last resort.[616]

3.4.2 Principles of Alternative Child Care

The 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children laid down alternative care principles for national and international placement.[617] The UNCRC (and the ACRWC), together with the 2010 UN Guidelines on the Alternative Care of Children, cement those principles. These instruments agree that family is the natural environment for the care and protection of children, and that the top priority is for all children to remain in the care of their parents.[618] Also, no child should remain without care and protection whenever parental care is unavailable or inadequate.[619] In such an occurrence, care by relatives, a substitute family or, if necessary, an institution should be the next care options considered, in that order.[620]

A body of pre-set principles must guide alternative care placement considerations. This study groups such principles in two categories: fundamental and general principles. Fundamental because they go to the core of the decision whether a child should be placed in alternative care or not. And general because they act as criteria to determine compliance with the fundamental principles. Determining whether care is genuinely needed (necessity principle), is provided

[614] Cantwell *et al*., *Moving forward*, above footnote 608 at p. 72.
[615] Section 17 and 18(7) and (8) of the Foster Care Placement Regulations.
[616] Regulation 3(c) of Children Homes Regulations sets as a general principle that care in children's homes should be temporary and a measure of last resort.
[617] Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption (3 December 1986).
[618] Ibid., Article 3, and sections 2(a) and 3 of the UN General Assembly, "Guidelines for the Alternative Care of Children" (resolution adopted by the General Assembly, 24 February 2010, A/RES/64/142)
[619] Section 19 of the UN General Assembly, "Guidelines for the Alternative Care of Children".
[620] Article 4 of the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption (3 December 1986).

appropriately (suitability principle), and is in the child's best interest (best interests principle), are the fundamental principles. Comparing the cardinal principles and the other principles and rights under the UNCRC and ACRWC can explain the distinction between fundamental and general principles. The general principles build on the framework of the fundamental principles.

3.4.2.1 Necessity Principle

A child should only be placed in alternative care when there is an absolute undeniable need to do so. The UN Guidelines under section 14 rule that removing a child from his or her family is a measure of last resort. Section 15 confirms that removal should be on extreme grounds only, poverty and its direct consequences notwithstanding. The Handbook interpreting the Guidelines lays down three main action points to operationalise this principle.[621] The points are extracted from sections 32-52 of the UN Guidelines devoted to providing legislative, policy and practical suggestions to ensure cohesion of the family and prevention of the need for alternative care. According to the Guidelines, these suggestions are the following:

First, there are preventive measures against situations and conditions that make a child need alternative care. Preventive action can be taken to avoid or combat a wide range of circumstances, so that the child can remain in his or her family's care. The Handbook lists the following:

> "…poverty, inadequate housing, lack of access to effective health, education and social welfare services, HIV/AIDS or other serious illness, substance abuse, violence, imprisonment and displacement, as well as birth to an unmarried mother and discrimination on the basis of ethnicity, religion, gender and disability."[622]

It refers to this as the primary level of prevention where the state must ensure the general public's access to essential services, social justice, and protection of their rights.[623] Prevention is summed up under sections 32-38 of the Guidelines, which encourage states to address select policy issues and implement initiatives that support and strengthen families to promote parental care.

Second, there are gatekeeping mechanisms that ensure children placed in alternative care are only those who cannot remain in the care of their parents or within the extended family and community. Gatekeepers include trained and qualified professionals working for competent bodies or authorities (such as judicial bodies) concerned with placement, including public and private care agencies. Gatekeeping measures are relevant to children at risk of being

[621] Cantwell *et al.*, *Moving forward*, above footnote 608, at p. 22.
[622] *Ibid.*, at p. 50.
[623] *Ibid.*, at pp. 50-53.

abandoned, relinquished, or removed from parental care. Sections 39-48 of the Guidelines and the secondary level of prevention under the Handbook provide for this action point.[624] To begin with, according to section 34 of the Guidelines, families that experience difficulties in caring for their children should receive support specific to their challenges. This includes support to adolescent parents according to sections 36 and 41 of the Guidelines. Next, for children with the impending risk of being abandoned or relinquished, social support, including counselling, should be given to their parents so they can continue caring for their children.[625] When the children cannot remain with their parents, informal alternatives such as placement with relatives, should be sought. Public and private care agencies must not receive children without inquiry; they must refer parents to other appropriate services before placement. Lastly, in the case that removal from parental care cannot be avoided, it should be done in response to a professional assessment and subject to judicial review when parents object.[626] In extreme cases, such as where a child's sole caregiver is deprived of his or her liberty, the Guidelines under section 48 propose alternative sentencing to detention in custody.[627]

Third, regular reviews of alternative care placements must be conducted. The Handbook terms this action point as tertiary prevention because it comes after the fact.[628] It involves reintegrating a child in alternative care into his or her family at an appropriate time and under appropriate conditions. From the beginning, the Guidelines under sections 2(a) and 3 require family reintegration as the ultimate end of the placement. Sections 14 and 15 recommend regular reviews of removal decisions. In addition, sections 49-52 of the Guidelines propose professional assessment of reintegration possibilities and how to do this with regard to the child's best interests.[629] Reintegration, however, is not simply returning home. It is a gradual and supervised process that requires follow-up in consideration of the reasons for the separation and the child's age, needs and evolving capacities.[630] Therefore, this action point prevents a child from unnecessarily remaining in alternative care while keeping the child's well-being in sight.

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[624] *Ibid.*, at pp. 53-61.
[625] Sections 44 and 45 of the UN General Assembly, "Guidelines for the Alternative Care of Children".
[626] Ibid., sections 39, 40 and 47.
[627] For policy and practical suggestions, see Cantwell *et al*, *Moving forward*, above footnote 608, under Focus 6 at pp. 60-61.
[628] *Ibid.*, at pp. 62-65.
[629] Family reintegration is reiterated in other sections of the UN General Assembly, "Guidelines for the Alternative Care of Children" such as under section 60, 123, and 166-167.
[630] Ibid., section 52.

3.4.2.2 Suitability Principle

After determining that a child needs alternative care, what follows is yet another determination in respect of an appropriate placement. Provision of care must be in a suitable manner. To ensure this, the Handbook sets two action points to check the suitability of the placement.[631] The points are drawn from, among others, sections 57-68 of the Guidelines providing for the determination of the most appropriate form of care. Thus, alternative care placement is only suitable if:

First, all care settings meet general minimum standards. Care providers in both family-based and residential care settings must meet a set of criteria prior to placement. The Guidelines recommend minimum standards for alternative care settings in various sections from which states could develop the criteria. The standards pertain, for instance, to conditions of care, staffing, funding, child protection and access to basic services.[632] To ensure compliance, there must be a mechanism through which care settings are assessed based on the criteria and remain subject to regular inspection and monitoring.[633]

Second, the proposed care setting meets the needs of the child. This action point involves matching an individual child with the most appropriate care setting depending on his or her needs. It requires two things: a range of available care options, so there is a real choice according to sections 53-54 of the Guidelines, and an established systematic procedure for determining the most suitable option according to section 57 of the Guidelines.

A range of options allows meticulous assessment to determine the most suitable care setting for a child, and guards against frequent changes of care setting, which are discouraged under section 60 of the Guidelines. It provides for a range of family-based, family-like, and community-based care options, which take precedence over residential care according to sections 53 and 54 of the Guidelines. Nevertheless, it also includes residential care which, according to sections 21 and 23 of the Guidelines, may complement the other options and in individual cases be the "appropriate, necessary and constructive" option.

In determining suitable placement, there must be a clear purpose to find the most appropriate care setting for the child and permanency in due course, based on the short-term and long-term view.[634] Determination of the most suitable option combines preventive gatekeeping under the necessity principle with reactive gatekeeping under the suitability principle. Thus,

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[631] Cantwell *et al*., *Moving forward*, above footnote 608 at p. 22.

[632] UN General Assembly, "Guidelines for the Alternative Care of Children" under sections 80-100; 105-117; and 123-127.

[633] Inspection and monitoring are provided for under sections 128-130 of the Guidelines.

[634] Care planning should begin way before placement so as to determine how a care setting is most suitable in the short and long-term as suggested under section 61 of the Guidelines.

gatekeeping generally involves determining whether a child needs alternative care, efforts to retain the child in his or her family environment, and when not possible, finding the care setting that is most responsive to the child's needs.[635] For the determination process, the Guidelines under sections 57, 64 and 65 recommend rigorous action by a team of qualified professionals guided by established judicial and administrative procedures in consultation with the child, his or her parents or legal guardians or other significant persons. Again, continuity in a child's upbringing is a robust agenda in determining the most suitable care option for a child as per sections 58 and 62 of the Guidelines. Regular reviews, every three months as suggested by section 67 of the Guidelines, form part and parcel of the never-ending determination of placement suitability and working towards the permanency goal.[636] Of course, the best interests of the child are central to the whole determination process.

3.4.2.3 The Best Interests of the Child Principle

The third of the fundamental principles of alternative care and a pillar of the 2010 UN Guidelines is the best interest of the child principle.[637] Article 3(1) of the UNCRC requires public and private social welfare institutions, courts of law, administrative authorities and legislative bodies, whenever making decisions affecting the child, to take as a primary consideration the child's best interest. The principle establishes three co-dependent requirements.[638] One, whenever involved, the decision-making authorities must consider the child's best interests. Two, while the child's interests are the primary consideration, the rights and interests of other persons involved must also be considered. And three, consideration of the child's best interests is one right among others, so that the final decision must be compliant with the other rights of the child.

In decisions relating to alternative care such as family separation under UNCRC Articles 9(1), 20(1), and child adoption under Article 21, the child's best interests become the absolute determiner. This means that, while considering removing a child from his or her family environment or when deciding for adoption as the most suitable care setting, the best interests of the child take precedence over the interests of all other involved persons. However, the responsibility to determine the child's best interests and the requirement to comply with other rights cannot be compromised.

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[635] Cantwell *et al*., *Moving forward*, above footnote 608 at p. 67-70.

[636] Sections 49, 59, 65 and 68 of the UN General Assembly, "Guidelines for the Alternative Care of Children" require regular reviews to follow set procedures and to always emphasise preparation in case of family reintegration.

[637] Cantwell *et al*., *Moving forward*, above footnote 608, at pp. 18 and 24-29, lists taking into account the best interest of the child as a pillar of the Guidelines.

[638] *Ibid*., at p. 24. Here the three requirements are explained.

The criteria for best interests determination (BID) are not a component of Article 3 of the UNCRC. The drafters left it open to allow for flexibility of determination depending on the circumstances of each case. Nevertheless, the Committee on the Rights of the Child and the UN High Commissioner for Refugees have developed guidelines for determining the child's best interests.[639] Specific to the alternative care context, the Handbook interpreting the UN Guidelines lists seven criteria upon which BID should be based.[640] Considering the seven points, it is clear that the principle of the child's best interests underlies all principles of alternative care, including necessity and suitability, and determines all actions regarding placement.[641] In Tanzania's context, the best interests of the child principle is stated under the Law of the Child Act, 2009 section 4(2) and reiterated under regulation 3 of the Adoption of Children Regulations, 2012, regulation 3(1) (a) of the Child Protection Regulations, 2014 and regulation 3(f) of the Children's Homes Regulations, 2012.

The best interest of the child principle and its application generally and specifically in alternative care, particularly child adoption, is discussed in detail in chapter five of this thesis.

3.4.2.4 General Principles

The principles guiding the provision of alternative care are based on, among others, children's rights as recognised under the UNCRC and the ACRWC. The UN Guidelines, 2010, based on the UNCRC, set general principles and perspectives of alternative child care in sections 3-26. The Handbook, which interprets the Guidelines, discusses the general principles in Chapter II.[642] Borrowing from the framework of the Handbook, this study groups the principles and perspectives into three: basic and overarching standards, primary policy orientations, and state responses. This part lists the principles and standards established under the UN Guidelines and Tanzania's Law of the Child Act and its Regulations without going into a detailed discussion of each one of them.

3.4.2.4.1 Basic and Overarching Standards

This category includes standards that determine how alternative care services are structured and provided. They consist of approaches, the summation of which ensure compliance with

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[639] Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (CRC/C/GC/14 adopted by the Committee on the Rights of the Child at its sixty-second session (14 January - 1 February 2013)) (2013); together with UN High Commissioner for Refugees, "Guidelines on Determining the Best Interests of the Child", https://www.refworld.org/docid/48480c342.html (May 2008).

[640] Cantwell *et al*., *Moving forward,* above footnote 608 at p. 25.

[641] This is apparent in sections 2(b), 6-7, 14, 17-18, 21,44, 48-49, 56-57, 64-65, 67, 75, 81, 94, 98-99, 101-104, 146, 150-151, 155 and 161 of the UN General Assembly, "Guidelines for the Alternative Care of Children".

[642] A discussion on the general principles and perspectives set by the 2010 UN Guidelines is available in Cantwell *et al*., *Moving forward*, above footnote 608 at pp. 35-48.

the fundamental principles of necessity, suitability, and the child's best interests. They include the following:

A child should remain in or return to his or her family environment provided it offers adequate care and protection. Therefore, the family should be given protection and assistance to ensure that it discharges its caregiving responsibilities in the community. This standard is based on preamble statement number 5 of the UNCRC and number 4 of the ACRWC, Article 3 of the 1986 UN Declaration, sections 3 and 32-52 of the UN Guidelines and regulation 3(a) of Tanzania's Children Homes Regulations, 2012.

If a child cannot remain in his or her family, alternative placement should be family-based rather than institutional. This standard is stated under Article 20(3) of the UNCRC and 25(2) (a) of the ACRWC, sections 2(a) and 53 of the UN Guidelines, regulation 3(3) (a) of Tanzania's Child Protection Regulations, 2014 and 3(d) of the Children's Homes Regulations, 2012.

Placement should be permanent rather than temporary. Placement should ensure care in a safe, stable and supportive environment so that a child puts down roots and develops a feeling of belonging. Frequent placement changes must be avoided. Sections 2(a) and (b), 12 and 60 of the UN Guidelines and regulation 3(3) (b) of the Child Protection Regulations, 2014 lay down this standard.

Siblings should not be separated by alternative care placement unless it is in their best interest. Where separation is unavoidable, contact should be maintained among siblings unless their wishes or interests dictate otherwise. Sections 17, 22 and 62 of the UN Guidelines and regulation 3(e) of the Adoption of Children Regulations, 2012, 3(3) (c) of the Child Protection Regulations, 2014 and 3(k) of the Children Homes Regulations, 2012 provide for this principle.

Placement in residential care should be temporary rather than permanent, and a measure of last resort used only when determined most suitable for the child's needs. Article 20(3) of the UNCRC uses the words 'if necessary' in formulating this principle. It is also reiterated under sections 21 and 23 of the UN Guidelines advocating for de-institutionalising the care system and regulation 3(c) of the Children Homes Regulations, 2012.

Alternative care must be available to all children in need without discrimination. For instance, children living with disabilities or with other special needs are also entitled to special care, treatment, and facilities for their rehabilitation and equal opportunities in education and training to develop their maximum potential whenever possible. Such provision is only possible in a caring environment, if not in their own family, then in an alternative one. Article

2 of the UNCRC and 3 of the ACRWC, sections 9(b), 10, 34(b), 117 and 132 of the UN Guidelines and regulation 3(j) of the Children Homes Regulations, 2012 stipulate the principle of non-discrimination.

Mandated authorities shall always ascertain and duly consider a child's wishes and feelings as far as practicable depending on a child's evolving capacities. This principle is based on children's right to opinion and participation under Article 12 of the UNCRC and 7 of the ACRWC, reiterated in sections 6, 7, 40, 49, 57, 64, 65, 67, 94, 98, 99, 104 and 132 of the UN Guidelines, and regulation 3(a) and (b), of the Adoption of Children Regulations 2012, 3(1) (b) and (c) of the Child Protection Regulations, 2014 and 3(b) of the Children Homes Regulations, 2012.

Whether preventive or reactive, all decisions and actions to strengthen families or provide suitable alternative care must be made on a case-by-case basis. Only when authorities consider the circumstances of each case can specifically tailored solutions that are in the best interests of the child concerned be reached. Sections 6 and 57 of the UN Guidelines stipulate this principle.

In determining the most suitable placement for any child, due regard should be paid to the desirability of continuity in a child's upbringing and the child's ethnic, religious and cultural background. This principle means that placement should be national, and close to a child's familiar locality, rather than international. It is set under Article 20(3) of the UNCRC and 25(3) of the ACRWC, Article 21(b) of the UNCRC and 24(b) of the ACRWC requiring inter-country adoption to be a measure of last resort, sections 58 and 62 of the UN Guidelines, and regulation 3(c) of the Adoption of Children Regulations, 2012, 3(3) (d) of the Child Protection Regulations, 2014 and 3(g) of the Children Homes Regulations, 2012.

All competent bodies, public and private, engaged in decision-making relating to alternative child care should act expeditiously in the process. Any delays in decisions regarding the child's future may prejudice the welfare of the child. Sections 43 and 58 of the UN Guidelines and regulation 3(d) of the Adoption of Children Regulations, 2012, 3(3) (e) of the Child Protection Regulations, 2014 and 3(h) of the Children Homes, 2012 provide for this principle.

3.4.2.4.2 Primary Policy Orientations

The main objective of the UN Guidelines 2010 is to set forth desirable orientations for policy and practice meant for application in all sectors that deal with issues of alternative child care directly or indirectly.[643] The Handbook, which seeks to put the Guidelines into practice,

[643] Stated under section 2, and reflected throughout the text of the UN General Assembly, "Guidelines for the Alternative Care of Children".

further digests its provisions and suggests several implications for policy-making in alternative care. This part does not discuss all policy issues raised in the two documents but concentrates on only three as follows:

Poverty. The former chairperson of the UN Committee on the Rights of the Child acknowledged that in most countries children are placed in alternative care mainly because of poverty.[644] Research has shown that in most countries, regardless of their economic affluence, children are relinquished by their parents or removed from parental care due to the inability of the parents to meet their material needs.[645] The African Child Policy Forum, for instance, found that poverty is a criterion for adoptability in most African countries.[646] For this reason, the Committee on the Rights of the Child under section 15 of the Guidelines directs that poverty should never be the sole justification for a child's removal from parental care, placement in alternative care, or denial of family reintegration. Instead, poverty, whether financial or material, should signify that a family needs support and strengthening. Tanzania's Child Protection Regulations, 2014 under regulation 42(7) clearly state that a child shall not be placed in care where the likelihood of suffering harm is solely due to poverty. In collaboration with projects such as Tanzania Social Action Fund (TASAF), the Community Development Department coordinates efforts to support families financially and materially in Tanzania.[647] This practice responds to the policy laid down in national plans such as NSGPR I and II, NCPA I and II, and the current NPA-VAWC.

Corruption. As a matter of principle, section 20 of the Guidelines requires that placing a child in alternative care should never be motivated by the care providers' political, religious or economic goals. A child should be placed in alternative care purely because there is an unavoidable need to do so. The Handbook gives an example of child 'harvesting' as being tempting for owners of residential facilities which are privately funded depending on the number of children they host. Policies that seek to crush corrupt practices in child care in Tanzania include the current movement for the de-institutionalisation of child care.[648] Reports of corrupt practices in child adoption by social welfare officers colluding with managers of

[644] Jean Zermatten in the foreword in Cantwell *et al*., *Moving forward*, above footnote 608, at p. 3.
[645] Cantwell *et al*., *Moving forward*, above footnote 608, at p. 38.
[646] African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption* (Addis Ababa, 2012), at pp. 20-21. At the time, only Guatemala had as a principle in their law that poverty is not sufficient ground to place a child in alternative care.
[647] Interview with Community Development Officers 1 and 2 at Bunju Ward, Kinondoni Dar es Salaam, on 04.01.2019.
[648] Interview with Child Protection Specialist, UNICEF, in Dar es Salaam on 21.02.2019. The specialist indicated that de-institutionalisation of alternative child care was a leading agenda of UNICEF Tanzania at that time.

residential facilities in Arusha, for instance, justify the decision to close down facilities that seek to profit from the plight of children without parental care.[649]

De-institutionalisation. The Guidelines under sections 21 and 23 recognise residential care as a necessary and complementary component in the range of alternative care options. However, placing a child in a residential facility should be because it is in the child's best interests and not because of time or resource constraints. Due to the potentially damaging and long-term impacts to the child of receiving impersonal and inadequate care in residential care facilities, termed as institutions under section 23 of the Guidelines, there is a need to de-institutionalise the care system. Although not articulated as an outright ban on institutional care, the Guidelines' strategy is to progressively eliminate care in institutions. Initiatives or permission to establish a new residential facility should take this strategy into account. The Handbook under Focus 3 provides action plans on how to de-institutionalise appropriately.[650] Tanzania is also currently working towards fulfilling this policy by attempting to bolster traditional care practices, placement with fit persons, and reviewing residential facilities to close down those that operate beyond the ambit of the law.[651]

3.4.2.4.3 State Responses

Implementation of alternative care laws and policies require the will of the state. All pillars of the state, administrative, legislative, and judicial, must support proper alternative care practice. Recognising this, the Guidelines recommend to the state measures to promote the application of its provisions. Sections 24-26 set three fundamental principles to promote states' response to ensure quality alternative care provision. The principles are as follows:

Cooperation among governmental entities. States have the responsibility to use their maximum potential, human and financial resources to ensure the timely, optimal and progressive provision of alternative care throughout their territories. To achieve this, cooperation is necessary among all government bodies, whether directly or indirectly concerned with alternative care prevention or provision. Efforts to secure child and family welfare must be mainstreamed and coordinated in the government ministries, agencies, and departments. Support from development partners requires the same cooperative framework in order to make an actual difference. The ACPF in 2016, while researching on implementation

[649] Refer to the discussion in part 6.4.6 of this thesis.

[650] Cantwell *et al*., *Moving forward*, above footnote 608 at pp. 43-46.

[651] Information obtained from field research in Tanzania, January-March 2019. UNICEF Tanzania in collaboration with the MoHCDGEC carrried out a country-wide situational analysis in 2019 to assess alternative care practice with the intention of spiking up efforts to de-institutionalise and resort more to family-based care measures such as kinship care and placement with fit persons or foster parents.

of child rights in Tanzania, found that cooperation and coordination among governmental authorities and other stakeholders need to be vitalised.[652]

Provision of a specifically tailored policy framework for alternative care. Section 26 of the Guidelines encourages states to draft country- or profession-specific policy statements that will build upon and make the Guidelines' policy perspectives relevant to their national or field realities. In doing so, it urges quality improvement rather than lowering of standards. The Child Protection Regulations of 2014 respond to this call. Under Regulation 5, for instance, the Regulations require the Commissioner for Social Welfare to develop standards to regulate the conduct of agencies, departments, approved residential homes or institutions, non-governmental organisations and individuals working with children suffering or at risk of suffering harm.

Seeking international assistance. In line with Article 4 of the UNCRC, section 25 of the Guidelines gives states the responsibility to determine whether international assistance is needed and seek it in implementing the Guidelines. Requested international assistance must be consistent with the provisions of the Guidelines. This will avoid the imposition of alternative care solutions from abroad that are not in line with state policy or the situation on the ground.[653]

3.5 Procedure to Enter into Formal Care in Tanzania

The Law of the Child Act, 2009 and Regulations under it outline procedures for placing a child in alternative care. The Child Protection Regulations, 2014, provide the child protection procedure before placement. It covers the whole process from receiving and screening referrals, investigation, needs assessment and placement authorisation. From there, placement-specific regulations take over and provide the requisite procedure for placing a child with a fit person or family, foster carer, adopter, or residential facility.

It is significant to note that Child Protection Regulations were drafted two years after the Regulations for foster care placement, adoption and children's homes came into force in 2012. There have been no efforts to synchronise the provisions of the Regulations. As a result, there are some procedural discrepancies between the letter of the law and practice when it comes to alternative care placement. For this reason, the whole procedure under the Child Protection Regulations is outlined in this part to provide a basis for distinction from practice. Also, this

[652] African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*, above footnote 570 at pp. 51-53.

[653] Cantwell *et al*., *Moving forward*, above footnote 608, at p. 46. International assistance should not pressure states to condone unwarranted solutions such as institutional care or inter-country adoption.

part explaining the procedure before placement should be read together with the next part on types of placements to identify and understand any procedural discrepancies.

3.5.1 Child Protection Referrals

Anyone who knows of a child suffering or at risk of suffering harm, a child who is lost, abandoned, or excluded from home, a child who is in exploitative labour or a child whose parent, guardian, relative or custodian is refusing or neglecting to provide the child's basic needs, should report this to the authorities.[654] The Child Protection Regulations refer to such communication as child protection referral. Section 95 (1) of the Law of the Child Act binds any community member with evidence or information of child rights infringement or neglect as stated above to report to the local government authorities in their area. Under section 95(6) of the Act, a person in contravention of this responsibility is liable to a fine of at least fifty thousand shillings or three months imprisonment or both. The Child Protection Regulations extend the community member's responsibility to any professional, staff member or volunteer working with or providing services to children or families. A member of the community may report orally (including by telephone) or in writing. However, in the case of a professional, staff member or volunteer, an oral report must be confirmed in writing and filed.

A member of the community is required to report to the local government authority in their area. Regulation 11(3) (a)-(g) of the Child Protection Regulations defines local government authority by inclusion. An intake social welfare officer is the first designated receiver of child protection referrals in the district.[655] Others are a ward or district social welfare officer, a ward, village or *mtaa* (street) executive officer, a member of the Most Vulnerable Children Committee (MVCC)[656], or a police officer of the area. Professional referrers are limited to reporting to intake or ward social welfare officers. When referrals are made to any of the officers listed other than the intake social welfare officer, the officers, according to regulations 11(4), (5), and 12(3), must, within 24 hours of receiving the referral, inform the intake social welfare officer about it. According to regulations 11(7) and 12(4), the identity of a community member referrer and the information about the child referred are confidential unless circumstances warrant disclosure upon authorisation.

[654] Regulations 11(1) (a) - (d) and 12(1) (a) - (d) of the Child Protection Regulations.
[655] An intake social welfare officer is defined under regulation 2 and is appointed by the Head of Social Welfare Department according to regulation 10 of the Child Protection Regulations.
[656] Defined under regulation 2 of the Child Protection Regulations as 'a subcommittee to the public and social welfare committees/social services committees at the City, Municipal, Town and District Councils and at the ward, mtaa or village levels'.

Regulation 13 provides for the processing of the referral. Once an intake social welfare officer receives a referral, the first step is to ascertain whether there has been a previous referral for the same child. The next step is to file the referral, which for a previously referred child involves re-opening his or her old file if it was already closed, and for a subsequently referred child opening a new hard copy file. In the presence of an electronic case management system, the information recorded in the hard copy file should also be stored electronically. Information in the file includes the date of the referral, details of the referrer including name and whether a community member or professional, the reported concern and basic details of the child such as name, age, address, name of parents, guardian or carer, siblings, school, or any child welfare service attended.

According to regulation 11(6), the intake social welfare officer should consider the received referral and, within 24 hours, determine whether there is cause for concern and whether the matter needs further investigation. If the intake social welfare officer reasonably believes there is no immediate risk of harm, he or she may request a ward social welfare officer to clarify with the referrer about the nature of the concerns and how they arose. The ward social welfare officer must contact the referrer by meeting, phone, or e-mail within 48 hours of being requested. Following that, within 24 hours of obtaining requested information from the referrer, the ward social welfare officer should report it to the intake social welfare officer. Based on the information received, the intake social welfare officer shall, within 24 hours, determine whether there is a cause for concern that warrants an investigation.

Feedback to the referrer is part and parcel of the procedure. Regulations 11(8) and 14(5) (a) require an intake social welfare officer, within 72 hours, to acknowledge receipt of information and assure the referrer that he or she will work on it. Also, when the decision is not to proceed with investigation of the received referral, regulation 12(8) requires feedback to the referrer within 24 hours. The officer must record the decision not to investigate in the child's hard copy file, and where there is no further action, the file should be closed.

During field research in Tanzania, it was found that para-social workers and community caseworkers are an essential connection between the community and social welfare departments in terms of relaying referrals.[657] In Bunju Ward, Kinondoni District, Dar es Salaam, a para-social worker explained that they make referrals and act as emergency care providers pending determination of a further cause of action.[658] According to the social worker, the main reason is that there are no emergency care centres in the ward, district or

[657] Interview with para-social worker, Bunju Ward, Kinondoni District, Dar es Salaam, on 16.01.2019.
[658] Interview with para-social worker, Bunju Ward, Kinondoni District, Dar es Salaam, on 16.01.2019.

even region for children in need of immediate care, such as children who have been violated, or who are lost or abandoned, or children excluded from home. The social welfare officer in charge of Bunju Ward, while affirming, said that responding to the referrals according to the timelines set under the Regulations is rarely possible due to constraints of time and resources that necessitate care at the homes of para-social workers and community caseworkers. Sometimes the procedure is considerably delayed resulting in the temporary placement of referred children in an approved residential facility pending determination of their situation.

3.5.2 Initial Investigation

Initial investigation is warranted when an intake social welfare officer has received a referral in accordance with regulation 14(1)(a) – (e) and has established that there is reasonable cause for concern. Although an intake social welfare officer may determine whether to investigate, it is the head of the district social welfare department who gives directions to undertake an initial investigation. The investigation is intended to determine whether intervention is justified to prevent a child from suffering or continuing to be at risk of suffering harm. The mandate to carry out an initial investigation lies with intake social welfare officers. When unavailable, the head of the social welfare department appoints another officer at the social welfare department or a ward social welfare officer to investigate. In the event of lack of capacity of the department or absence of a ward officer, a member of the Ward MVC Committee trained in conducting child protection investigations should investigate.

Where the evidence suggests that there is an immediate risk of harm, or this is determined according to section 96(2) of the Law of the Child Act, the initial investigation must be completed within 24 hours. In all other cases, initial investigation commences within 72 hours of the referral and concludes within seven days. However, when the information received constitutes or may constitute a criminal offence against the child, the intake social welfare officer should liaise with the police as early as possible within 24 hours of receiving the referral and carry out a joint investigation guided by Regulation 15(2).

Adhering to the principle of the child's right to opinion and participation, regulation 16 sets up standards for interviewing referred children. It emphasises the need for the interview to be conducted by or in the presence of a social welfare officer. Where a criminal offence is involved, the child should only be interviewed by a police officer professionally trained to interview children who have suffered or are at risk of suffering harm or who have witnessed or are victims of crime. The interview should not be in the presence of parents or any person suspected of abusing the child or colluding with such an abuser. In addition, where a child

does not speak the language of the interviewer, a cost-free interpreter should be provided. Also, because interviewing a child must be kept to a minimum, audio or video recording is recommended whenever practicable. Regulation 17 makes such unedited audio or video tapes of a child's interview admissible as evidence in court.

When determined necessary by a social welfare officer or jointly with the police, medical examination forms part of the initial investigation. Consent of the child's parents, guardian or carer is required. According to Regulation 20, if such parental consent is not forthcoming, then alternative consent by the child to medical examination and any necessary treatment will suffice. However, the child must be of sufficient age and maturity, a fact to be determined by the doctor responsible for the examination. According to section 95(3) (a) of the Law of the Child Act, in all cases where the parent, child or both refuse consent, the head of the social welfare department must seek a court order permitting the examination.[659] As stipulated by regulations 20(5) and 21(2), the court must hear such an application on the day the officer submits it. As an exception, the requirement of consent is waived when emergency treatment to prevent loss of life or permanent damage to the child is required.

Initial investigation cannot be undertaken without the participation of the child and his or her parent, guardian or carer. According to regulation 18, where a parent, guardian or carer is unwilling to participate or make the child available for investigation, a social welfare officer accompanied by a police officer may enter and search the premises where the child usually resides or is being kept, as per section 96(1) of the Law of the Child Act. If the officers do not find the child, regulation 19 requires the head of the social welfare department, on behalf of the local government authority, to file an emergency application for an interim care or supervision order and for a search and production order within it, in accordance with rule 111 of the Juvenile Court Rules.[660] If there is reasonable cause to believe that the parent, guardian or carer may remove the child from the premises he or she is believed to be present in, the application should be for an *exparte* search and production order according to rule 113 of the Juvenile Court Rules. Upon finding the child in either scenario, where there is reasonable cause to believe the child or any other child in the premises is suffering or is at risk of suffering harm or needs immediate care and protection, the child should be removed to a place of safety.

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[659] According to section 95(4) of the Law of the Child Act, 2009, the Primary Court is the court of first instance but in accordance with sections 97 and 98 of the Act, the court referred to here is the Juvenile Court.

[660] Law of the Child (Juvenile Court Procedure) Rules is erroneously cross-referenced under regulation 19 of the Child Protection Regulations, which may be due to the revocation of the Juvenile Court Rules, 2014 GN. No. 251 of 2014, which are replaced by the Rules of 2016.

3.5.3 Removal to a Place of Safety

In the course of an initial investigation, when a social welfare officer determines that a child is at immediate risk of suffering harm, he or she may, in the company of a police officer, remove the child to a place of safety for a period not exceeding seven days.[661] Regulation 2 of the Child Protection Regulations defines 'place of safety' as care of a child by a relative, fit person, foster parent, in a fit institution or any other place where the child can be safely accommodated awaiting the decision of the head of the social welfare department or the Juvenile Court regarding future care.[662] Any place of detention such as a police cell, retention home, approved school or prison does not constitute a place of safety. Regulation 22(5) includes accommodation in a hospital as a place of safety and mentions accommodation in a residential facility only as a matter of last resort. Regulation 22 is an improvement of section 96(4) of the Law of the Child Act, which has a shorter list of accommodation places and, according to the listing order, suggests placement in a residential facility as the first resort.

When the officers remove a child to a place of safety, his or her parent, guardian or carer must be informed of the whereabouts of the child. Also, they will be allowed contact as soon as practicable provided there is no risk of the child being harmed and that this in the child's best interests. A parent, guardian or carer shall not be allowed to remove a child from a place of safety whenever there is a reasonable belief that the child will be at immediate risk of suffering harm once removed. The local government authority shares parental rights and responsibilities for a child in a place of safety, and the parents' rights and responsibilities may be limited to a necessary extent. However, a parent or guardian retains the right to appeal to the Juvenile Court against both the child's removal to a place of safety and refusal to permit contact.

The Law of the Child Act and Child Protection Regulations set time limits regarding removal to, staying in and extending care in the place of safety. Regulation 22 requires the social welfare officer in charge to inform the head of the social welfare department about removing a child to a place of safety within 24 hours. Where a child is removed to a place of safety by a police officer in the absence of a social welfare officer, the police officer is required to inform the intake social welfare officer about the removal immediately. If not yet underway, the initial investigation should commence within 72 hours of receiving information on a child removed to a place of safety. A child's accommodation in a place of safety according to both

[661] Section 96(2) of the Law of the Child Act, 2009 read together with regulation 22(1) and (2) of the Child Protection Regulations.

[662] Reiterated under rule 3 of the Law of the Child (Juvenile Court Procedure) Rules.

the Act, section 96(2), and the Regulations, regulation 22(2), should not exceed seven days. For this reason, the Regulations require the social welfare officer and head of the social welfare department to consult about extending accommodation in the place of safety within 72 hours of the removal. Upon deciding to seek an extension, an application to the Juvenile Court should be made within five days from the first time a child is removed to a place of safety. This timeline in the Regulations alters the one set under the Act, section 96(3), which requires a social welfare officer to seek a court order for the child within fourteen days. Notification to the parent, guardian or carer of intention to apply for the extension must be made not later than on the day of application, unless they cannot be found and the requirement is waived.

When applying to extend accommodation in the place of safety, according to regulation 23(6), an application for a care order may be made simultaneously. Nevertheless, regulation 23(9) permits a social welfare officer to allow a child whose place of safety has been extended by the court to return to his or her parents, guardian or carer if it appears safe to do so.

Regulation 23(2) specifies that the child's best interests shall be the paramount consideration when deciding on whether to extend accommodation in the place of safety. As a rare provision, regulation 23(3) names five criteria for determining the child's best interests precisely for the purpose of extending accommodation in the place of safety. Such specification of criteria has the potential to make best interests determination systematic in practice.

3.5.4 Social Investigation

Once officers complete the initial investigation, they should place a written report in the child's file in accordance with regulation 14(6) of the Child Protection Regulations. Based on the investigation findings, the intake social welfare officer, in consultation with the head of the social welfare department, and a police officer where a crime is involved, shall decide regarding the referral. The officers can make three types of decision according to regulation 24(1). One, no further action is required; two, the family should be referred to the MVC Committee in the area for support; and three, there is reasonable cause for concern. The first two decisions can only be reached when there lacks any reasonable cause to believe the child or any other child in the household is suffering or is at risk of suffering harm. When officers reach such a decision, regulations 24(2), 25(1) and (2) of the Child Protection Regulations require them to give feedback to the referrer. The child's file should then be closed or, where a parent or relative is charged with a criminal offence, remain open until the conclusion of the

criminal case. The social welfare department must keep the closed file until the child attains 21 years of age.

When the officers find reasonable cause for concern, a social investigation according to regulation 26 is required. As regulation 25(4) (a) and (b) stipulates, the officers should notify the referrer that they are still investigating the referral and will inform him or her when a decision is made. A social investigation is intended to determine whether the child is suffering or is at risk of suffering harm and whether the parent, guardian or carer can promote the child's health and development and appropriately respond to the child's needs. It must be concluded within seven days. An intake social welfare officer in charge of the social investigation collects and analyses information from all sources, including a child of sufficient maturity, a parent, guardian or carer, professionals working with the child or family, medical examination results and existing records on the child.

Regulation 26(4) requires the intake social welfare officer in consultation with the head of the social welfare department, and the police where a crime is involved, to decide on the next step after completing a social investigation. They can make four types of decision. When there is no reasonable cause to believe the child or any other child in the household is suffering or at risk of suffering harm, no further action should be taken, or the family should be referred to the MVC Committee in the area for support. If there is reasonable cause to believe the child is suffering or is at risk of suffering harm, then the child should be referred to a child protection conference, and if the child is suffering harm or at immediate risk of suffering harm, then emergency action to safeguard the child is required. When emergency action is required, the child should be removed to a place of safety as per regulation 22, explained above.

3.5.5 Child Protection Conference

As regulation 27 of the Child Protection Regulations stipulates, when emergency action to safeguard a child is not required, but reference to a child protection conference is, according to regulation 26(4)(c), the intake social welfare officer should hand over the case to an assigned social welfare officer. Regulation 2 defines an assigned social welfare officer as a social welfare officer assigned to a child's case by the head of the social welfare department. The assigned officer is required to convene a child protection conference within ten days after completion of a social investigation.

A child protection conference aims to provide all professionals working with the child and the family with all relevant information regarding the case. The case is then reviewed and plans

are made to safeguard and promote the child's welfare.[663] As listed under regulation 27(4)(a)-(g), any person determined by the assigned officer to have a relevant contribution to make to the case may participate in the conference.[664] The deliberations of the conference revolve around the child's health, development and well-being and whether his or her parents, guardian or carer can promote these and ensure the child's safety. The conference may decide on the likelihood of the child suffering harm in the future and recommend action to safeguard the child, specifying its mode of execution and intended outcomes.

Regulations 30-34 provide in detail the rules and procedures of the child protection conference, chairing of the conference, professional discussion, minute-taking and dissemination and handling of conference documents. Regulation 35 covers the decision of the child protection conference. The chairperson of the conference and the participating professionals must decide whether a child is at continuing risk of suffering harm. According to regulation 35(2), the proof is on a balance of probabilities. Where there is not sufficient evidence to prove that a child is suffering harm, the conference may recommend that no further action be taken or the child be referred to an MVC Committee. Where the conference finds that the child is at continuing risk of suffering harm and that a child protection plan can safeguard the child's health and development, it should draft such a plan in accordance with regulation 36. However, where the conference concludes that a child protection plan is not adequate to safeguard the child against harm or impairment of his or her health and development, the case must be referred back to the head of the social welfare department for immediate action. While the Regulations do not define immediate action, regulation 2 declares "in need of immediate care and protection" to mean that a child is likely to suffer harm unless removed from the place where he or she is living. Therefore, immediate action may translate to emergency action, which involves removing the child to a place of safety as stipulated under regulation 26(5).

Some of the provisions under regulation 35 may be counterproductive. For instance, a parent, guardian or carer is required to consent to and comply with a child protection plan; otherwise, there will be an immediate referral for further action to safeguard the child. However, this is not the same as for a child referred to the MVC Committee, since regulation 35(4) specifies that refusal of the Committee's services shall not be sufficient cause to re-open the child's

[663] Regulation 29 of the Child Protection Regulations further explains the information required at the conference.
[664] Regulation 28 of the Child Protection Regulations provides for the involvement of the child, the parent, guardian or carer and relatives in the child protection conference.

case. Left alone, this child's case may progress to the point that the child needs immediate care and protection while a stricter provision could avoid it.

3.5.6 Child Protection Plan

According to regulation 36, a child protection plan aims to safeguard the child from further harm and promote his or her health and development while remaining in the family home with a parent, guardian, or carer. Another member of the family may also care for the child if the parents agree. The child protection conference drafts a child protection plan based on the findings of the social investigation. The plan must detail how the child is to be protected with the object of reducing the risk of harm and promoting the child's safety, health and welfare in the short and long term. The plan must also specify actions and responsibilities, including contact with professionals and relatives, as well as set timelines for those actions and progress reviews. The plan should consider the wishes and feelings of the child and views of the parent, guardian or carer to the extent that they are in the best interests of the child.

In consultation with the assigned officer, the head of the social welfare department should finalise the child protection plan submitted by the chairperson of the child protection conference within seven days of receipt. The duration of the plan should not exceed 12 months. Upon receiving a copy of the plan, the parent, guardian or carer must sign an agreement to its provisions. If the child is of sufficient age and maturity, the assigned officer should explain the plan to him or her and obtain an agreement to the plan recorded in writing. Professionals and services working with the child, regardless of participation in the conference, are also entitled to a copy of the plan. Lastly, the officers must register children subject to a child protection plan in the vulnerable children register, and they must remain registered, even when no longer subject to a plan, until they attain the age of 18 years.[665]

The law requires that the child protection plan be subjected to progress reviews, the dates of which must be shown in the plan. The first review must take place no later than 28 days after its commencement. Subsequent reviews shall be carried out every three months during the subsistence of the plan. The rules and procedures of the child protection conference, including the same chairperson, shall prevail during subsequent review conferences of the child protection plan. Regulation 37 sets out the aims of the review and matters requiring decision-making. The review will show whether the plan is adequate to safeguard the child, ensure that the plan is followed and recommend whether the plan should continue in the current form or

[665] An MVC Register should be established and kept by the head of social welfare department according to regulation 7(2)(i) of the Child Protection Regulations. However, no such register could be accessed during field research in Tanzania at the district social welfare offices visited.

be changed to meet the child's needs. The review conference may make recommendations to the head of the social welfare department, such as that the plan should continue as initially drafted, that it should be varied, that it is no longer necessary to safeguard the child, or that further intervention is required to safeguard the child.

In consultation with the assigned officer, the head of the social welfare department must act on every recommendation and must be guided at the same time by the child's best interests. The officers may accept, reject, vary, or seek further reconsideration on the recommendations of the review conference. If the plan is not sufficient to safeguard the child and further intervention is required, the head of the social welfare department shall order an additional social investigation to be undertaken and completed within seven days. Where necessary, according to regulation 37(19), the head, together with the assigned officer, may decide on further action to protect the child from harm and promote his or her health and development within 72 hours of receiving the social investigation report. The assigned officer shall communicate any plan changes to the parent, guardian, or carer. This regulation does not specify what further action entails.

3.5.7 Assistance and Accommodation

According to regulation 38(1) of the Child Protection Regulations, any child who presents or who is referred to the department as lost, abandoned, seeking refuge or who is without parental care for whatever reason needs care and protection. Section 94(5) of the Law of the Child Act and regulation 38(1) and (2) of the Child Protection Regulations make local government authorities responsible for assisting and accommodating such children. According to regulation 38(2) and (3), the local government authority in the area where the child ordinarily resides, or is found if the child has no fixed residence, has the immediate duty to assist any such child. However, if another local government authority has been responsible for the child, it should continue to do so. Section 94(6) requires local government authorities in collaboration with the police force to find the child's parents, guardians or relatives and return the child to his or her ordinary place of residence. Upon failure to do so, the authority should refer the child's case to a social welfare officer.

Regulation 38(4) says that the social welfare department should provide assistance and accommodation while an initial and social investigation regarding a child is taking place. The department may assist and accommodate the child within its own district or in another district,

depending on the availability of resources.[666] The Act and the Regulations do not define the phrase 'assistance and accommodation'. However, while regulation 2 of the Child Protection Regulations does not define the term assistance, it does define accommodation as meaning accommodation provided for a continuous period exceeding 24 hours. The definition does not shed much light on understanding what comprises assistance and accommodation. Although regulation 38 makes no explicit statement on the definition, an implication can be drawn under sub-regulation (1) which says that the authorities should provide accommodation because the child has no access to his or her home for reason of being lost, abandoned, excluded, run away or removed from such home. Therefore, assistance can be the summation of care and protection services the authorities provide to such children pending their return home or until they find another durable solution.[667] Assistance and accommodation respond to the duty placed on states under Article 20(1) of the UNCRC and Article 25(1) of the ACRWC, requiring states to provide special protection and assistance to children deprived of their family environment.

According to regulation 38(5), before a child is accommodated, the social welfare department must ascertain and give due consideration to the child's views and feelings regarding the provision of accommodation as far as this is practicable and consistent with the child's welfare.

The department shall also assume parental rights and responsibilities over the accommodated child until the child's parent, guardian or carer is found.[668] Once found, the child should be placed back in their care unless the child objects or a social welfare officer believes removal from the accommodation may cause the child to suffer harm. In such a scenario, the officer should refer the child's case to the head of the social welfare department, who, according to regulation 38(8), must determine within 72 hours whether further action to safeguard the child such as removal to a place of safety is necessary.[669]

Interviews with para-social workers and ward social welfare officers revealed no emergency centres that the social welfare department can use to accommodate children while other procedures are ongoing.[670] Hence children who are lost, abandoned, seeking refuge or without

[666] Regulation 41 of the Child Protection Regulations refers to the responsibility of the sending district regarding assistance and accommodation of a child transferred to another district.

[667] See regulations 58 and 59 of the Child Protection Regulations which outline the duties of local government authorities pertaining to children in their care.

[668] Regulation 60 of the Child Protection Regulations regulates the transfer and extent of shared parental rights and responsibilities.

[669] Regulation 38(8) is a result of incorrect numbering of the Child Protection Regulations. It should be regulation 38(6).

[670] Interview with several social welfare officers and para-social workers in January-March 2019.

parental care are usually accommodated in the short term in the houses of community volunteers or local government officials such as ten-cell leaders. When a child's parents, guardians or carers are not found within a week, the officer will most likely place the child in a residential facility. The practice of placing children in individuals' homes without any assessment has proved to be risky both for the child's and the hosting family's welfare. A para-social worker at the Bunju Ward, Kinondoni District Dar es Salaam reported multiple thefts at her home due to hosting 'lost' children.[671]

Regulation 59(1) (c), read in conjunction with regulation 62(1) and (2)[672] of the Child Protection Regulations, says that local government authorities can place children requiring assistance and accommodation with a relative, a friend or person connected to the family, a foster parent, a fit person, or a residential home. However, it might take a while to arrange for such accommodation, especially when accessibility is not guaranteed. This explains why in practice, the officers first place children in emergency accommodation which is available, although not established under the law.

3.5.8 Placement into Care

The Child Protection Regulations under regulation 38(9) provide for alternative care placement of children without parental care. Before placement considerations, the provision requires efforts to reunite a child who is lost, abandoned, or seeking refuge, with his or her parents, guardian or carer. If this is not possible because the child's parents are dead, cannot be found, or lack capacity, or the child is in conflict with the law and falls under regulation 39, the head of the social welfare department, after an initial and social investigation, must determine further interventions necessary to safeguard the welfare of the child.

Children who have gone through the detailed child protection procedure above, and are re-referred to the head of the social welfare department under the terms of regulation 37(19), are also subject to further intervention. Although regulation 37 does not specify any such interventions, those listed under regulation 38(9) apply to these children.

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[671] Interview with para-social worker, Bunju Ward, Kinondoni District, Dar es Salaam, on 16.01.2019. 'Lost' means the para-social worker was sceptical of the child's status hinting that some children present as lost or abandoned for purposes of finding an opportunity to steal. This supposition could not be proved during the subsequent field research; it is a case for future research.

[672] The numbering for regulation 62(2) is skipped in both the English version of the Child Protection Regulations, 2014 and the Kiswahili version, *Tafsiri ya Kanuni za Usalama wa Mtoto za Mwaka 2014* (GN No. 169 of 13.05.2016). However, regulation 62(3) (a) refers to what would ordinarily be considered as regulation 62(1) (a) as regulation 62(2) (a). Therefore, this study considers the types of placements as appearing under regulation 62(2) (a) – (c).

The Regulations list three types of further intervention to be undertaken. These include placement with relatives, admission into voluntary care, and application for a care or supervision order in relation to the child. The sub-parts below explain each intervention.

3.5.8.1 Care by Relatives

The word relative is defined under section 3 of the Law of the Child Act to include a grandfather, grandmother, brother, sister, cousin, uncle, aunt, or any other member of the extended family. In the definition of family under the same section, the Act includes close relatives who live in a household with either biological or adoptive parents and their children. Therefore, a child can be under the care of relatives within the meaning of the Act only if they do not reside together with the child's parents in the same household.

As part of the child's right to identity, section 6 of the Law of the Child Act recognises and protects the child's right to know members of his or her extended family. Section 7 mentions the child's right to grow up with his or her family, including relatives, unless it is against the child's best interest. As explained above, Tanzania's child law considers children in the care of their relatives as children with parental care. Hence, where a child is sufficiently cared for by relatives under whatever arrangement, even when his or her parents are alive and able, the law considers the child as having adequate parental care.[673]

Also, whenever a child is without adequate parental care, be it from parents, a guardian or a relative, the law still depicts placement with other relatives as an alternative care measure of first resort. Section 9(4) of the Law of the Child Act confirms this by providing that once a child is orphaned, a relative from either side of the family may assume parental responsibility, whether by a statutory or traditional arrangement. Traditional arrangements may be according to the Local Customary Law (Declaration) Order, 1963 or the living customary law of the given ethnic group. Cementing this position, section 16(a) lists an orphaned child as one in need of care and protection only when abandoned by his or her relatives.

The Child Protection Regulations under regulation 38(9), also in support of the position above, list placement with relatives as the first intervention for a child in need of alternative care. Notably, during a child's protection conference, information on 'other relatives'' capacity to safeguard and promote the child's health and development is required under regulation 29(1). It means that when a child needs alternative care, the priority will be placement with a relative who is capable of safeguarding the welfare of the child. Further, regulation 42(1) (b) (iii) and (4) (c) requires a child to be placed under voluntary care only

[673] Sections 7 and 9 of the Law of the Child Act, 2009 and the child protection procedure under the Child Protection Regulations show that a child may be in the care of a parent, guardian or relative.

when the authorities determine that placement with relatives is not possible or will not safeguard the welfare of the child. Lastly, regulation 44(2), also in agreement with this position, provides that an application for a care or supervision order should be made only when the social welfare department has considered and found inadequate the capacity and willingness of relatives to care for and protect the child from harm.

Placement with a relative may be informal, guided by customary law, or formal, ordered by a competent administrative or judicial authority in conformity with statutory law. Although the Law of the Child Act and the Child Protection Regulations recognise informal care by relatives (informal kinship care), they do not lay down any standards or procedures for its execution or regulation. Of course, it may be argued that the lacuna is deliberate to give precedence to customary law over traditional child care arrangements. However, studies have found that lack of state involvement exposes children under informal kinship care to higher risks of suffering harm.[674] Formal kinship care may be an outcome of the child protection procedure or an order of the Juvenile Court. For instance, as part of the child protection plan under regulation 36(2), a child can be placed with "other members of the family" with the consent of the child's parents. Also, a court care or supervision order may place a child with a relative according to section 18(3) (d) and 19(3) of the Act. However, section 18(3) (d) appears inconsistent with regulation 44(2) stated above, which requires an application for a care or supervision order to be made after placement with a relative is determined inadequate to safeguard the child's welfare. A plausible explanation is that a court order subjects care given or likely to be given by a relative to supervision and review, in order to address any inadequacies in safeguarding the child's welfare. Otherwise, it makes no sense to place a child with a relative whose care and protection is already determined inadequate.

3.5.8.2 Voluntary Care

A child may be admitted into the voluntary care of a local government authority in two circumstances, as stipulated in regulation 42(1)(a), and (b) of the Child Protection Regulations. First, when based on a social investigation report, there is reasonable cause to believe that the child is at risk of suffering harm if not placed in care; alternatively, second, when a child protection plan is not sufficient to safeguard a child, and his or her case is referred back to the head of the social welfare department according to regulation 37(17). Voluntary placement for a child subjected to the child protection procedure may only be done

[674] See references in Rwezaura, "'This is not my child': integrating orphans into the mainstream of Tanzania's society", above footnote 550; and in Rwezaura, "The Value of a Child: Marginal Children and the Law in Contemporary Tanzania", above footnote 49.

with the parents' consent.[675] For a child covered by regulation 38, who is lost, abandoned, or seeking refuge, this can only be done subject to three preconditions: first, reunification with parents is impossible; second, parents are, for whatever reason, incapable of caring for the child; and third, placement with relatives is inadequate to safeguard the child's welfare.

In addition to the grounds above, regulation 42(4) adds one more prerequisite for admission into voluntary care. A child should be received into care only when supporting the parents to continue caring for their child is insufficient to safeguard the child's welfare. The support referred to here may include family support services and counselling as per section 94(3) and (4) of the Act and regulation 7(2) (e) of the Child Protection Regulations. Regulation 42(7) reiterates a similar tenet by specifically denying a child's admission into care where poverty is the sole or primary ground for the likelihood of suffering harm. In such case, the Regulations propose referral to the MVC Committee to receive services.

Placement in voluntary care requires a plan. An assigned social welfare officer is responsible for preparing a care plan before he or she admits a child into voluntary care. When admission is a matter of emergency, the officer must prepare the care plan within 21 days of admitting the child into care. The contents of a care plan are outlined under regulation 48 and may be drawn up in accordance with relevant guidance provided by the Commissioner of Social Welfare. The parent and the child (if of sufficient age and maturity) have to agree with the care plan after receiving explanations from the assigned social welfare officer as stipulated under regulations 42(5) and 48(2). The parent must understand the effect of placing the child in voluntary care, and that it involves conditions such as that notice of 14 days will be required to remove the child from care subject to review unless placement was temporary for an agreed period; the local government authority may apply for a care order when determined necessary to safeguard the welfare of the child; and the authority will share parental rights and responsibilities with the parent and will determine where the child lives and with whom. The parent must also understand the child access arrangements and arrangements for care plan reviews. According to regulation 42(8), the head of the social welfare department must consider whether it is necessary to apply for a care order if the parent disagrees with the care plan.

In the case of voluntary care placement, a child shall have the same legal status as a care order subject. According to regulation 42(9), the local government authority assumes responsibility for the child in the same way as for a child under a care order or one provided with assistance

[675] Regulation 42(6) of the Child Protection Regulations require the head of the social welfare department to formally record in writing the parental consent to admission of the child into voluntary care.

and accommodation according to section 94(5) of the Act.[676] Subject to 14 days notice, voluntary care placement may be terminated as indicated under regulation 43. A parent may issue such notice orally or in writing accompanied by an explanation of the change of circumstances and details of the care arrangements for the child, including where the child will live, with whom, and plans for the child's education and health care. If the head of the social welfare department has reasonable cause to believe that removal may expose the child to harm, he or she may direct a social welfare officer to take the child to a place of safety according to regulation 22(3) in order to prevent termination of the placement. The child protection procedure set out in Parts VI to VIII of the Child Protection Regulations and explained above must be followed in such cases.

Regulation 59(1) (b) read together with regulation 62(2) provide placement options for a child in voluntary care. However, regulation 62(2) (a), concerning placement with relatives, may not apply. This is because for a child to be placed under the voluntary care of the local government authority, the care by relatives option must have already proven impossible. This researcher finds that blanket provisions such as those given under regulations 59(1) and 62(2) fail to be specific to the demands of each type of care intervention available to the local government authorities. During field research, it was found that care by fit persons or foster parents, which could be provided urgently and short-term, is not yet widely practised to sufficiently accommodate children placed under voluntary care. Also, local government authorities own no child care facilities. Therefore, the reasonable conclusion to draw here is that placement in voluntary care equals, in most instances, placement in residential care facilities.[677] Since the Tanzanian government owns only one children's home located at Kurasini, Dar es Salaam, placement is either at Kurasini or in one of the numerous privately owned facilities in the country. This practice poses a significant challenge to adherence to the three cardinal principles of alternative care and the de-institutionalisation efforts of the child protection system.

3.5.8.3 Care by Court Order

A court order becomes necessary when a child is suffering or is likely to suffer harm, and placement with relatives or under voluntary care of the local government authority is either impossible or inadequate to safeguard the child's welfare. On behalf of the local government

[676] The duties of local government authorities in respect of such children are detailed under Part XI of the Child Protection Regulations.

[677] This conclusion is based on the responses of social welfare officers during field research in Tanzania in January-March 2019. They explained that they rely on institutional care because it is still the most readily available form of alternative child care.

authority, the head of the social welfare department may, according to regulation 44, apply to the Juvenile Court for a care or supervision order for such a child based on three possible grounds: the harm is due to the parental care given or likely to be given, the child is out of control, or the head of the social welfare department is convinced that only a care or supervision order can safeguard the child's welfare.[678] Regulation 44(2) posts a caveat requiring the application to be lodged only after the head of the social welfare department has considered and found inadequate the capacity and willingness of relatives to protect the child from harm.

Section 24(2) of the Law of the Child Act emphasises that an application for a care or supervision order should be made only after all possible alternative methods of assisting the child have proved unsuccessful. Also, an application may be made if the significant harm suffered or likely to be suffered requires removing the child from where he or she resides, or if the danger the child is exposed to is so severe as to compel immediate removal. According to section 25(1), the objective of the order centres on three points in such circumstances. These are removing the child from harm, assisting the child and those he or she is living with, and solving or ameliorating the problem necessitating the order, so that the child can return to the community. These apply depending on whether the child is either the subject of a care order or a supervision order.

A care order is different from a supervision order. Although the Act and the Regulations do not define them in their interpretation sections, their import can be deduced from provisions relating to them.

3.5.8.3.1 Care Orders

The purpose of a care order is to remove a child from a place where he or she suffers or is likely to suffer significant harm. It is provided for a maximum period of three years subject to extension, or until a child attains 18 years, whichever is earlier.[679] It transfers parental rights and responsibilities, including the child's custody, to the local government authority responsible for the child.[680] The authority has to determine the most suitable alternative care placement for the child through the social welfare department. According to section 18(3) of the Act, placement can be with an approved residential facility, a fit person, an approved foster parent or at the home of a parent, guardian or relative. It can also be child adoption

[678] Reiterated under rule 100 of the Law of the Child (Juvenile Court Procedure) Rules. The rule also requires that application for a care or supervision order be in the best interest of the child.

[679] Section 18(4) of the Law of the Child Act, 2009 and rules 104 and 105 of the Law of the Child (Juvenile Court Procedure) Rules.

[680] Section 18(2) of the Law of the Child Act, 2009 and rule 101 of the Law of the Child (Juvenile Court Procedure) Rules.

which is provided for under section 24(1) if the child's parent, guardian or relative does not show any interest in his or her welfare during a period defined by the court. In such a case, if the social welfare department finds child adoption to be the most suitable care measure according to the dictates of the child's best interest, proceedings to free the child for adoption can be undertaken according to regulations 49 and 50 of the Child Protection Regulations and rule 99 of the Juvenile Court Rules.

3.5.8.3.2 Supervision Orders

A supervision order is intended to prevent a child from suffering harm while the child remains in the home, custody and care of a parent, guardian or relative.[681] The order empowers a social welfare officer or a fit person from the local community to supervise the care given to the child.[682] Hence, pursuant to section 19(6) of the Act, the person living with the child must allow visits by the supervising authority to the child's home and must inform the authority of any change of address. According to regulation 55 of the Child Protection Regulations, the visits commence after the first week of receiving a supervision order. They continue once every 28 days after the first visit and last for the entire duration of the order. The court issues the order for one year subject to extension, or until a child is eighteen years old, whichever comes first.[683]

3.5.8.3.3 Interim Care and Supervision Orders

Interim care and supervision orders, unlike a full order, may be made at the first hearing or before the final hearing during care or supervision order proceedings. Section 18(7) of the Act specifies that the court cannot issue an interim care order unless the child is suffering or is likely to suffer significant harm. According to rule 94(2) of the Juvenile Court Rules, inability to serve the child's parent, guardian or carer with the application for a care order before the cessation of a place of safety in respect of the child, is a ground to make an interim order. In such a case, the court may issue an emergency interim care order for 72 hours to allow for service of the application or dispensing with it. Moreover, according to rule 94(6), an interim order may be made to allow for processing of a medical or psychiatric examination, assessment or report regarding the child or any respondent to the proceedings. Generally, an interim care or supervision order may subsist for the time specified in it, which shall not

[681] Section 19(2) of the Law of the Child Act, 2009, regulation 51 of the Child Protection Regulations, and rule 107 of the Law of the Child (Juvenile Court Procedure) Rules.
[682] Section 19(3) of the Law of the Child Act, 2009 regulation 53 of the Child Protection Regulations, and rule 110 of the Law of the Child (Juvenile Court Procedure) Rules.
[683] Section 19(4) and (5) of the Law of the Child Act, 2009 and rule 109 of the Law of the Child (Juvenile Court Procedure) Rules.

exceed eight weeks. It can be extended for twenty-eight days upon the parties agreeing, which does not necessitate their appearance in court for the extension.

3.5.8.3.4 Application for a Care or Supervision Order

An application for a care or supervision order is made in accordance with the Juvenile Court Rules.[684] The local government authority for the area where the child ordinarily resides or if the child is without parental care, where he or she is found or appears, is responsible for the application. Unlike voluntary care placement, application for a care or supervision order requires no parental consent.[685] Regulation 46 of the Child Protection Regulations only requires the social welfare department to make oral and written communication to the child's parents in whatever manner they will best understand. The information relayed should include a notice of intention to apply for the court order, the nature and extent of the concerns, and the right to and possible sources of legal representation. If the child falls under regulation 38, and the parent, guardian or carer is unknown, or cannot be found even after reasonable inquiry, or is incompetent, the court may waive the requirement of notice at the initial hearing. A child of sufficient age and maturity should also receive a notice of intention to apply for the order if it is in his or her best interest.

With the application for a court order, the social welfare department must submit written statements regarding the child's family background, actual or likely harm suffered, and the child's wishes and feelings. Regulation 47 lists further documentation required, including a care or supervision plan, initial and social investigation reports if available, evidence of communication of the application notice to the child's parent, guardian or carer, and a signed consent where a parent, guardian or carer have consented to child adoption.

3.5.8.3.5 Care and Supervision Plans

The Juvenile Court may not make a care order or a supervision order regarding a child unless presented with a care plan or a supervision plan.[686] Details on the content of the plans are provided in regulations 48 and 52 of the Child Protection Regulations. A care plan ensures that the selected alternative care arrangement meets the child's physical, mental, educational, emotional, social, and cultural needs. It considers these needs on a short and long-term basis with regard to the child's upbringing and future. On the other hand, a supervision plan seeks to identify how a child's short-term needs will be met while living in his or her family home.

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[684] Rule 91 of the Law of the Child (Juvenile Court Procedure) Rules.

[685] *Ibid*., rule 109(2). This rule provides that a supervision order, and not an application for such order, shall be made with the consent of the child's parent or guardian.

[686] *Ibid*., rules 98(5) and 108(5).

The main concern is to supervise the care given to the child to ensure that the child's welfare is safeguarded.

3.5.8.3.6 Other Orders Accompanying Care and Supervision Orders

While making a care or supervision order, the court may make other accompanying orders as stipulated under rules 98 and 108 of the Juvenile Court Rules. The main order involves placing a child under the care or supervision of the applicant local government authority or otherwise depending on the court's discretion based on the child's best interests, specified under rules 98(2) and 108(2). The other orders include a search and production order and an exclusion order covered under rules 111 and 116 of the Juvenile Court Rules. Also, an order for access to a child under a care order may be applied for separately as provided under rules 102 and 103 of the Juvenile Court Rules.

3.5.8.3.7 Reviewing, Varying and Discharging Care or Supervision Orders

A care or supervision order may be varied or discharged depending on the assessment of progress reported in periodical reviews conducted according to the care and supervision plans. According to sections 20 and 25(2) of the Act and regulation 54 of the Child Protection Regulations, an assigned social welfare officer must carry out regular reviews to ensure the plan works and that the child is not suffering harm. The officer may also apply to the court to vary the order if it no longer suffices or discharge it if it is no longer needed. A care or supervision order can be discharged according to section 23 of the Act, regulation 75 of the Child Protection Regulations, and rule 106 of the Juvenile Court Rules. Part XII, containing regulations 66-74 of the Child Protection Regulations, gives details of the procedure and requirements of reviews of the orders.

In practice, as found during field research in Dar es Salaam, social welfare officers find the review procedures and requirements cumbersome and impossible to comply with in each case.[687] They cited workplace pressures caused by the shortage of time and resources as their stumbling block. They said that regular visits to assess the child's progress and conduct placement reviews, as specified in the Regulations, are impossible.[688] This is because they have a massive workload due to insufficient human resources to deal with the cases they receive, which limits their time for out of office activities. Also, there are no vehicles to facilitate transportation to different parts of the city to conduct visits, nor is there financial

[687] Interview with and observation of social welfare officers in the Kinondoni District social welfare department in January-February 2019.

[688] Regulation 70 of the Child Protection Regulations require the assigned social welfare officer to provide a report on the child's progress for purposes of reviewing the placement. A progress report requires visits to assess how the child is doing in the placement according to section 21 of the Act.

support to pay for public or private transport. Therefore, they conduct the reviews on the basis of procedures developed through practice in the department and use their intuition garnered through experience to determine which cases require closer follow-up than others. In the opinion of the researcher, this practice is a typical demonstration of street-level bureaucracy in the daily work of social welfare officers in Tanzania.

3.5.8.3.8 Observations on Care and Supervision Orders

Some provisions concerning care and supervision orders in the Law of the Child Act may be confusing. For instance, section 18(3) (d), referring to placement at the home of a parent, guardian or relative, should not apply to children under care orders in the opinion of this researcher. This is because section 24(2) (a) of the Act specifies that a care order should be applied for only after all alternative care options have been unsuccessful. Regulations 42(1) (b) (iii), 42(4) (b) and (c) and 44(2) also support the position that a child should be placed in care only if no parent, guardian or relative of the child can provide adequate care. Even with a court order, placing a child in the home of a parent, relative or guardian whose care has already determined as inadequate is to put the child at risk.

Further, section 24(1) of the Act with the marginal note "care order and adoption" should distinctly provide for the prospect of child adoption in relation to a child under a care order, including freeing the child for adoption as covered by regulations 49 and 50 of the Child Protection Regulations and rule 99 of the Juvenile Court Rules. The wording of this section limits it to children under a supervision order rather than a care order. It means that if the care of a parent, guardian or relative of the child under supervision is still insufficient to safeguard the child's welfare, then the child qualifies for placement in other alternative care measures as mentioned. However, the section includes children under care orders as well, which brings the argument above into focus. Children under care orders cannot still be in the care of the parent, guardian or relative.

Further, the mention of other alternative care measures such as foster care and residential facilities under section 18(3) should also apply to a child under a supervision order whose parent, guardian or relative show no interest in his or her welfare as per section 24(1). Also, sections 24(2) and 25 are more applicable to care orders than supervision orders, but the drafter still includes supervision orders under them. Since the Child Protection Regulations and Juvenile Court Rules were drafted years after the Act, in 2014 and 2016, respectively, they are more precise on the orders than the Act. The Act needs amendments to follow suit.

3.6 Types of Placement

According to regulation 57 of the Child Protection Regulations, a care order places a child in the care of the applicant local government authority. However, regulation 59(1) clarifies that not only a care order places children in the care of a local government authority. They could be there because they are received into voluntary care or accommodated by the social welfare department during case management. It is the duty of local government authorities, as stipulated under regulation 58, to provide a child under their care with suitable accommodation. In discharging this duty, the authorities need to find an appropriate placement for the child. Regulation 62(2)(a) - (c), read together with section 18(3) of the Act, lists four types of placement: with a relative, friend or person connected to the family; foster parents; fit persons; or in an approved residential home.[689] Placement decisions must adhere to the conditions set under regulation 62(3), which, among others, requires preference to be given to placement with a relative, friend or person connected to the family. If possible, the child should remain near his or her former home, not be separated from siblings, be able to continue with education and training, and in the case of disability, have suitable accommodation that meets his or her specific needs.

Below is a brief exploration of each type of placement from a legal and practical perspective.

3.6.1 Placement with Relatives

Child care by a relative has already been extensively discussed above. When an administrative or judicial organ orders a person to care for a relative's child, this is considered as formal placement with a relative. It differs from care by relatives through traditional arrangements that are very common in the Tanzanian setting. As mentioned above, the Law of the Child Act recognises and refers to both customary law and statutory law child care by relatives under section 9(4) of the Act, albeit only in the case of orphaned children. This part only distinguishes care ordered by an administrative authority from that ordered by a judicial authority.

Regulation 38(9) (a) of the Child Protection Regulations lists care by relatives among the types of formal placement that the head of a social welfare department can arrange for to care for a child in need. This type is placement with a relative ordered by an administrative authority. According to the Regulations, this type of placement is the first resort for all children who are lost, abandoned, or seeking refuge; for those whose parents are dead, cannot

[689] It is significant to note that section 18(3)(d) lists the home of a parent, relative or guardian rather than the home of a relative, friend or person connected to the family as specified under regulation 62(2)(a) of the Child Protection Regulations, 2014. The researcher finds the provision of the Act under section 18(3)(d) mistaken, as explained under part 2.4.4.8.3 above.

be found or are incapable of caring for the child; or where the child is in conflict with the law. This position is reflected under regulations 42(1) (b) (iii), 42(4) (c) and 44(2), which require a child to be admitted into voluntary care or be placed under a care or supervision order only where care by a relative is impossible or insufficient to safeguard the welfare of the child. Regulation 62(3) (a) also reflects this by requiring that priority be given to care by relatives, friends or persons connected with the family. The phrasing of Regulation 38(9) (a) means that the social welfare department takes care of the whole process of placing a child with a relative. Taking regulation 36(2) into consideration, the officers must follow the child protection procedure in placing a child with a relative. The placement should be monitored according to the set procedure under the Regulations. Regrettably, the Law of the Child Act does not provide any guidance on administrative placement with relatives.

Placement with relatives by judicial order is two-fold. On the one hand, it can be the result of court proceedings where the court declares a relative as the legal guardian or custodian of a child, such as under section 9(4) in the instance that the biological parents of a child are deceased. On the other hand, it can be the outcome of care or supervision order proceedings according to sections 18 and 19 of the Law of the Child Act. The Act and the Regulations provide for procedures, requirements and monitoring of a child placed with relatives under a care or supervision order. Sections 20 and 21 of the Act establish the responsibility of social welfare officers to monitor the child through home visits, to carry out counselling, and to vary or discharge the order when necessary. However, the Act does not have specific provisions for the first type of judicial order described above in respect of placing a child under the care of a relative. This omission may be because the Act has no provisions on guardianship.

During field research, it was observed that in practice, by the time children's cases reach the authorities, it is rare that relatives are available and willing to safeguard the welfare of the child adequately. In most cases, where a child lacks parental care, relatives are the first to respond to the plight of the child. If the child has not been taken in by relatives, this indicates their incapacity or disinclination to do so. Therefore, formal placement with relatives occurs in very few cases. Another observation relates to the monitoring of children placed with relatives. Social welfare officers seldom monitor children placed with relatives as required by law. The officers generally find monitoring challenging due to workplace pressures caused by the shortage of time and human, financial and infrastructural resources. In trying to manage their time and workload, the officers assume that children placed with relatives are well cared for and hence require less attention.

3.6.2 Placement with Fit Persons

According to section 3 of the Law of the Child Act, a fit person is a person of full age, sound mind, high moral character and integrity, and able to look after a child. Moreover, it is a person whom a social welfare officer has approved as being able to provide a caring home for a child who is not his or her relative. In the context of child care, a fit person is not necessarily limited to a single person, but could be a husband and wife in a family environment.[690] In this scenario, it is referred to as a fit family. In addition to the term fit person, the law also contains the term fit institution. Section 18(6) of the Law of the Child Act indicates that a manager or patron of an institution or residential home may be designated as a fit person provided that the Commissioner has approved their institution or residential home by notice published in a Gazette. The Child Protection Regulations, 2014 under regulation 2 define a fit institution as "an approved residential home or other institution approved by the Commissioner for Social Welfare to accommodate a child." Therefore, a fit person may refer to a single person, a married couple, or a representative of an institution (manager or patron of it).

According to the Law of the Child Act, placement with a fit person may be invoked in a varied set of scenarios and for different purposes. These scenarios and purposes under the Act relate to children in two different groups. The first category covers children in conflict with the law, for whom the authorities may use this type of placement widely. For this group of children, placement with a fit person may be used *in lieu* of a remand prison (section 104(1)), imprisonment (section 119(2) (c)), and placement in an approved school (section 125). The second category uses fit persons for children in need of care and protection in instances that do not relate to juvenile justice. Section 18(3) (b) of the Law of the Child Act lists placement with a fit person as one of the possible alternative care arrangements for a child under a care order. A fit person may also act as a supervisor according to section 19(3) of the Act. This subsection specifies that a fit person may act in the place of a social welfare officer and supervise the care of a child under a supervision order while at the home of a parent, guardian or relative.[691] Also, in exceptional cases, fit persons can be used to provide care for children whose mothers are imprisoned (section 144(3) (d)). This study focuses on the second category of children. However, legal requirements and procedures for care arrangements with fit

[690] Information gathered from an interview with a social welfare officer in charge of fit persons practice in Temeke District, Dar es Salaam Region on 04.02.2019.

[691] According to regulation 53(3) of the Child Protection Regulations, 2014 the head of a social welfare department appoints an appropriate person to supervise care on behalf of a social welfare officer in case of the department's incapacity.

persons are not clear as these Regulations are yet to be published. During field research in early 2019, both the Department of Social Welfare and UNICEF Tanzania indicated that the Regulations are being finalised and would be released soon. However, they had not been released up to the time this thesis was written.

In the absence of official Regulations providing legal requirements and procedures for placement with fit persons, this study relies on information obtained during field research. First of all, initial practice on placement with fit persons was prompted by the project titled Fit Family Scheme engineered by UNICEF Tanzania in collaboration with the government and launched in 2013.[692] The project was initiated in Dar es Salaam and extended to five other regions in Tanzania, these being Mwanza, Mbeya, Kilimanjaro, Iringa, and Njombe.[693] Up to 2019, UNICEF Tanzania supported the Department of Social Welfare in training social welfare officers from 58 local government authorities (58 districts out of 185) on how to operationalise the fit person scheme in their areas.[694] Temeke District in Dar es Salaam was used as the pilot district for the scheme, followed by Siha in Kilimanjaro and Magu in Mwanza, and progressing to other districts. At the time of field research, it was operating in more than 60 districts.[695] The researcher successfully accessed information from Temeke, which was one of the locations of the study and a pioneering district for the scheme.

In Temeke District, the fit persons programme actively started in 2014 with the search for fit persons. [696] The social welfare department called for volunteers through announcements posted at the district and ward levels. Interested persons were required to fill application forms and submit them to the head of the social welfare department through the offices of their ward or street executives. Eligibility criteria included marital status (preferably married, if single, only women), permanent residence in Tanzania, being within a certain age limit (35-55 years) and having no criminal record. A significant number of people came forward and applied.[697] Upon receiving the application forms, the social welfare department sorted through them to identify eligible candidates. Those who were considered eligible were further

[692] Getrude Mbago, "UNICEF recommends Tanzania to invest more on 'Fit Family' scheme", The Guardian (20 September 2018).
[693] *Ibid.*
[694] UNICEF Tanzania, *A real home for the first time*: *Learn more about the fit family programme in Tanzania* (05 July 2019).
[695] Interview with social welfare officer in charge of fit persons practice in Temeke District, Dar es Salaam Region on 04.02.2019 and interview with a child protection specialist working with UNICEF Tanzania, Masaki Dar es Salaam, interviewed on 21.02.2019.
[696] Information resulting from an interview with social welfare officer in charge of fit persons practice in Temeke District, Dar es Salaam Region on 04.02.2019.
[697] The respondent social welfare officer could not recall the exact number of people. She said that many came forward because they heard that they would be remunerated for taking care of children.

assessed to establish their suitability as fit persons. The assessment included an investigation of the applicant's home, moral standing, and financial capacity. The main point of the assessment was to ensure that fit person placement is in the best interest of the child to be placed and the existing children of the family. After the assessment, the head of the social welfare department approved ten applicants as the first batch of fit persons to be used in the pilot scheme. The successful applicants were then registered in the fit persons register maintained at the district social welfare department. Lastly, the department trained them to take on their new roles.

The ten successful applicants were still serving as fit persons in Temeke at the time of field research for this study in 2019. The only change had been the division of Temeke District and the formation of the new District of Kigamboni. Some of Temeke's wards and fit persons fell in the new District. Also, one of the fit persons had died and was yet to be replaced at the time of the field research. These persons took care of two categories of children: children in need of care and protection, and children in conflict with the law. At any particular time, one fit person or family was required to care for no more than three children. Since these children had needs with financial implications, the fit persons received financial support for necessities such as school fees and supplies, medical services, clothing and food. They rarely received support in cash; instead, the officers arranged for delivery of material things or organised services. UNICEF Tanzania provided funding to the government to financially support fit persons at the pilot stage. Later on, UNICEF left it to the government to guarantee the scheme's sustainability.

Fit person placement is an emergency and short-term measure. Social welfare officers use it as an emergency placement in the process of case management, for instance to accommodate a lost or abandoned child while following the usual procedure to find their parents or their home, or to decide on alternative care. It is short-term and lasts for a maximum of six months. If a child's case lasts longer than this, the social welfare department seeks a long-term solution. The officer in Temeke District said that in most cases, if no clear prospects for the child's future are on the horizon after six months, the child is placed in a children's home. She also said that in some cases, children stay longer in fit person placement than the six months, especially where removal will not be in the child's best interests, and there is no pressure to urgently free the place for another child.

The procedure for fit person placement is entirely within the mandate of the district social welfare departments. This makes it an alternative care measure that is relatively

uncomplicated in the opinion of the social welfare officers.[698] The placement uses persons already approved and active in the field, and therefore well known by the social welfare officers. To place a child requires a letter from the police and a cover letter from a social welfare officer stating why the child needs the placement. If it is not in an emergency situation, accompanying the two documents must also be information about the child obtained from the child's file. Then the social welfare officer in charge of the child's case makes a telephone call to the most suitable fit person considering the characteristics of the case and arranges to drop the child at their home.[699] There is no contact with the Department of Social Welfare or required approval of the Commissioner in this process, making it less formal.

Above is an account of the fit person scheme from a practical perspective. It is acknowledged that requirements and procedures may have differed considerably from one district to another during the initial phase, without uniform regulations. However, during field research, there were indications that social welfare officers had internal regulations for the scheme within the social welfare departments. The author, nonetheless, was not able to access these and therefore has to await a comprehensive law and procedure on the fit person programme under future Fit Persons Regulations.

The fit persons or fit family scheme, as launched in 2013, has made considerable strides since then. Although it still lacks formally published regulations, the measure has played a significant role in catering to children in need of care and protection. While it was not possible to assemble any reliable statistics on the number of fit persons and children served over the years up to 2019, specifically in Temeke, and generally in the districts where it was in operation, UNICEF Tanzania and other stakeholders have shared success stories of the scheme.[700]

3.6.3 Foster Care Placement

Foster care, also known as fosterage, is defined under section 3 of the Law of the Child Act as a voluntary and temporary child care and protection measure provided by a family or an individual unrelated to the child. In this type of placement, the placed child is a foster child and the carer a foster parent or family. The Foster Care Placement Regulations, 2012 define these terms in regulation 2. Section 52(2) of the Law of the Child Act adds some detail to the

[698] Interviewed social welfare officers indicated this during field research in January-March 2019.

[699] This was the experience shared by the social welfare officer in charge of fit persons practice in Temeke District.

[700] See for example Chiara Frisone, *In Tanzania, child protection systems keep children safe from harm*: *"'We are ready!' Children have a right to survive"* (18 July 2016); Getrude Mbago, "'Fit Family' scheme bears fruit in Mbeya Region", The Guardian (26 September 2018); and UNICEF Tanzania, *A real home for the first time*, above footnote 694.

definition of a foster parent, who is defined as "a person who is not the parent of a child but is willing and capable to undertake the care, welfare and maintenance of the child." The eligibility criteria established under regulation 8(1) (a)-(e) of the Foster Care Placement Regulations, read together with sections 32 and 53 of the Act, specify that a child is eligible for foster care if he or she is under a care or interim care order (section 18(1)), has been committed to an approved residential home or institution by a care or supervision order (section 32(1) and 53(1) (a)), or has been placed in an institution by a person (section 53(1) (c)). It also includes children for whom a social welfare officer recommends placement in an approved residential home or institution (section 53(1) (b)) or who have been placed in foster care for temporary custody (section 53(7)). In the light of regulations 59 (1) (a)-(c) and 62(2) (b) of the Child Protection Regulations, 2014, children in other circumstances may also be placed in foster care. For instance, children taken into the voluntary care of the local government authority may be placed in foster care, although they do not necessarily meet the eligibility criteria under regulation 8(1).

Foster care is a voluntary care measure in Tanzania.[701] Under section 32(2) of the Act and regulation 4(1) of the Foster Care Placement Regulations, persons interested in fostering a child may apply. However, the applicant must meet the requirements set out in regulation 5 of the Foster Care Placement Regulations. The age limit is 21-65 years. Both single and married Tanzanians and non-Tanzanians may foster, but non-Tanzanians must have resided in Tanzania for at least two and a half consecutive years prior to the application. The number of fostered children for each parent should not exceed three at a given time. Regulation 4(1) requires an application to foster a child to be made to the Commissioner of social welfare. In practice, such applications are received on behalf of the Commissioner by social welfare officers in the local government authorities at the ward or district levels.

If the applicant is eligible, assessment for suitability to be a foster parent as per regulation 6 of the Foster Care Placement Regulations follows. An assigned social welfare officer carries out the assessment and reports to the Commissioner, who decides to approve or turn down the application. According to regulations 8(5) and 9, the Commissioner's decision is based on the social investigation report submitted together with the assessment report. Once the Commissioner approves the applicant as a foster parent, he or she is registered in the foster carer register maintained at the district and national levels pursuant to regulation 7 of the Foster Care Placement Regulations. During field research, it was not possible to access such a

[701] See definition of foster care under section 3 of the Law of the Child Act, 2009.

register, either at the Department of Social Welfare headquarters in Dodoma or in the four districts studied. The main reason for inaccessibility was not confidentiality, but rather that the register did not exist, at least not in the form stipulated under the regulations.[702] A register of foster care placements, required by regulation 7(6), was not accessible for the same reason. Thus, it was impossible to obtain reliable statistics on the number of foster parents or placements during field research. When asked about the unavailability of the registers, a high-ranking officer at the Department of Social Welfare said,

> "Social welfare officers are very busy officers. Not every department in municipal or district councils is good at keeping records. Even if they were, the data might not reach the Commissioner because the officers have to first report to their municipal or district directors, who have to submit their reports to the Commissioner after that. It involves a long process that is often not completed."[703]

Placement in foster care must be in accordance with a foster care plan as provided for under regulation 17 of the Foster Care Placement Regulations. As the plan considers the views and feelings of the child's biological parents (regulation 17(4) (c)), their consent to the placement comes first as required under regulation 8(3) of the Foster Care Placement Regulations. According to section 27(1) of the Law of the Child Act, foster parents assume parental responsibilities during foster care placement with the consent of the child's parents. Regulations 11 and 12 specify the rights and responsibilities of foster parents, while regulation 13 specifies the rights of a foster child. However, regulation 12 does not mention full parental rights, but only limited rights pertaining to day-to-day decisions regarding the fostered child. Full parental rights, according to section 18(2) are transferred to a social welfare officer when a child is placed in foster care by a care or interim care order. In the case that a child is in foster care without a care order, for instance after being taken into the voluntary care of a local government authority, parental rights according to regulation 42(5) (d) of the Child Protection Regulations will be shared by the local government authority, the birth parent and foster parent. To ensure that foster parents and children enjoy their rights and discharge their responsibilities, they receive support in varied services as stipulated under regulations 14 and 15 of the Foster Care Placement Regulations. In Tanzania, foster parents

[702] Interview with a social welfare officer at the adoption desk in Dodoma on 22.03.2018. During the interview, the officer showed the researcher a list of names recorded in a counter book and explained that it is the current list of foster care applicants, some of whom have already been given foster children while others are still in the process of being assessed. This was not a register of standby foster parents but rather of applicants who, in the respondent's opinion, were in most cases prospective adopters.

[703] Interview with a high-ranking officer of the DSW, in Dar es Salaam on 20.02.2019.

do not receive financial support from the government as is the practice in other jurisdictions.[704]

Foster care is a temporary measure. It can be provided both in the short-term and long-term but remains temporary. This is because a foster child does not become a permanent member of the foster family, as happens for instance in child adoption. Foster care placement terminates with the discharge of the order placing the child in foster care or upon a child attaining 18 years.[705] Regulation 18(1) of the Foster Care Placement Regulations provides for placement termination, including on the grounds of abuse, placement no longer serving the child's best interests or reunification with the biological family. For this reason, foster care placement requires regular reviews in the form of supervision visits as directed by regulation 16 of the Foster Care Placement Regulations.

The Law of the Child Act under sections 32(1) and 53(1), together with the Foster Care Placement Regulations under regulations 4(3) and 8(1) (b)-(d), emphasises the position of approved residential homes or institutions as the source of children to be placed in foster care. These instruments do not state other places from which children placed into foster care may originate. The reason for the omission is the previous law on foster care: the Children's Homes (Regulation) Act and Children's Homes Regulations of 1968 emphasised children's homes as the primary source of children eligible for foster care.[706] However, since the Foster Care Regulations under regulation 8(1) (a) consider children under care or supervision orders to be eligible for fostering, then approved residential homes or institutions should not be as overemphasised as they are. Also, considering regulations 59(1) and 62(2)(b) of the Child Protection Regulations, social welfare officers may use foster care to provide care and protection for a wide range of children in need. For instance, foster care can be used to accommodate a child pending placement determination as stipulated under regulation 59(1)(c) of the Child Protection Regulations.

Foster care is an independent placement in its own right. However, it can also be part of child adoption in the form of pre-adoption care. The Law of the Child Act requires this form of care

[704] For instance, in Ghana, the Children's Amendment Act, 2016: Act No. 937 while amending Part IV of the Children's Act, 1998: Act No. 560 establishes a Foster-Care Fund under section 72 which aims at providing financial support to foster parents in maintaining their foster children. The use and management of the Fund are further provided for under sections 73-76 of the Act.

[705] According to regulation 18(7) of the Foster Care Placement Regulations, 2012, a child is not required to remain in foster care after attaining 18 years but may need to remain up to the age of 21 years if still undergoing educational or vocational training pursuant to regulation 18(8). The Regulations are silent on where the child who leaves foster care should go.

[706] For further details of practice under this law, see Rwezaura; Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at pp. 157-159.

for prospective adopters as stipulated under sections 56(3) (b) and 74(1) (c) of the Act and regulation 4(7) of the Adoption of Children Regulations, 2012. The researcher found that pre-adoption care is the dominant form of foster care in practice. Interviewed social welfare officers explained that given the socio-economic situation in the country, it is implausible that people should volunteer to care for unrelated children without receiving any financial support. This partly explains the lack of a register of foster carers. Tanzanians and non-Tanzanians alike apply to foster children mainly in order to fulfil the requirement of pre-adoption care. However, the officers reported that a considerable number of resident Tanzanians fostering children as a prerequisite for adoption do not proceed with an adoption petition but keep the foster child indefinitely. Rwezaura and Wanitzek reported a similar practice where native Tanzanians preferred formal foster care to child adoption, and, unlike Europeans and Asians who had also applied for foster care, they did not end up adopting the child.[707]

The author was interested in finding out what the social welfare office does when prospective adopters stop at fostering. In replying to this question, social welfare officers, both at the central and local government levels, showed how this practice disturbed them.

> "When an applicant does not follow the procedures and time limits, it creates more work for us in terms of follow-up. Follow-up demands more time and human resource, which we do not have to begin with. This is why those foster carers have remained with the children for so long already. However, the Commissioner usually sends alert letters to the foster carers but taking the child away is not an option in our case."[708]

On possible solutions, the officers indicated that there were plans to follow up on the indefinite foster carers and make them adopt the children. There was, however, no talk of plans to formalise them as foster carers instead. Nevertheless, a ward social welfare officer shared a story that served to show that it is possible to convert pre-adoption care into a foster care placement. He said,

> "A Kenyan lady residing in Tanzania found a boy who was formerly a child living on the street in a children's home that was about to close down. She liked the child and wanted to adopt him. She applied to the ward social welfare office for adoption. The social welfare officer in charge visited the child's family to inform them, and they agreed to give up the child for adoption. The lady started to care for the child in pre-adoption foster care. After a while, the child manifested naughty behaviour, including not sleeping at home. The lady tried to find help and even involved the police. Throughout the process, she never gave up taking care of the boy. Once the boy turned 18 years old, the ward social welfare officer advised the lady to

[707] *Ibid.*, at p. 158.

[708] Interview with social welfare officer, Bunju Ward, Kinondoni, Dar es Salaam on 04.01.2019 and also with social welfare officer, Ilala Municipal Council, Dar es Salaam on 07.02.2019.

> let go. The office then made efforts to reunite the boy, who was no longer a child, with his birth family."[709]

This is what exists in practice. However, it is not what the law says. It is a pure example of how street-level bureaucrats implement law and policy during case management in a way that is shaped by the prevailing circumstances of their work.

The Law of the Child Act, 2009 and the Foster Care Placement Regulations, 2012 establish foster care placement requirements and procedures. A complete account of these is not within the scope of this part, but some pertinent issues relating to the law and practice of fostering that turned up during field research have been discussed.[710] The next chapter, which provides the legal framework for child adoption, discusses further legal and practical issues relating to foster care in connection with the law and practice of child adoption.

3.6.4 Institutional Care Placement

Regulation 2 of the Children's Homes Regulations, 2012 defines institutional care as "a range of facilities and services serving most vulnerable children and children in need of care and protection in a group setting." Under Part XI, the Law of the Child Act divides institutional caregivers into two groups, namely, approved residential homes and institutions, and daycare centres and crèches. This part refers to the first category. Section 3 of the Law of the Child Act defines such institutions by inclusion. They comprise approved residential homes, retention homes, approved schools, institutions for socially deprived children and street children, a person or institution that has care and control of children, and any other establishment designated as such by the Commissioner for Social Welfare. Considering that the list of available institutions is quite extensive, it is significant to indicate that this study focuses only on children's homes as defined under section 2 of the Children's Homes Regulations, 2012. These are defined as "an institution other than an approved school and a retention home, where five or more most vulnerable children or children in need of care and protection are received, cared for, and maintained, either gratuitously or for payment by a person who is not a relative or guardian of the child." In addition, because regulation 2 of the Children's Homes Regulations, while defining the term institution for purposes of the Regulations, excludes approved schools, retention homes and crisis centres, this part excludes the same from its scope of coverage.

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[709] Interview with social welfare officer, Bunju Ward, Kinondoni, Dar es Salaam on 04.01.2019.

[710] For a full discussion of the law and practice of foster care in Tanzania, see Veronica G. Buchumi, *The Right to Alternative Care for Children in Tanzania: An Inquiry into the Law and Practice of Foster Care* (Doctoral Dissertation in Law, University of Bayreuth, 2021).

Institutional care placement is listed under section 18(3) (a) of the Law of the Child Act and regulation 62(2) (c) of the Child Protection Regulations as one type of alternative child care. Both provisions refer to it as care in an approved residential home. Section 3 of the Law of the Child Act defines an approved residential home as a licensed home where a child receives substitute and temporary family care. However, other provisions under the Act refer to placement in "an approved residential home or institution".[711] Section 133(8) of the Act lists what constitutes approved residential homes and institutions. The list includes some institutions excluded by the Children's Homes Regulations and from the scope of this study as explained above. This study's rationale for the exclusion includes placement grounds listed under section 137(1) of the Act and regulation 59(1) of the Child Protection Regulations. Some of the grounds, such as a child being in conflict with the law, are beyond this study's scope.

The Law of the Child Act and the Children's Homes Regulations provide the law and procedure for placement in children's homes. Placement in a children's home is provided for in sections 18(3) (a) and 137(1) of the Act. A child may be placed in a children's home pursuant to a care order; pending a court order for care and protection;[712] when a social welfare officer has determined it the most suitable place; or when an officer has approved placement for an orphan to whom family or foster care is unavailable. Other ways may be through the child presenting himself or herself at the children's home or being taken there by another person as stipulated under section 53(1) (c) of the Act and regulation 16(4) (a) and (b) of the Children's Home Regulations. Regulation 16 of the Children's Home Regulations provides the placement procedure. The requirements and procedures for admission into a home vary slightly depending on the circumstances of placement. Parental consent is, however, necessary for such placement. According to regulation 16(1), a social welfare officer gives consent when placement falls under sections 18 and 137(1) of the Act. This is so because, among other reasons, section 18(2) of the Act gives a social welfare officer parental rights over a child placed under a care order.[713] In the case of emergency situations stipulated

[711] See sections 18(6), 19(7), 21, 27, 31(7), 32(1), 37(3), 40, 53(1), 96(4) and the whole of Part XI (a) of the Law of the Child Act, 2009.

[712] Section 31(7) of the Law of the Child Act, 2009 directs a social welfare officer to place a child in an approved residential home or institution pending a care or supervision order of the court when it is not issued within fourteen days (probably referring to the period in which a child is taken to a place of safety). A similar provision is reiterated under section 96(4) of the Act.

[713] The section should be read together with regulation 60(1) of the Child Protection Regulations, 2014 which provides that an applicant local government authority assumes parental rights for a child placed under a care order. According to regulation 6(2), the social welfare department in a local government authority exercises the authority's mandate in child welfare cases.

under regulation 16(4) (a) and (b) of the Children's Homes Regulations, the law waives parental consent and procedures for official admission as explained under regulation 16(5) and (6). The Act under Part XI, together with the Children's Homes Regulations, describes extensively the principles, requirements and procedures for placement in a children's home. This part does not endeavour to cover them comprehensively. Instead, it focuses on some key issues relating to institutional care in the law and as observed during field research.

According to the principle formulated in regulation 3(c) of the Children's Homes Regulations, institutional care placement in Tanzania should be a temporary measure and a last resort. It is temporary if the children are awaiting a further administrative or judicial decision regarding their care. Also, children may be placed for a time while seeking other care solutions, such as foster care or family reunification, according to section 137(3) and (5) and regulation 22 of the Children's Homes Regulations. It is a measure of last resort because other care measures must be given priority over it. This means that a child should be placed in a children's home only when no other care option is available or when it has been determined that institutional care is the most suitable option for the child. Even in these scenarios, the placement of children in a children's home must be in their best interest as stipulated under regulations 3(f), 4(1) and 22(1) of the Children's Homes Regulations. In practice, however, the researcher found that institutional care is neither a measure of last resort nor temporary in a considerable number of cases. Children's homes are used as a measure of first resort pending further action, which is in accordance with sections 18(3) (a), 31(7), and 137(1) (a) of the Act. Unfortunately, in many cases, there is no 'further action'. The scarcity of other suitable care alternatives (fit persons or foster parents) may explain this practice. This state of affairs, combined with the workload pressures of social welfare officers which limit their ability to follow up each case, leads to children staying in homes until they reach majority. In most cases, this practice does not serve the best interests of the child. When discussing this, a respondent social welfare officer said,

> "Children remain in residential homes when their assigned officers find no way to place them in a family-based care measure. And once these children grow older, it becomes increasingly difficult to get an alternative to the homes. For instance, adopters want only younger children. Hence, the older ones remain in the homes, get educated and trained to be self-reliant, and when they are 18, they leave."[714]

[714] Interview with social welfare officer 1-Kinondoni District, Dar es Salaam, on 23.01.2019. Regulation 22(7) of the Children's Homes Regulations requires homes to prepare children approaching 18 years for independent living. Also, while working with the homes, social welfare officers, in consultation with the child, are required to find accomodation and employment or placements for further educational or vocational training. How these requirements are enforced in practice is a subject for further research.

A child cannot be placed in a children's home unless the Commissioner of Social Welfare has approved and licensed the home under section 133 (2)-(5) of the Act and regulations 5-7 of the Children's Homes Regulations. Thus, as per section 146(2) (a) of the Act, a person operating a children's home without a licence commits an offence punishable by a fine and/or imprisonment. Licensing is meant to safeguard the child's welfare because licensed homes are monitored, supervised, directed, and inspected in accordance with the requirements of sections 134-136 and 151 of the Act and regulations 27-28 of the Children's Homes Regulations. If monitoring and inspection prove a home to be unfit, the Commissioner must cancel the licence, as per section 140 of the Act, and provide an alternative arrangement for the children placed in it. During field research, it was found that there were a considerable number of homes operating without licences. Also, the Department of Social Welfare was in a dilemma regarding closure of the unlicensed homes because it had no safe places to take the children to. A social welfare officer working in the social welfare department for Arusha city council said,

> "Since Arusha is a touristic city, many Europeans pass through it. As they usually are interested in helping children, they assist resident Tanzanians in opening children's homes and sponsoring them. To maintain this sponsorship, the owners always try to find children to place in their homes. They treat these homes as a business. Hence, they are not overly concerned with making them legal; they, instead, continue operating without licences. Our recent monitoring and inspection undertaking found that fifteen children's homes are operating without licences in Arusha. Unfortunately, we cannot close them immediately as it will risk the children's welfare."[715]

UNICEF Tanzania, whose emphatic agenda was the de-institutionalisation of child care in the country, found this a challenge. The respondent UNICEF child specialist opined,

> "UNICEF Tanzania intends to work with the government to ensure that only a few well-managed children's homes remain in operation. Placing children in institutions must be the very last resort. This is the clearest position for UNICEF Tanzania now." [716]

Institutionalised care remains a prominent mode of child care in Tanzania. In 2011, the Ministry of Health and Social Welfare, with the support of UNICEF Tanzania, carried out a national survey assessing institutional care in the country.[717] The survey found that there were 282 children's homes in Tanzania, with 11,216 children.[718] Arusha was the region with the

[715] Interview with social welfare officer 2-Arusha City, on 19.03.2019.
[716] Interview with child protection specialist, UNICEF, in Dar es Salaam on 21.02.2019.
[717] Open University Consultancy Bureau, *A Draft Report on Assessment of the Situation of Children in Institutional Care in Tanzania* (November 2011).
[718] *Ibid.*, at p. 12.

most significant number of homes, standing at 39. During field research in 2019, the researcher found the following statistics for Arusha:

Table 3-1: Number of Children's Homes in Arusha[719]

Number of Children's Homes in Arusha, March 2019		
Licensed	13	There were 32 children's homes in 2018. The Commissioner closed down 4 homes that were in severely bad condition.
Unlicensed	15	
Total	28	

It is evident that in view of the extent of the problem of children in need of care and protection, as described in this chapter, the number of children living in homes is still relatively low. Although the survey's findings are almost a decade prior to this study, the number of children in the homes could not have grown to account for the statistics discussed earlier in the chapter. Since it was not in the scope and capacity of this study to do a national survey of institutional care, it is difficult to explain where the remaining children in need of care and protection are accommodated. This is after considering the low level of fit person and foster care practice. Of course, as already explained, a substantial number of children live and work on the street. Still, they do not account for the numbers represented in the reports discussed in this chapter. In this case, it is reasonable to surmise that there are cracks and holes in the child protection system. Still, the question of how de-institutionalisation will be achieved remains.

Pertinent to this study is the role played by approved residential homes and institutions in the child adoption process. As specified under section 3 of the Law of the Child Act, such homes provide temporary care for children pending family reunification, fosterage, or adoption.[720] Sections 32(1), 53(1) and 143 of the Law of the Child Act specify that homes provide care for children before being placed in foster care or adopted. Section 53 of the Act and Regulation 8 of the Foster Care Placement Regulations show that children eligible for foster care and later adoption mainly originate from homes or institutions. Thus, in simple terms, children's homes are the primary source of children put up for adoption in Tanzania.

Patrons/matrons or managers of approved residential homes or institutions have significant roles to play in the adoption process. First and foremost, they have parental responsibility for

[719] Interview with social welfare officer 2-Arusha city, on 19.03.2019 produced the statistics.

[720] Sections 137(3)-(5) and 143 of the Law of the Child Act, 2009 specify that managers of residential homes and the Social Welfare Department are required to work towards a more permanent solution for children in institutions such as family reunification, foster care placement or adoption.

the children placed in their homes or institutions according to section 27 of the Act. Second, they can identify children in their care whom they consider suitable for foster care and adoption.[721] Third, under section 58(1) of the Act, consent for adopting a child from a children's home should be sought from the respective patron/matron or manager who has parental rights over the child. Last, further cementing their role in adoption, section 143(3) of the Act requires the Commissioner to consult the patron/matron or manager of an approved residential home or institution when deciding regarding the adoption of a child in his or her care.

3.6.5 Child Adoption

Child adoption, the special focus of this study, is one of Tanzania's formal alternative care measures. It is an alternative care measure that provides a child in need of care and protection with a family environment. However, it is in a different class from the four types of placement discussed above. Section 18(3) of the Act does not list it as an alternative care placement option. Instead, section 24(1) of the Act lists it as a care option for a child under a care or supervision order whose parent, guardian or relative does not show any interest in his or her welfare within a specified time. When suitable and available for a child, child adoption provides a permanent solution through a new adoptive family. The adopted child's familial relations thus permanently change with parental rights and responsibilities transferring from the biological to the adoptive parents. For this reason, once child adoption is concluded, the adopted child is not considered to be in an alternative care placement.

As child adoption is the special focus of this study, it is examined in all its details in the following chapter.

3.7 Conclusion

There are a significant number of children in need of parental care and protection in Tanzania. Section 16 of the Law of the Child Act provides an extensive list of circumstances in which these children live. The listed circumstances do not necessarily mean the children are without, or deprived of, parental care; others have parental care, but it is inadequate. This study considers those children who, for whatever reason, can never return to or remain in the care of their parents, guardians, or relatives, and hence are freed for adoption.

The Law of the Child Act and the Regulations made under it build a legal and institutional framework for the care and protection of children in need. Unfortunately, these laws have multiple errors ranging from language, typos, incorrect numbering, and cross-referencing

[721] According to section 32(1) and (3) of the Law of the Child Act, 2009 and rule 9(1) (b) of the Foster Care Placement Regulations, 2012 they may identify or recommend children for foster care placement.

inconsistencies within the same text or across different texts. The legal framework they create has interpretative issues arising from the different timelines of the Act's enactment and Regulations' adoption. Also, the drafters' intention is not always clear, which may lead to misapplication of the law. For these reasons and others to be explored in the following chapters, the practice of child care and protection is complicated.

The principles of alternative care, for instance, are not consistently incorporated in the Act and Regulations. The Act does not include a list of alternative care principles. These are found under the Regulations. The Foster Care Placement Regulations have the least provision for the principles, while the Children's Homes Regulations include the most comprehensive list. Thus, adherence to these principles in child protection practice is inconsistent, which may impinge on the best interests of some children. Uniform across all instruments is the requirement for all administrative and judicial action to adhere to the best interests of the child principle.

Alternative care placement provisions in the Act and Regulations are sometimes in conflict. There lacks clarity between Regulation 44(2) of the Child Protection Regulations and other provisions that children under voluntary care of a local government authority or subject to a care order of the court may be placed with relatives. Following the child protection procedure laid down in the Regulations, children subject to voluntary care or care order arrangements are those whom social welfare officers have confirmed cannot be adequately cared for by their relatives. Thus, suggesting placement with relatives as an option for them is a contradiction.

The Law of the Child Act recognises kinship care. However, its regulation remains a challenge. The law provides for the monitoring of formal placements with relatives. Nonetheless, social welfare officers rarely achieve this in practice. Informal kinship care ends with its recognition in the Act. The Act contains no further provisions regarding standards or safeguards. Although state intervention in traditional child care remains debatable, issues regarding children's exposure to significant harm in kinship care cannot be ignored. There must be a balance for the child's best interest.

The laws establish a range of formal alternative care measures in response to the suitability principle. However, these measures are not sufficiently practised in terms of extent and compliance with the law. For instance, the Act introduced placement with fit persons in 2009, but it has not yet taken off as a measure practised in all districts in the country. Its Regulations had not been published at the time of writing, more than a decade after the measure was initiated. Foster care placement, on the other hand, is largely practised as pre-adoption care. It

does not live up to its potential under the law. There are no standby registered foster carers as the Act envisages. These practical shortfalls leave children languishing in institutional care, mostly against their best interests. Also, they increasingly make institutional care the measure of first resort, against the principles laid down in the law.

Despite these challenges, the Child Protection Regulations establish a robust, comprehensive child protection procedure, which, if implemented, guarantees adherence to the principle of the child's best interests. However, enactment of the Regulations did not go hand in hand with enhancing the work conditions of social welfare officers. The existing workplace pressures arising from the shortage of resources, such as time, qualified human resources, infrastructure, and finance, compromise implementation of the Regulations.

Chapter 4: Legal Framework on Child Adoption in Tanzania

> "When an adoption order is made, the adoptive parent of the child shall assume the parental rights, duties, obligations and liabilities of the child with respect of custody, maintenance and education **as if the child was born to the adoptive parent in a lawful wedlock and was not the child of any other person**."[722] [emphasis added]

4.1 Introduction

The Law of the Child Act, with several Regulations made under it, covers broad issues concerning child welfare. Together, they provide a comprehensive but inexhaustive framework for child adoption. As this chapter endeavours to show, several other laws come into play regarding the legal framework of child adoption in the country.

This chapter explores the current legal framework regulating child adoption in Tanzania. The main objective is to familiarise the reader with the multiple legal orders that govern child adoption and give a step-by-step walk through the legal requirements and procedures entailed. Where relevant, the chapter also provides a critical analysis of the law, based on insights gained during field research. The ultimate aim is to achieve an understanding of legal and policy aspects that govern child adoption in Tanzania.

4.2 National Law

National or domestic laws include all sets of laws, rules and regulations that apply within the Tanzanian territory. Since Tanzania is a union composed of Tanzania Mainland (formerly Tanganyika) and Zanzibar, only some of the laws apply to the entire country. Others apply only to one part of the union. Child welfare does not fall within the pool of union matters listed under the first schedule to the 1977 Constitution. Therefore, the Law of the Child Act, as it specifies under section 2, applies only to Mainland Tanzania. Tanzania Zanzibar has its own Children's Act.[723] This chapter mainly analyses the laws that apply in Tanzania Mainland. In the instance that it refers to a law that does not so apply, details will be given of its territorial application. The primary sources of domestic law in Mainland Tanzania are the Constitution of the United Republic of Tanzania, 1977, principal and subsidiary legislation, case law, received law, customary law, and religious law. Within these categories, the chapter explores the domestic laws that govern child adoption.

[722] Section 64(1) (b) of the Law of the Child Act, 2009.
[723] Zanzibar's Children's Act, 2011.

4.2.1 Constitution of the United Republic of Tanzania, 1977

The Constitution of the United Republic of Tanzania guarantees fundamental rights and freedoms.[724] Such provisions are in the Bill of Rights as covered under Articles 12-19 of the Constitution. The Constitution also establishes a mechanism for redress where there is a violation of human rights under the Bill.[725] However, it does not explicitly provide for children's rights, especially for their care and protection. Thus, only inferences can be drawn from its general provisions. For example, Article 13(1), which guarantees equal protection before the law, means that measures are needed to ensure the safety of children in danger. The same is also true of Article 14, which provides that "every person has the right to live and to the protection of his life by the society in accordance with the law." The words 'every person' include children. Thus, alternative child care is a way of ensuring the protection of children, especially of children in need.

Lack of express provision for children's rights and welfare may signify that the Constitution shows its age. In recent years, Tanzanians started to show their discontent with the current Constitution, which led to the constitutional review process in 2011. The fourth phase of government under President Jakaya Mrisho Kikwete initiated the process through the Constitutional Review Act.[726] The review process, however, was never concluded, as political and other diverging interests polarised it. Its unfinished product was the Proposed Draft Constitution of 2014 with no force of law, as a referendum to legitimise it was never called. The proposed draft, however, had some comprehensive provisions covering children's welfare. For example, Article 50 of the Proposed Draft Constitution, 2014, codified children's rights. Unfortunately, the draft rests on the government shelves, leaving the old Constitution in operation with no explicit promotion and protection of children's rights and welfare.

4.2.2 Principal Legislation

Principal legislation or Acts of Parliament are laws enacted by the Parliament of the United Republic of Tanzania.[727] The Parliament derives its legislative power from Articles 63(3) (d) and 64 of the Constitution (URT Constitution) of 1977. In matters of family and child law, there are two specialised Acts of Parliament. These are the Law of Marriage Act, 1971, which governs marital and parental relations, and the Law of the Child Act, 2009, which covers all issues relating to children. Both Acts play a part in the practice of alternative care of children.

[724] Constitution of the United Republic of Tanzania.
[725] See the details in Article 30 of the Constitution and Basic Rights and Duties Enforcement Act, [Cap 3 R.E 2019].
[726] Constitutional Review Act, 2011 [Cap 83 R.E 2014].
[727] Section 4 of Interpretation of Laws Act, [Cap 1 R.E 2019].

4.2.2.1 Law of Marriage Act, 1971

In 1969, the Government of Tanzania issued a White Paper with recommendations for a new law of marriage.[728] The intention was to unify and harmonise the multiple prevailing regimes of the law of marriage at the time. Thus, the law would recognise marriages as long as they were celebrated under the recognised legal systems, for example under Islamic, customary, or Christian rites.[729] The White Paper recommendations led to the enactment of the Law of Marriage Act of 1971. With its several amendments, this Act has been the core source of family law in Tanzania since 1971.

The Law of Marriage Act governs the inception, subsistence and dissolution of marriage and its consequences as well as associated matters. Naturally, children as fruits of marriage are provided for under the legislation. However, provisions for child care are limited to matters proceeding from marriage breakdowns such as custody, maintenance, distribution of matrimonial property and other matrimonial reliefs.

Alternative care for children at risk of or deprived of parental care is not a matter extensively covered under the Law of Marriage Act, 1971. It was only in 2009 that the Law of the Child Act (discussed below) addressed this matter comprehensively. Before 2009, alternative child care was governed in a piecemeal style with its regulation scattered across several pieces of legislation such as the Adoption of Children Act, 1953, the Children's Homes (Regulation) Act, 1968 and the Children's Homes Regulations,1968.

It is not that the Law of Marriage Act did not provide for alternative child care at all, but it did so only in a very specific manner. The Act provided alternative care mainly in the form of child custody once a marriage has broken down and both parents are found unfit to have custody of their child or children. In that situation, section 125(1) of the Law of Marriage Act provides for alternative care through the court, in which the custody of a child is entrusted to a relative or an association concerned with children's welfare. As far as child adoption is concerned, the Act defines a child in section 2(1) as including an adopted child. This means that wherever a child is mentioned under the Act, it also refers to an adopted child. Further reference to adopted children in the Act is limited to Section 14(4), where marital relations between adopters and adoptees are prohibited.

[728] The Government of Tanzania, Government Paper No. 1 of 1969: Government Proposals on Uniform law of Marriage (Dar es Salaam, Tanzania, 1969).

[729] Law Reform Commission of Tanzania, Report of the Commission on the Law of Marriage Act, 1971 (Act No. 5 of 1971) Presented to the Minister for Justice and Constitutional Affairs (Dar es Salaam, 1994), at p. 1.

4.2.2.2 Law of the Child Act, 2009

Failure to sufficiently provide for and protect the child in the Law of Marriage Act, 1971 and the piecemeal framework of child laws necessitated the reform and consolidation of laws relating to children. The reform of child law in Tanzania culminated in the enactment of a unified Law of the Child Act in 2009. The Law mainly covers four areas as stipulated in its long title: promotion and protection of children's rights and welfare in line with commitments under international and regional instruments; parentage and care of children in terms of child affiliation, custody, maintenance, foster care, adoption, and institutional care; employment and apprenticeship; and juvenile justice.

To ensure the promotion of child welfare, the Act identifies a child in need of care and protection under section 16 and proceeds to establish mechanisms for his or her well-being. The Act and Regulations under it provide for the formal process of child care and protection. As shown above in chapter 3, it starts with referrals to the social welfare department, which may extend to court orders of care or supervision. If a child's home is unsafe, removing the child becomes necessary, and alternative care placements under section 18(3) of the Act, such as placement with fit persons or foster parents, admission to a children's home, or adoption, become necessary.

The Law of the Child Act, 2009 is the principal source of adoption law and procedure in Tanzania. It applies together with several Regulations made under it.[730] Provisions on child adoption are in Part VI of the Act. Sections 62 and 74 of the Act provide for adoption by non-resident Tanzanians and resident non-Tanzanians, the special focus of this study. A detailed account of the law and procedure regarding these two types of child adoption follows in other parts of this chapter below.

4.2.3 Subsidiary Legislation

Section 4 of the Interpretation and Application of Laws Act defines subsidiary legislation as orders, proclamations, rules, rules of court, regulations, notices, by-laws, or other instruments made under a parent Act by a lawful authority. Several rules and regulations relating to child welfare were made under the Law of the Child Act, 2009. These laws are relevant as they guide child adoption procedure and practice. They include the Child Protection Regulations of 2014, the Foster Care Placement Regulations of 2012, the Adoption of Children Regulations of 2012, the Children's Homes Regulations of 2012, and the Juvenile Court Procedure Rules of 2016.

[730] The power to make regulations for child adoption and other related matters is vested in the Minister under sections 75 and 157 of the Law of the Child Act, 2009.

4.2.3.1 Child Protection Regulations, 2014

These Regulations were enacted in 2014 under section 157(a) of the Law of the Child Act.[731] They provide general principles and guide action for the care and protection of children suffering or at risk of suffering harm. The Regulations map out the entire procedure from identifying children in need of care and protection to their removal to a place of safety, provision of assistance and accommodation or placement in care. They also identify the institutions and personnel responsible for the whole protection process.

Adoption of children is an alternative care measure with the potential to respond to all principles guiding child care decisions listed under regulation 3 (2) (a)-(e). Recognising the role of child adoption in the care and protection of children, regulation 7(2) (g) requires heads of social welfare departments to establish and maintain adoption services in their districts. Further, in the preparation of a care plan for purposes of a care order, regulation 48(1)(b) (to be read together with section 24 of the Law of Child Act) specifically requires a social welfare officer to consider and declare whether adoption is in the best interests of the child. Where child adoption is the most suitable option for the child, regulation 49(4) directs the Juvenile Court in care order proceedings to declare the child free for adoption. Thereafter, according to regulations 49(5) and 50(5), child adoption procedures under the Law of the Child Act, 2009 and Regulations under it shall follow suit.

4.2.3.2 Foster Care Placement Regulations, 2012

The Child Protection Regulations list placement with foster parents as an alternative solution for children deprived of parental care.[732] Foster Care Placement Regulations are made pursuant to section 157(b) of the Law of the Child Act, 2009. The Regulations lay down the procedure and requirements for foster care placement in Tanzania.

According to sections 56(3) (b), 59(5), and 74(1) (c) of the Law of the Child Act, 2009, foster care placement, depicted as pre-adoption care, is a legal prerequisite of child adoption. Within the required foster care period, a bond is created between the prospective adoptive parents and the child. An assessment of the viability of adoption is based on observations during this period. For resident non-Tanzanians, the required foster period is a minimum of three months. The Law of the Child Act or Foster Care Placement Regulations do not specify the necessary foster period for non-resident Tanzanians. Hence it is presumably a minimum of six months

[731] Child Protection Regulations, 2014.

[732] Foster Care Placement Regulations 2012, G.N 153 of 2012. Regulation 38 read together with 62 indicate that children in need of assistance and accommodation, which includes children lost, abandoned, seeking refuge or without parental care, may be accommodated with an appropriate foster parent.

as stated under section 56(3) (b) of the Act. The Foster Care Placement Regulations thus govern part of the process of child adoption.

4.2.3.3 Adoption of Children Regulations, 2012

These Regulations are made under sections 75 and 157(c) of the Law of the Child Act, 2009.[733] They provide the legal requirements and procedures for child adoption. The Regulations underline the paramountcy of the child's best interests as the governing principle in all decisions relating to child adoption. The determination criteria for the best interests of each child are listed under regulation 3(a)-(e). This means that the adoption of children by non-resident Tanzanians and resident non-Tanzanians should only be allowed if it is in the child's best interests. However, the Regulations do not go into much detail concerning these two types of adoption.[734] Thus, this chapter extensively analyses the relevant legal requirements and procedures and how they work out in practice.

4.2.3.4 Children's Homes Regulations, 2012

Regulations to establish and maintain standards for approved children's homes are made under sections 145 and 157(a) of the Law of the Child Act.[735] Under regulations 3, 4, 9 and 12, the Regulations provide a long list of principles and children's rights that must be adhered to in the care and maintenance of children in the homes. Apart from guiding children's lives in homes, these principles also establish the right of children to be placed in non-institutional alternative care. Thus, regulation 3(c) stipulates that placement in institutional care must be a measure of last resort and temporary.

Regulation 22(4) stipulates that in case of failure to reunite the child with his or her parent, relative or guardian, a social welfare officer should identify the most suitable alternative care option for the child. Reading this sub-regulation together with section 143 of the Law of the Child Act, 2009, child adoption may be the most suitable option when it is in the child's best interest. The Children's Homes Regulations are significant in the child adoption regulatory framework because, according to the Act, the Adoption of Children Regulations and the Foster Care Placement Regulations, children put up for adoption mainly originate from children's homes.

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[733] Adoption of Children Regulations 2012, G.N No. 197 of 2012.

[734] The English version of the Adoption of Children Regulations obtained from the Attorney General's Office does not have provisions for these types of adoption due to a page numbering problem that truncates the Regulations. Instead, their provision is available under sections 25-26 and 27-28 of the Kiswahili version of the Regulations, Tafsiri ya Kanuni za Uasili Watoto za Mwaka 2012.

[735] Children's Homes Regulations, 2012, G.N 155 of 2012.

4.2.3.5 Law of the Child (Juvenile Court Procedure) Rules, 2016

The Law of the Child Act under section 97 makes the Juvenile Court responsible for hearing and determining matters relating to children. Section 99 of the Act also enables the Chief Justice to make rules to guide procedure and practice in the court. In 2016, the Juvenile Court Procedure Rules were adopted to protect children's rights under the Act and provide uniform procedure and practice in all juvenile court establishments in Mainland Tanzania.[736] According to section 98 of the Law of the Child Act, juvenile courts have jurisdiction in criminal and civil matters. The courts, therefore, do not only deal with cases where the child is in conflict with the law. They also come in where the care, maintenance and protection of a child is at issue. The Juvenile Court Rules give procedures for determining parentage, custody, access, maintenance, and care and protection of children.

Child adoption is one of the alternative care measures that a juvenile court needs to consider and authorise. According to rule 99, in an application for a care order where the care plan is for adoption, the court has to look at the evidence presented, including consent or lack of consent to adoption, before declaring the child free for adoption. The process of freeing a child for adoption includes determining a child's adoptability but does not conclude the adoption process itself. Both the Act and the Rules confer jurisdiction for child adoption not on the Juvenile Court, but on the High Court, and in cases of open adoption on the Resident Magistrates' Court or the District Court.

4.2.4 Case Law

Tanzania's legal system is based on the English common law system. Therefore, the doctrine of *stare decisis* by which case law is generated applies. The doctrine originates from a Latin maxim *Stare decisis et non quieta movere*, which translated as the obligation to stand by prior decisions and not disturb matters already settled. According to this doctrine, courts in the common law tradition are bound or persuaded by the principle or rule established in a previous case involving facts or issues similar to those of the present case.[737] Observance of precedents is founded on the need for consistency and certainty in the administration of justice, where similar cases yield similar outcomes.

Case law is also known as judge-made law. Before the Law of the Child Act, 2009, judges made rules to regulate the adoption of children by non-resident Tanzanians and resident non-Tanzanians because there were no provisions for this under the Adoption of Children Act,

[736] Law of the Child Act (Juvenile Court Procedure) Rules, 2016 GN. No. 182 of 2016.
[737] Glanville L. Williams, A. T. H. Smith, *Learning the Law* (London: Sweet & Maxwell, 2010), p. 92.

1953.[738] These rules became binding or persuasive in subsequent similar adoption petitions. For instance, the case of *Master Ayaz and Two Others* has become a classical case whose precedent has been used in determining similar questions of law in other adoption petitions.[739] In the recent legal regime, rules made by judges and magistrates on diverse points of adoption law, even under the repealed Adoption of Children Act, 1953, apply in subsequent adoption petitions. The doctrine of precedents may be observed further under chapter six, where some cases are discussed.

4.2.5 Received Law

English law was applicable in Tanzania during the colonial period. The Judicature and Application of Laws Act makes it applicable to date. According to section 2(3), applicable laws to Tanzania are common law, doctrines of equity, statutes of general application and powers, procedure, and practice before Courts of Justice in England enforceable on 22nd July 1920. However, their applicability is said to depend on the local circumstances in Tanzania.

Sections 9 and 14-18 of the Judicature and Application of Laws Act also make laws passed in the UK and in India enforceable in Tanzania. The only difference is the reception date of these laws. Only Acts enforceable in the United Kingdom before the 22nd of July 1920 and the 1st of December 1920 in India are applicable. Applicability is also limited by the list of Acts in the first and second schedules of the Judicature and Application of Laws Act. These received laws have an impact on child adoption law and practice in Tanzania. For instance, the Indian Succession Act of 1865 listed under the second schedule is still applicable in the legal framework for probate and administration of estates in Tanzania. Since this law and others in its class may affect adopted children's inheritance rights in Tanzania, it makes received laws a legal source to reckon with in child adoption practice. This study, however, does not analyse received laws in any specific terms relating to the subject of the study.

4.2.6 Customary and Religious Law

Section 11 of the Judicature and Application of Laws Act recognises and permits customary law in specified circumstances in Tanzania. According to section 11(3), courts may apply customary law prevailing within their area of local jurisdiction, if multiple, then of the area where the matter arose, or whichever is determined applicable.[740] Section 12 of the Act

[738] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, pp. 143–147.
[739] High Court of Tanzania, At Dar es Salaam, "In the Matter of Adoption Ordinance, Cap. 335 and in the Matter of Master Ayaz and Two Others", LRT (1978).
[740] Further details on customary law and its applicability are in the Magistrates Courts Act. See for example Section 18 (1) of Magistrates Courts Act [Cap 11 R.E 2019].

empowers district councils to declare or modify local customary laws. In the spirit of the section, after independence, customary laws in Tanzania were unified and codified in the Declarations of Customary Laws, 1963.[741] The Declarations are not representative of the customary laws of all communities in Tanzania. Also, because customary law is dynamic, living rather than recorded customary law reflects the prevailing customary norms in each community.[742]

For a long time in Tanzania, customary laws have played a central role in the care and protection of children. Traditional care of children, kin- or community-based, has remained informal and regulated by customary law. The Law of the Child Act under section 9(4) recognises traditional arrangements for the care of orphan children. Also, in child adoption, section 68 of the Act subjects an adopted child to customary law where the adoptive parent is also subject to it. Customary law, therefore, influences the child adoption legal regime in Tanzania.

Religious law is also recognised as a source of law in Tanzania. The Judicature and Application of Laws Act and other laws permit the application of religious law in family matters. For example, according to section 11(1) proviso (ii) of the Judicature and Application of Laws Act, Islamic law may apply in marriage, divorce, guardianship, inheritance, *wakf*, and similar matters for Muslims. Nevertheless, formal child adoption is not one of those matters as it is not permissible under Islamic law. Section 76(1) of Tanzania Zanzibar's Children's Act provides explicitly that child adoption provisions do not apply to persons professing the Islamic faith.[743] Instead, a form of adoption called *kafala* is practised as provided for under section 75 of Zanzibar's Children's Act. Since the Law of the Child Act does not provide for *kafala*, the researcher finds the practice of child adoption by Muslims in Tanzania Mainland an interesting subject of observation.

4.2.7 International and Regional Law

Tanzania is a member of the international community and a State Party to several international and regional organisations. Relevant to this part are its legal obligations incurred under treaties concluded under the umbrella of the organisations. Concerning child welfare, instruments of the United Nations (UN), the African Union (AU), the East African

[741] Local Customary Law (Declaration) Orders, 1963.

[742] Living customary law refers to the observed unwritten, accepted and binding practices of a particular community. It adapts and changes according to the prevailing conditions in the community. See Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa", above footnote 46.

[743] Zanzibar's Children's Act, 2011.

Community (EAC), and the Southern African Development Community (SADC) domesticated in Tanzania are most significant to the study.

Much as international conventions and treaties are a source of law in Tanzania, they do not automatically apply. The application of international law in the country follows the dualist school of thought. This means that national law and international law are two separate legal orders. Thus, it is not enough that Tanzania has signed or acceded to an international instrument. For any international law to be justiciable in the country, a second step is required. Under Article 63(3) (e) of the 1977 URT Constitution, the Parliament must ratify it. Ratification is later followed by incorporation into national law.

When an international law is incorporated in national law, this is called domestication. However, even where certain provisions of a signed and ratified international instrument do not appear in an incorporating statute, those provisions remain binding according to the principle of *pacta sunt servanda.*[744] Article 27 of the Vienna Convention on the Law of Treaties prohibits states from evading their international obligations under treaties by invoking the excuse of absence from or conflict with national law.

4.2.7.1 United Nations' Instruments

Tanzania is a party to several treaties concluded by the United Nations that provide for child protection and well-being. These include the Convention Relating to the Status of Refugees, 1951; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979; the United Nations Convention on the Rights of the Child, 1989; the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 and the United Nations Convention on People Living with Disabilities, 2006.

As far as child adoption is concerned, the most pertinent instrument is the United Nations Convention on the Rights of the Child, 1989. Apart from being signed and ratified, the Convention has been extensively incorporated in the Law of the Child Act, 2009. Most noteworthy is the replication in the Act of the four cardinal principles that govern interpretation of the Convention. These principles are non-discrimination under section 5; the child's best interest under section 4(2); the right to life, survival and development under section 9, and respect for the child's views under section 11 of the Law of the Child Act, 2009. Also, relating to alternative care of children, the Act reflects Articles 20 and 21 of the

[744] This principle means that every treaty in force is binding to its parties and must be performed in good faith. See further Article 26 of the Vienna Convention on the Law of Treaties 1969 (23 May 1969).

Convention that provide for various measures such as foster care placement, child adoption, and placement in suitable institutions.[745]

Regarding child adoption, Article 21 gives the State the duty to ensure that the child's best interests shall be the paramount consideration. The standard is maintained in part VI of the Act and throughout its provisions, and under regulation 3 of the Adoption of Children Regulations. Section 59 of the Law of the Child Act, 2009, which provides for conditions of an adoption order, for instance, proves that the Act conforms to the Convention's provisions. It reflects the requirements for competent authorities to be involved in child adoption while emphasising adherence to law and procedure. The section also demands gathering pertinent information on the child, obtaining consent for adoption, and offering counsel when necessary. The remainder of Article 21 is echoed in the Act, not in the sense of inter-country adoption but rather adoption by non-Tanzanians.[746] The conclusion of bi- or multilateral arrangements or agreements is not included within the framework of adoption presented by the Act.

Also forming part of the legal framework are the United Nations Guidelines for the Alternative Care of Children, 2010.[747] The Guidelines aim at enhancing the implementation of the UNCRC and other international instruments providing for the well-being of children at the risk of being deprived of or deprived of parental care. This is a non-binding instrument that aims at informing policy and practice of alternative care in individual states. Because Tanzania has domesticated the UNCRC, the Guidelines apply to executive, legislative and judicial bodies, private child-welfare stakeholders, and the general public in matters of alternative care.

The United Nations' instruments mentioned in this part have a bearing on child welfare and adoption in one way or another. They do not represent an exhaustive list. Nonetheless, they are fundamental when considering issues of child care in Tanzania. The United Nations Convention on the Rights of the Child, 1989, is an indispensable ingredient in the child adoption legal framework recipe in Tanzania. Domestication of the Convention under the Law of the Child Act, 2009 reinforces adherence to it.

4.2.7.2 African Regional Instruments

Tanzania is a member of the African Union. In respect of the promotion and protection of human and children's rights and welfare, Tanzania signed and ratified the OAU Convention

[745] See Parts IV, VI and XI of the Law of the Child Act, 2009.
[746] Section 74 of the Law of the Child Act, 2009 provides for adoption by non-Tanzanians (foreigners).
[747] Guidelines for the Alternative Care of Children, A/RES/64/142 (24 February 2010).

Governing Specific Aspects of Refugee Problems in Africa, 1969; the African Charter on Human and Peoples' Rights, 1981 (Banjul Charter); the African Charter on the Rights and Welfare of the Child, 1990; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003; and the African Youth Charter, 2006. The position of these instruments in the Tanzanian legal framework does not differ from other international law instruments. They also require ratification and incorporation in national laws.

The instruments named above provide for the welfare of children at different levels. In some of them, child welfare can only be deduced from their provisions. For instance, the Banjul Charter recognises the collective rights and freedoms of all African peoples.[748] The closest it comes to explicitly providing for child welfare is under Article 18, which provides protection for the family. Specifically, Article 18(3) of the Charter charges states to protect children's rights as stipulated under international declarations and conventions. Therefore, though not clearly stated, it follows that the right to alternative care for children deprived of family care is guaranteed under the Charter.

The 1990 African Charter on the Rights and Welfare of the Child is the principal African instrument on child welfare. The Charter is a version of the United Nations Convention on the Rights of the Child, 1989, tailored to the African context. Thus, incorporation of the Charter in Tanzania's domestic law is apparent as its provisions barely differ from those of the UNCRC. Those sections of the Act that adopt an Africanised perspective from the Charter reflect its spirit much more clearly. For instance, section 15 of the Law of the Child Act, 2009, which establishes a child's duty and responsibility, follows Article 31 of the Charter.

Article 24 of the African Charter on the Rights and Welfare of the Child, 1990 covers child adoption. Although most elements of the provision are reflected in the sections providing for child adoption under the Law of the Child Act, 2009, a crucial part is underplayed. For instance, there is no clear machinery established under the Act or the Adoption of Children Regulations to monitor the well-being of the adopted child in accordance with Article 24(f) of the Charter.

When considering child adoption law in Tanzania, due attention must be paid to the 1990 Charter. The Charter in its entirety is binding on the State and can be used to guide child adoption practice. For instance, weaknesses in domestic law on post-adoption monitoring can

[748] See Article 2 of the African Charter on Human and Peoples' Rights (1981).

be redressed based on what the Charter provides because it is a part of the legal framework on child adoption.[749]

4.2.7.3 African Sub-Regional Instruments

Tanzania is a Member State of the East African Community (EAC) and the Southern African Development Community (SADC). These are sub-regional economic communities committed to cooperating and integrating in socio-economic development, politics, and security issues. Agreements concluded in these sub-regional groups become enforceable in Tanzania through the domestication process discussed in the preceding sections. For instance, in recognition of the dualist system, Article 8(2) of the EAC Treaty, 1999 requires the member states, called Partner States in the case of the EAC, to enact legislation to give effect to the treaty. Several EAC and SADC instruments provide for a similar requirement.[750]

In so far as child welfare is concerned, the blocs have not yet done much in terms of binding instruments. Although most of their Treaties and Protocols provide for social welfare in general, they do not specifically address the needs of the child.[751] With the increase in abuse of children in Africa in recent years, it is imperative for the two blocs to state their standing on child welfare. On the one hand, the EAC has adopted instruments such as the Bujumbura Declaration on Child Rights and Well-being of 2012,[752] the Child Rights Policy of 2016,[753] and the Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development (2012-2016).[754] The SADC, on the other hand, has adopted the Code of Conduct on Child Labour, 2000[755] and the Protocol on Gender and Development, 2008[756]. Other EAC and SADC instruments dedicated to boosting socio-economic development in their respective regions imply the promotion of children's welfare, but the instruments stated above are more forthright.

In the Bujumbura Declaration of 2012, the EAC Partner States committed themselves to strengthening their legal and policy frameworks on children. They agreed to ratify and

[749] Article 24(f) of the African Charter on the Rights and Welfare of the Child,1990, requires every African country practising child adoption to establish a machinery for monitoring the child's well-being post-adoption.
[750] For example, see Article 6 of the SADC Protocol on Gender and Development, 2008.
[751] The EAC Treaty, 1999 is built on the principle of promoting and protecting fundamental human rights and freedoms and Article 120(c) urges Partner States to co-operate amongst themselves in order to develop and adopt a common approach in social welfare towards disadvantaged and marginalised groups, including children. Also, Article 39 of the Common Market Protocol makes a call to the Partner States to harmonise their social policies towards protection of vulnerable groups, including children.
[752] Bujumbura Declaration on Child Rights and Wellbeing in East African Community (03.09.2012).
[753] EAC Child Policy 2016 (2016).
[754] Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development (2012-2016) (2012).
[755] Code of Conduct on Child Labour (2000).
[756] SADC, SADC Protocol on Gender and Development, 2008.

domesticate international and regional instruments related to children to enhance the protection of children in the region. The States realised the need to harmonise child laws and establish institutions and mechanisms for implementation, enforcement, monitoring, and reporting while involving children, families, and the community in such processes.[757] Also, they resolved to collaborate with other child rights stakeholders in the region.[758] These commitments, if implemented, will have a revolutionary impact on the law of child adoption in the region.

The idea to have an EAC Child Rights Policy was conceived in the Bujumbura Declaration.[759] The Policy realises the commitments made under the Declaration, formulates priority areas, and provides policy statements for each area. The policy packs quite a punch as a statement of intentions that influence legal and policy formulations, implementation, enforcement, monitoring, and reporting within the Partner States.

The SADC Code of Conduct on Child Labour, 2000 and the Protocol on Gender and Development, 2008 promote children's rights. While the Code mainly aims to prevent child labour and protect children from it, the Protocol seeks gender equality and equity in Southern Africa. They both advocate for enacting national legislation, adopting policy, programmes, and actions against child labour and gender discrimination. The Code further promulgates fighting against HIV/AIDs, eradicating poverty, prioritising education, and strengthening response and enforcement mechanisms for children's physical health, welfare, and social protection.[760] Although these instruments do not cover the right to alternative care, they recognise the brokenness of families and communities due to HIV/AIDs and violence. These problems have led to an increase in children in need of alternative care. In other words, these instruments encourage the social protection of children, which may translate into supporting the establishment of frameworks for alternative care provision in member states' jurisdictions.

4.3 Policy Framework

Policy is a statement of intent meant to direct the accomplishment of a public benefit that would otherwise not be achieved even with the best utilisation of available resources. It must be well researched and thought out and grounded on the reality of existing circumstances and

[757] Paragraph 1(b) and (m) of the EAC Council of Ministers, Bujumbura Declaration on Child Rights and Wellbeing in East African Community, 2012.
[758] *Ibid*., paragraph 2.
[759] *Ibid*., paragraph 1 (c).
[760] Paragraph 4(4) of the SADC, Code of Conduct on Child Labour, 2000.

in order to have the desired consequence.[761] Policies usually cover a particular subject matter in its broadness.

4.3.1 National Policies

National policies are adopted by the government and published in an official gazette to guide both public and private institutions in discharging their responsibilities in the given policy area. Most national policies in Tanzania touch on the welfare of children as children are part and parcel of the general population. However, only a few have children as their principal subject matter. Some key policies on children's matters include the Child Development Policy, 2008[762]; the National Education and Training Policy, 2014;[763] and the National Youth Development Policy, 2007.[764] Other child-related policies that address the welfare of children include the National Health Policy, 2017,[765] and the HIV/AIDS Policy, 2001.[766]

The Child Development Policy, 2008, is the principal policy on children in Tanzania, and is the policy that this part focuses on. It is a second edition of the 1996 Child Development Policy. The review focused on the changing socio-economic situation in the country with the aim of reformulating policy statements for the better realisation of children's rights. These changes included the increasing effects of HIV/AIDs, globalisation, the free trade system, and moral disintegration of the community.[767] Although the 1996 Policy was already based on the UNCRC 1989, the Declaration of the World Summit for Children of 1990 and the Millennium Development Goals 2000, the 2008 revision aimed at re-emphasising the five pillars of child rights: the right to life and survival, development, protection, participation, and non-discrimination.

The 2008 Policy provides a situational analysis, raises issues, and espouses policy statements for these five pillars of child rights to which it is dedicated. It also recognises that the HIV/AIDs pandemic, family breakdown, gender violence, poverty, hunger, and drought have

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[761] A good policy needs to be founded on evidence, be legitimate, have political and financial feasibility and address the key challenges in the policy area. The argument is drawn from Suleman Sumra, *Will the '2014 Education and Training Policy' prepare Tanzanian children to face challenges of the 21st century?*: *HakiElimu position paper on the education and training policy 2014* (Dar es Salaam: HakiElimu, October 2015), at pp. 17-20.

[762] United Republic of Tanzania, Ministry of Community Development, Gender and Children, "Child Development Policy" (Second edition) (March 2008: English version 2010).

[763] Ministry of Science and Technology, *National Education and Training Policy, 2014* (Dar es Salaam: Government Printers, 2014).

[764] Ministry Labour, Employment and Youth Development, *National Youth Development Policy, 2007* (Dar es Salaam, Tanzania: Government Publishers, 2007).

[765] Ministry of Health, Community Development, Gender, Elderly and Children, *The National Health Policy* (Dar es Salaam: Government Printers, 2017).

[766] The Prime Ministers Office, *National HIV/AIDS Policy* (Dar es Salaam: Government Printers, 2001).

[767] See Paragraph 4 of the United Republic of Tanzania, Ministry of Community Development, Gender and Children, "Child Development Policy", p. 6.

led to increased numbers of orphans and vulnerable children.[768] For the care of these children, the Policy advocates for family life through returning children to their families or strengthening community-based or societal systems of care.[769]

The Policy underlines the significance of alternative care for children without parental care. This is apparent in the Policy's devotion to realising the child's fundamental rights observed through the five pillars it is founded on. The right to alternative care is underscored by the Policy's focus on children's rights, evident in the call for enactment and amendment of laws that promote and protect children's rights. It is also seen in the recommendations on signing and ratifying international and regional instruments on children's rights.[770] Commendable is the call for coordination of children's issues through a comprehensive institutional framework, and for linking the 2008 Policy with other national policies to establish an extensive policy framework for children.[771]

4.3.2 National Guidelines, Strategies and Action Plans

A considerable body of documents has been prepared and adopted with a direct or indirect focus on improving child welfare in Tanzania. These include guidelines, strategies, and action plans. These texts build on the policy framework because they are either groundwork for or extensions of national policies. They are usually drafted and adopted by government ministries departments with the help of public and private stakeholders. As part of the policy framework, this part briefly discusses select crucial documents affecting children's right to alternative care.

4.3.2.1 National Strategy for Growth and Poverty Reduction (NSGPR) I & II

The National Strategy for Growth and Poverty Reduction (NSGPR), popularly known as MKUKUTA in Tanzania, was a development-specific policy crafted and used throughout the fourth phase government from 2005 to 2015.[772] It had two five-year phases of implementation, from 2005/2006 to 2009/2010 and 2011/2012 to 2014/2015.[773] The strategy presented the government's commitment to accelerate economic growth and fight poverty in Tanzania. The intent to fulfil such a commitment lies in its design to realise Millennium

[768] *Ibid*., paragraph 51.
[769] *Ibid*., paragraphs 48 and 51, at pp. 18 and 20, respectively.
[770] *Ibid*., paragraphs 61 and 64, pp. 24–27.
[771] *Ibid*., paragraphs 62, 64, 78 and Chapter 7, 25-26; 28-29.
[772] MKUKUTA is the acronym of the Strategy in Kiswahili whose long form is: Mpango wa Kukuza Uchumi na Kuondoa Umaskini Tanzania.
[773] Ministry of Finance and Economic Affairs, The National Strategy for Growth and Poverty Reduction (NSGPR) II, above footnote 773.Vice President's Office, United Republic of Tanzania, The National Strategy for Growth and Poverty Reduction (NSGPR) (Dar es Salaam: Government Printers, 2005).

Development Goals 2015[774] and the Tanzania Development Vision 2025.[775] The ultimate goal of this policy framework was to transform Tanzania into a middle-income country with a competitive and robust economy, good governance, high quality of life, high standards of education and learning, peace, stability, and unity.[776] This strategy has inspired the spirit of legislation, policy, and government function during the two phases and beyond.

MKUKUTA I & II share the same envisaged development outcomes arranged in clusters with specific goals. Cluster II of the strategy in both phases addressed the improvement of quality of life and social well-being. Goals under this cluster were, among other things, the improvement of children's well-being and social protection, including orphans and vulnerable children.[777] Specifically concerning vulnerable children without family care, the strategy aimed to strengthen social protection measures to remove unacceptable levels of insecurity and deprivation. It advocated for social assistance programmes and safety nets to protect the vulnerable. Although not articulated, it is implied that alternative care for children deprived of parental care, including child adoption, is envisioned within the operational targets of the strategy.

4.3.2.2 National Costed Plan of Action for Most Vulnerable Children (NCPA) I & II

Most vulnerable children (MVC) include children living in child-headed and elderly-headed households, orphans, disabled children, and children living with a parent in destitute conditions.[778] Tanzania's government realised that the number of MVC was increasing due to extreme poverty, the effects of the HIV/AIDs epidemic, and social disintegration. Such socio-economic challenges have weakened traditional care systems involving the extended family and the community. This has affected the availability of care, support, and protection for children in need. In response, the government devised NCPA I & II (2007-2010 and 2011-2013), which established a framework of strategic actions to improve standards of service, service delivery, and harnessing of resources for the care, support, and protection of MVC. The NCPAs also recognised and sought to review, amend, reform, or harmonise laws, policies, guidelines, strategies, and programmes related to MVC. These instclude the law of

[774] United Nations Millennium Declaration: A/RES/55/2 (18 September 2000).
[775] United Republic of Tanzania, Planning Commission, Tanzania Development Vision 2025 (Dar es Salaam: Government Printers, 1999).
[776] Ministry of Finance and Economic Affairs, The National Strategy for Growth and Poverty Reduction (NSGPR) II, above footnote 773, p. 1.
[777] See Goal 3 and 6 of Cluster II, *ibid.*, pp. 70–82.
[778] Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2007-2010". At p. ix there is a definition of MVC. There is a note that even children living with their parents may be most vulnerable and that not all orphans are necessarily most vulnerable. The estimated number of MVC was 930,000 in 2006 which constituted 5% of the child population at the time.

the child, national child development, health, and HIV/AIDs policies, MKUKUTA I & II, Millennium Development Goals and Development Vision 2025.

Both of the NCPAs strongly advocated for family-based care for children deprived of parental care. They prioritised reunification with birth families where tenable, followed by care within the extended family and community-based care. Where the mentioned measures proved unavailable, their emphasis was on promoting child adoption for children without families.[779] Realising that most children within the MVC group may need short- or long-term alternative care, the NCPAs provided a strategic plan for their social protection.[780]

4.3.2.3 National Guidelines for Improving Quality Care, Support and Protection for Most Vulnerable Children in Tanzania

In 2009 the Department of Social Welfare adopted guidelines to direct public and private stakeholders in the care, support, and protection of most vulnerable children (MVC) in Tanzania. The Guidelines are meant to help stakeholders to improve the quality of essential services to the most vulnerable children and provide them without variation in content and quality. The demand for guidelines, and for the NCPA, arose from the increase in the number of most vulnerable children in Tanzania due to socio-economic factors, such as extreme household income poverty, effects of the HIV/AIDs epidemic, family breakdown, and weakening of the kinship and community-based care that had catered for these children in the past.[781]

The Guidelines are a progression from the 2003 Guidelines for Community Based Care, Support and Protection of the MVC, which replaced the 1994 National Guidelines and Strategies for Care of Orphans. The National Framework on Quality Standards of Care for Service Provision to Most Vulnerable Children 2008 and thematic areas of NCPA I (2007-2010) gave a base to the eight key service areas that require quality improvement under the 2009 guidelines.[782] The guidelines provide two service areas that promote family-based alternative care for children deprived of family care, family-based care and support, and social protection and security.[783] Provisions under these two areas state formal foster care and child

[779] Also in Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2013-2017" under Strategic Objectives 1 and 2. Specific objectives 2 and 6 call for promotion of child adoption for children without families.

[780] Ministry of Health and Social Welfare, Department of Social Welfare, "The National Costed Plan of Action for Most Vulnerable Children, 2007-2010", pp. 24–36.

[781] Ministry of Health and Social Welfare, Department of Social Welfare, "National Guidelines for Improving Quality of Care, Support, and Protection for Most Vulnerable Children in Tanzania".

[782] *Ibid.,* at pp. iii and 4-7.

[783] *Ibid.,* pp. 10–12.

adoption as measures available in Tanzania to ensure a child is cared for in a family environment.

4.3.2.4 National Plan of Action to End Violence Against Women and Children in Tanzania (NPA-VAWC)

Recognising that violence against women and children is rampant in Tanzania and that past efforts to end it have not succeeded, the government adopted the NPA-VAWC in December 2016.[784] The plan of action responds to Tanzania's commitment to end all forms of violence against women and children as promulgated in international, regional, and national instruments. Also, targets under the Sustainable Development Goals (SDGs) 2030, African Agenda 2063: The Africa We Want, and Tanzania Development Vision 2025 provided stimuli for the preparation and adoption of NPA-VAWC. Tanzania's status as a pathfinder country in the Global Partnership to End Violence Against Children played a central role in securing this plan.

NPA-VAWC is a plan that has taken centre stage in implementation after the NCPAs, which concluded in 2013. Relating but differing from the NCPAs, NPA-VAWC's agenda focuses on building systems that will prevent all forms of violence against women and children and respond to the plight of the victims. The plan creates a framework that identifies eight thematic areas in which operational targets are set with specific implementation approaches, plans, and strategies. In thematic area six, which is geared towards response and support services for victims of violence, alternative care is on the list of priority actions for children at risk of or victimised by violence.[785] It is recognised that care may be temporary or permanent depending on the situation in each case. Also, that the most suitable kind of alternative care must be determined in each case. This can include adopting children who have suffered violence, in order to permanently remove them from the violent environment.

4.4 Legal Requirements for Child Adoption in Tanzania

Under the Law of the Child Act and its Regulations, the child adoption framework establishes criteria for persons who can adopt and children who can be adopted. The criteria are vital to assist the involved actors in determining the adoptability of a child and the eligibility of the adopter. Also, they help ensure that child adoption is the most suitable option and, in the child's best interest.

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[784] United Republic of Tanzania. Ministry of Health, Community Development, Gender, Elderly and Children, "National Plan of Action to End Violence Against Women and Children in Tanzania (NPA-VAWC) 2017/18 – 2012/22", pp. 2–3.
[785] *Ibid.*, pp. 47–48.

The Act envisages different types of adoption. These include adoption by birth parents, relatives, resident Tanzanians, non-resident Tanzanians, and resident non-Tanzanians. This chapter discusses the law and procedure on child adoption. However, there will be a particular emphasis on adoptions by non-resident Tanzanians and resident non-Tanzanians, as they form the special focus of this study.

4.4.1 Child Adoptability

Determining the adoptability of a child requires proving that adoption is the most suitable care option for the child. The test of adoptability should not end at suitability but extend to the necessity of adoption. Adoptability is not just a legal concept but takes into account social, psychological, medical, and emotional elements of child welfare. Thus, an adoptable child is one whose legal and psycho-social status makes it clear that adoption is required and is potentially beneficial.[786]

The adoptability of a child is a central question demanding an answer before any decision to adopt is made. Surprisingly, all principal legal instruments on this matter, including the UNCRC, ACRWC, and the Law of the Child Act, 2009, lack a definition of child adoptability. Instead, one can deduce its meaning by assessing their general provisions relevant to this matter. For example, Articles 21 of the UNCRC and Article 24 of the ACRWC emphasise that competent authorities must determine adoptability based on established procedure and relevant and reliable information on the child's status and the child's parents, guardians, and relatives. Thus, in these Articles, adoptability means that after considering all factors, adoption is the best option to secure and protect a child in need of alternative care. This part explores criteria under the Law of the Child Act and Regulations that establish a child's adoptability.

4.4.2 Adopter's Eligibility

Who may adopt? Eligibility means satisfying a particular set of criteria that gives a person the right to do or obtain something. Unfortunately, neither the UNCRC nor the ACRWC, the principal international and regional instruments regarding child welfare, define a person eligible to adopt. State parties have the reserved mandate to define and set criteria for eligibility to adopt in their laws. The Law of the Child Act, 2009 and Regulations made under it provide such criteria for Tanzania. However, it is significant to note that determination of eligibility does not end at ability but instead extends to suitability to adopt. Hence, apart from

[786] African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 91, pp. 15–16.

fulfilling legal conditions, social workers investigate every prospective adopter to determine their suitability to adopt.

4.4.3 Criteria for Adoptability and Eligibility to Adopt

Like many other African countries, Tanzania has numerous criteria for establishing who is adoptable and who may adopt.[787] However, the criteria set in the law and procedure for child adoption under the Law of the Child Act and its Regulations are not exhaustive. This is because the final decision on the adoptability of a particular child may also depend on other factors not necessarily mentioned in the law, for example, opinions presented by social welfare officers. The law tasks these officers to conduct a social investigation where their professional knowledge, skills, and experience become vital in determining the suitability for adoption of both children and applicants. This means that even though there are general legal criteria for consideration before approving an adoption, the specific administrative considerations may be broad and may vary from case to case. However, this part focuses only on criteria found under the Act and its Regulations. Administrative considerations are explained in chapter six.

4.4.3.1 Status of the Child

The status of a child who qualifies for adoption varies depending on the type of adoption envisioned. Two factors are decisive for this, i.e. whether the adoption is open or closed and whether the adopter is Tanzanian or not. Under sections 54(3) and 55(2) of the Law of the Child Act, open adoption is restricted to relatives. In other words, an open adoption is a form of child adoption where only relatives of the child are permitted to adopt. Section 3 of the Law of the Child Act recognises grandparents, brothers, sisters, cousins, uncles, aunts, or any other member of the extended family as a child's relatives.[788] This definition is wide enough to include the extended family, regardless of how its membership is construed in Tanzania's numerous ethnic groups. The implication is to extend the responsibility of care to other family members beyond the nuclear family so that a child remains connected to his or her family roots. Apart from this, the Act and Regulations on child adoption do not specifically establish the status of a child eligible for open adoption beyond being a relative of the adopter.

Closed adoption, among other things, involves adopting non-related children. Section 24 of the Law of the Child Act qualifies children for adoption under this type to include those put under a care or supervision order whose parent, guardian, or relative do not show any interest in their welfare while the order subsists. In other words, in the Tanzanian context, closed

[787] For a glimpse of criteria for adoption in other African countries, see *ibid.*, pp. 22–25.
[788] Read together with regulation 2 of the Child Protection Regulations, 2014.

adoption applies to children who do not find care within the extended family. Children placed under care or supervision orders include those suffering or likely to suffer significant harm based on circumstances described under section 16 of the Law of the Child Act. The section mentions seventeen circumstances which make children subject to the sort of environment that presents nothing but danger to them.

According to section 137 (1) of the Act, children exposed to significant harm may be placed in approved residential homes or institutions as an immediate protective measure, pending suitable placement in family-based care. Such children can be placed in foster care or may qualify for adoption if this best serves their interests.[789] Previously adopted children are eligible for re-adoption as stipulated under section 63 of the Act. However, the law does not provide grounds for re-adoption. However, it can be assumed that in cases of re-adoption the same grounds apply as those for adoption, i.e. to provide a child in need of care and protection with a family-based environment. Therefore, the non-relative status of children in closed adoptions goes hand in hand with the circumstances described in this paragraph.

To be adoptable by a resident non-Tanzanian, a child has to meet further criteria. First, he or she must acquire the status of a child adoptable under closed adoption unless the non-Tanzanian adopter is a relative of the child. Second, according to section 74(1) of the Act, for the child to be adopted by a resident non-Tanzanian, there must be further proof that such a child cannot be placed in a foster or adoptive family or be cared for in any manner that is in the child's best interests while the child is in Tanzania. Here, the section attempts to incorporate the principle of continuity in a child's upbringing and the child's ethnic, religious, cultural, and linguistic background. It, therefore, makes adoptions by resident non-Tanzanians a measure of last resort and considers continued upbringing in Tanzania in the Tanzanian child's best interest.

4.4.3.2 Best Interests of the Child

Regulation 3 of the Adoption of Children Regulations names the child's best interests as the paramount consideration in making any decisions concerning child adoption. It means that a child is adoptable only when it is proven that adoption is in his or her best interest.[790] A two-part test is required to determine whether adoption is in the child's best interest. The first part takes place before declaring a child free for adoption. According to regulation 48(1) (b) of the

[789] Section 53 of the Law of the Child Act, 2009 read together with regulation 8 of the Foster Care Placement Regulations, 2012 indicate that most children placed under foster care come from approved residential homes and institutions. Also, section 143 of the Law of the Child Act, 2009 provides that a child may be adopted from the home or institution if it is in his or her best interest.

[790] See Sections 56(1), 59(1) (b), 74(1) (a), (2), (4), and 75(2) (d) of the Law of the Child Act, 2009.

Child Protection Regulations, social welfare officers, while preparing a long-term care plan as part of care order proceedings, may recommend that a child be freed for adoption on the basis of their assessment of the child's case. At this point, the officers would have already determined child adoption as the most suitable option and thus in the child's best interest.

The second part takes place before the court grants an adoption order. With the assistance of a social investigation report, the court determines whether adoption is in the child's best interest. The social investigation report, as provided for in sections 59(2) (b), 74(3), 74(4) (b), and 75(2) (d) of the Law of the Child Act, 2009 and Regulation 11 of the Adoption of Children Regulations, 2012, is a vital document in every adoption proceeding that assists the court in best interest determination.

Criteria for determining whether adoption is in the child's best interest are provided under Regulation 3(a)-(e) of the Adoption of Children Regulations. The social investigation report template (A.C. Form No. 7) also guides social welfare officers in ascertaining whether adoption is in the child's best interest.[791] Further details on the best interest of the child principle regarding its interpretation, determination, and application in practice follow in chapters five and six of this thesis.

4.4.3.3 Consent

Free and informed consent is a core prerequisite for adoption. Several persons are required to give consent before the court can make an adoption order. First, section 57 of the Act and regulation 5(1) of Adoption of Children Regulations require consent from those who have a direct connection with and authority over the child. These include any parent, guardian, or relative of the child. Second, the requirement of consent extends to any person the court considers as having rights or responsibilities in respect of the child under an agreement or court order. These persons must consent as required by section 58(1) of the Law of the Child Act, 2009, regulation 49 of the Child Protection Regulations, and rule 99 of the Juvenile Court Rules, 2016. Third, sections 56(1) (c) and 58(2) require the consent of an applicant's spouse where the other spouse has solely applied for adoption. Lastly, the prospective adoptive child must also consent to the adoption. Section 59(1) (c) of the Act and regulation 5(3) of the Adoption of children Regulations makes such consent mandatory if the child is at least fourteen years of age, provided he or she has sufficient maturity to understand the meaning and effects of adoption and is capable of expressing an opinion.

[791] The template is scheduled under the Adoption of Children Regulations, 2012.

Consent, both parental and by the child, must be informed. According to section 59 (1) of the Act, informed parental consent means that the parents understand the effects of adoption, especially permanent deprivation of parental rights. Regulation 5(5) of the Adoption of Children Regulations requires commissioners for oaths or consular officers, before whom consent is given, to explain the effects of adoption to persons giving parental consent before they give their consent. For child consent, regulation 11(7) of the Adoption of Children Regulations requires social welfare officers to explain to the prospective adoptee the meaning and effects of adoption in a manner that the child can understand.

The Adoption of Children Regulations, 2012 under regulation 5(1) and (2) stipulate that it is the applicant's obligation to obtain consent. However, regulation 49(1) of the Child Protection Regulations, 2014, places the duty to obtain parental consent on the social welfare officer in charge of the child's case. This procedure is applicable in care order proceedings before a juvenile court, where the care plan is for adoption. Thus, in cases where there are no care order proceedings for the child, applicants need to obtain parental consent on their own.[792] This discrepancy in the law exists due to different timelines in enacting the Regulations and lack of their harmonisation.

Regulation 5(4) of the Adoption of Children Regulations sets requirements for valid consent. It must be in writing and signed before a commissioner for oaths or consular officer if obtained abroad. In the case of care order proceedings, regulation 49(2) of the Child Protection Regulations provides that consent must be signed in the presence of a magistrate of the Juvenile Court. Parental consent must be in the format set out under A.C. Form No. 3 available in the Adoption of Children Regulations' Schedule. However, the Regulations do not provide a format for an adoptee's consent.

This part notes how fundamental consent is in child adoption. Thus, the law allows withdrawal of consent. This provision provides an opportunity to a parent or a child who has appraised him or herself of the nature of adoption to reconsider their decision. Parents may accept adoption of their children in the belief that they stand to benefit from their adopted children in the future and do not lose their parental ties altogether. The opportunity to withdraw consent caters for such a scenario to avoid parents becoming victims of their ignorance. Under regulation 6 of the Adoption of Children Regulations, withdrawal is possible within sixty days after the date of consent. The withdrawal of parental consent must

[792] Although, as explained in chapter three, application for a care order is required under the law for children who cannot remain in the care of their relatives or voluntary care of a local government authority, it is a process that social welfare officers seldom engage in.

be in a format set out in A.C Form No. 5 of the Schedule to the Adoption of Children Regulations. Although the Regulations do not provide a format for a child's consent, they do provide one for withdrawal of consent, in A.C Form No. 6.

Notwithstanding the significance of parental consent in child adoption, the court can dispense with it in four scenarios. These scenarios are found in different provisions of the Act and Regulations, these being section 57(2) (a) - (b) of the Law of the Child Act, regulation 7(1) (a)- (c) of the Adoption of Children Regulations, regulation 50 (1) and (2) of the Child Protection Regulations, and rule 99 (2) and (5) of the Juvenile Court Rules. [793] The court dispenses with the consent requirement, first, when it is satisfied that the parent, guardian, or relative has neglected or persistently ill-treated the child. In this case, it does not matter that the parent, guardian, or relative refuses to consent; to safeguard the child's best interest, the court elects to forego the requirement. Second, consent can also be dispensed with when no person with parental rights and responsibilities for the child is known or can be located. This scenario is common in cases of lost or abandoned children. Third, consent is waived when the available person lacks the capacity to consent. Legal or mental challenges may be the cause of such incapacity. And fourth, the consent requirement may be set aside when consent is unreasonably withheld. If the court determines that there is no valid ground for the parent to deny consent to adoption, it applies its discretion in deciding whether to dispense with it.

Regulation 7(2)-(5) of the Adoption of Children Regulations, regulation 50(3) of the Child Protection Regulations and rule 99(3), (4), (6) and (7) of the Juvenile Court Rules give detailed criteria for the court to consider in dispensing with consent. While exercising its discretion, the court is aided by written and oral reports submitted by the appointed social welfare officer regarding the child's best interests.[794] The court must also consider that any delays in making decisions on a child's care are only justified if in the child's best interest.[795]

4.4.3.4 Age Requirement

Section 2 of the Adoption of Children Regulations provides the age limit for adoption. Together with other relevant sections of the Act, this section defines a child as a person below the apparent age of eighteen years.[796] The use of the word 'apparent' may be explained by the provisions of regulation 9 of the Adoption of Children Regulations, in which the court is

[793] The Child Protection Regulations, 2014 and Juvenile Court Rules, 2016 provide on dispensing with consent in respect of applications for a care order where the care plan is for adoption and the child needs to be freed for adoption.

[794] Regulation 7(6) of the Adoption of Children Regulations, regulation 50(3) of the Child Protection Regulations and rule 99(8) of the Juvenile Court Rules.

[795] Regulation 7(7) of the Adoption of Children Regulations and rule 99(9) of the Juvenile Court Rules.

[796] See, for example, sections 4(1), 18(4), 19(4), 34(2) (c), 47, 114(1), 127 and 137(6) of the Law of the Child Act, 2009.

required to determine the child's age for adoption purposes. The court should consider a birth certificate or a certificate signed by a medical officer attesting to the child's age as sufficient proof of that age. However, there can be situations where the child's age has not been proved to the court's satisfaction. In that case, in accordance with section 70(1) (a) of the Law of the Child Act, the court can determine the probable date of birth for adoption purposes.

The law sets age restrictions for adopters. Section 56(1) (a) of the Act permits adoption by an applicant whose age is at least twenty-five years old. Further, that applicant must be at least twenty-one years older than the prospective adoptee. For example, an adoption of a ten-year-old child by a person who is twenty-five years old is not possible. In such a case, the adopter must be at least thirty-one years old. However, there is an exception when the adoption is by a relative. In that case, section 56(1) (b) maintains the same minimum age limit of twenty-five years but does not limit the age difference between adopter and adoptee to at least twenty-one years. Therefore, it is possible for a relative who is twenty-five years old to adopt a child aged ten. In either case, if it is a joint application, at least one of the applicants should meet the age requirement. The age restrictions are intended, among others, to ensure the adopters are of sufficient maturity to fully understand and commit to their new parental rights and responsibilities. However, some lenience exists for relatives because the children still remain in the care of their extended families.

The age restrictions include the maximum age for adopters, which regulation 12 (1) of the Adoption of Children Regulations sets as fifty years. For applicants beyond this age, the court has the discretion to decide whether to grant the adoption or not. There is a presumption that the adoption of a child below ten years of age by such an applicant would not be in the child's best interest. That notwithstanding, the court may take into account other considerations to arrive at the most appropriate conclusion, such as a social investigation report signifying otherwise.

Where the adopter is the biological mother or father of the child, no age requirement is prescribed in the law.

4.4.3.5 Marital Status

Section 55(1) of the Law of the Child Act specifies that an adoption application may be made jointly by a husband and wife, or by the child's father or mother alone or jointly with his or

her spouse. Section 56(4) categorically prohibits authorisation of adoption to joint applicants who do not fit these categories.[797]

The other envisaged type of adoption applicants is those who apply to adopt individually. For instance, one spouse can apply to adopt a child. In that case, section 56(1) (c) requires the other spouse's consent to the adoption. This is practical because the law assumes that the adopted child will still be under the influence of the non-adopting spouse. As for a sole male applicant, section 56(2) of the Law of the Child Act restricts adoption unless the man is adopting his son. In other words, a male person cannot adopt another man's child or his own daughter unless exceptional circumstances warrant the order. The subsection omits to specify whether the male applicant can be single or must be married. However, the law gives a specific green light for single Tanzanian women who wish to adopt, as section 56(1)(d) of the Act stipulates. By referring to Tanzanian single women, the law excludes non-Tanzanian single women from adopting in the country. Yet, lack of a similar precision under section 56(2) means that a single non-Tanzanian man may apply to adopt his son or any other child when special circumstances permit. For open adoption, there are no such restrictions. According to section 55(2), a relative, in the singular, may apply to adopt a child. No specific reference to the relative's marital status is provided under the Act and Regulations, nor does the law distinguish between female and male relatives.

The law does not provide the rationale for these restrictions on closed adoptions. However, it may lie in the socio-cultural perceptions of Tanzanian society.[798] Marriage is honoured in Tanzania. A married person acquires an elevated status in society that goes along with respect and trust. Some laws endorse this social value, for instance by emphasising the difference between children born in and out of lawful wedlock.[799] Numerous Tanzanians still frown

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[797] The wording of the subsection could lead to a mistaken interpretation. While it intends to limit joint applications to a married couple, it uses the words "husband and wife or father and mother" which creates an impression that the father and mother applying together need not be married.

[798] Interviews with social welfare officers and random members of the public who shared their opinions on these matters during field research in Tanzania form the basis for this information.

[799] Affiliation of illegitimate children is still required and practised under customary law and is recognised by section 35(c) of the Law of the Child Act. Also, despite the promotion and protection of children's rights under the Act, it fails to erase all discrimination between legitimate and illegitimate children. For instance, such discrimination can clearly be observed in their inheritance rights in relation to their parents' estates. While section 10 of the Law of the Child Act, 2009 recognises children's right to enjoyment of their parent's estate, section 36(4) of the Act subjects inheritance rights of a child born out of wedlock to their father's religious beliefs. Depending on the professed religion, in an intestate devolution of property, a child born out of wedlock may not be eligible to inherit. In Islam for example, illegitimate children are excluded from inheriting (see Surat An-Nisaai of the Holy Qur'an). For further discussion on the inheritance rights of illegitimate children under Islamic law, see Mustafa M. Mzee, "Islamic Law of Inheritance: The Case of Illegitimate Child and Possibility of Having an Assets of Deceased Father: A Tanzanian Case Study", Journal of Law, Policy and Globalization, Vol. 45 (2016): pp. 55–59.

upon single parenting. This practice is discouraged on the basis of customary and religious laws. To beget a child outside a legally, customarily, or religiously recognised relationship is immoral or sinful in the eyes of many people.[800] Following the same logic, a single man may not be trusted to take care of children, especially female ones, as this may lead to sexual relations. A single woman is trusted on the basis of society's conviction that women possess a natural nurturing character enabling them to care for children. It is probably due to these same socio-legal perceptions that non-Tanzanian single persons are not allowed to adopt a child, except for a man adopting his own son.

Section 55(1) (b) raises an interesting question in respect of the marital status of adopters. It allows a father or mother of a child to apply for adoption either individually or jointly with his or her spouse. However, it does not explain why a mother or father would adopt her or his child or why they would adopt the child jointly with their spouse. This issue has been touched on in chapter two of this thesis in the context of child adoption by relatives. In a nutshell, biological parents can adopt their children to legitimate their relationship. In the case of a child born out of wedlock, they may apply separately or together with their new spouses. It can also be done to strengthen parent-child legal ties, especially for single parents. A single mother, for instance, could adopt her child to ensure that the father's relatives do not lay a legal claim to her child in the future. Of course, the father, if alive and known, must consent to the adoption. Biological parents adopting their children is not common in Tanzania, nor easily understood in the context of customary and religious laws. There are special requirements and procedures in those laws for affiliating an 'illegitimate' child to the parents and their wider families.[801]

Considering that the requirement of married status for joint adoptions excludes numerous persons from adopting in Tanzania, Section 58(3) of the Law of the Child Act becomes an alarming provision. It prohibits adoption orders in favour of any person referred to under section 55 of the Act if such a person "practices or is of the civil relationship or marriage". Civil relationship or marriage is not defined under the Act. However, civil marriage is defined

[800] Emily A. Onyango, "Single Parenthood", Transformation: An International Journal of Holistic Mission Studies 19(1) (2002): pp. 80–82; Kolawole O. Paul, "The Church and Single Parenting in Africa", International Journal of Social Science and Economics 1(1) (2021): p15; Abiodun Olayiwola, Adekunle Olowonmi, "Mothering Children in Africa: Interrogating Single Parenthood in African Literature", Cadernos de Estudos Africanos (25) (2013): pp. 141–59; "Surviving and thriving as single mothers", The Citizen (Saturday, 09th June 2018).

[801] Customary laws on child affiliation in Tanzania differ from one ethnic group to another and keep evolving. For a discussion of religious law on child affiliation, see Isa A.-R. Sarumi, Azizah b. Mohd, Norliah b. Ibrahim, "A Polemical Discourse over the Legitimation of Illegitimate Children under Islamic Law", IIUM Law Journal 27(1) (2019): pp. 151–79.

under Sections 25 and 29 of the Law of Marriage Act, 1971 as a marriage ceremony where a government official solemnises the marriage. It is an entirely valid marriage in the eyes of the law in Tanzania, and for some other jurisdictions (such as Germany)[802] the only kind warranting official recognition.

Interpreting the sub-section to refer to this type of marital union becomes an absurdity. If one attempts to deduce the drafter's intention, it would have made more sense if reference was being made to civil partnerships. The problem is that Tanzania does not recognise or permit civil partnerships as conceptualised and practised in other jurisdictions. Practising civil partnerships in Tanzania would amount to a criminal offence under sections 154 and 157 of the Penal Code.[803] This may have been the basis for the provision. Nevertheless, no provision in the Act directly refers to an applicant's or a child's sexual orientation.[804]

4.4.3.6 Residence Requirement

Section 56(3) (a) of the Law of the Child Act requires adoption orders to be granted only in respect of a child and an applicant who reside in Tanzania. Since this Law applies only in Mainland Tanzania, its provisions do not extend to children or applicants residing in Zanzibar. The meaning of the word residence is not given under the Act. Rwezaura and Wanitzek say that it is difficult to define the term residence without particular consideration of the legal context in which it is applied.[805] Quoting Bromley, the authors define residence as a person's physical presence in a territory with the aim of remaining there for an extended period sufficient to make the presence non-transitory.[806]

Under the same sub-section, the law exempts Tanzanians who are living abroad from the residence requirement. They can adopt a child from home provided they fulfil other conditions in the Act. Non-Tanzanians, however, must be residents in Tanzania to be eligible as child adopters. Section 74(1) (b) of the Law of the Child Act requires a minimum of three years consecutive residence before a non-citizen can adopt a child. It is unlikely that anyone would come to reside in Tanzania for three years only to fulfil the adoption conditions. This

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[802] According to section 1310 of the German Civil Code (Bürgerliches Gesetzbuch -BGB) (1896, entered into force on 01.01.1900) a valid marriage in Germany is that which is officiated by a duly certified registrar of marriages and which usually takes place at the civil registry office or 'Standesamt'. Foreign marriages concluded in other forms are also recognised in Germany subject to certain conditions. For further details, visit https://www.auswaertiges-amt.de/en/newsroom/konsularisches/eheschliessung-node.

[803] In Tanzania, it is a penal offence for a person to have carnal knowledge of any person against the order of nature. See sections 154 and 157 of The Penal Code [Cap 16 R.E 2019].

[804] Further details on sexual orientation and eligibility to adopt in most African countries are given in African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 91, at pp. 23-24.

[805] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 128.

[806] *Ibid.*

requirement, therefore, targets those who, for various other reasons, already live in the country. The rationale behind this residence requirement is to ensure that the non-citizen adopters understand Tanzania's culture and environment. This understanding may assist in adhering to the desirability of continuity in a child's upbringing and the child's ethnic, religious, cultural, and linguistic background.

4.4.3.7 Fostering Requirement

Foster care is defined under section 3 of the Law of the Child Act to mean temporary care and protection for a child provided voluntarily by a family or an individual not related to the child. According to section 56(3) (b) of the Act, no court shall grant an adoption order unless the child has been in the continuous care of the applicant for a minimum of six consecutive months before a child adoption application is submitted. This requirement is meant to allow the prospective adopter to bond with the child and get to know him or her well so that the decision to adopt is fully informed. For resident non-Tanzanians, section 74(1) (c) shortens the period to a minimum of three months. Apart from shortening the foster period, and unlike the above provision, section 74 does not say that the child should be in the continuous care of the applicant during these three months. Also, it is significant to note that only section 74(1) (c) refers to the pre-adoption care period as a foster period.

Section 59(5) imposes a further pre-adoption foster care condition in relation to the adoption order. It specifies that an adoption order shall not be granted for any child unless there is proof that the child has been in the continuous care and custody of the petitioner for at least three consecutive months immediately before the order. Therefore, once the petitioner fulfils the pre-adoption care requirement and obtains the Commissioner's approval to adopt the child, the child must still remain in their continuous care (to ensure there is at least three months continuous care before the order). The Act and Regulations do not specify whether the three months stipulated are additional to the required foster care period before submitting a child adoption petition. Thus, the aggregate duration of pre-adoption care required before the adoption order is issued remains uncertain. It probably depends on how long it takes before the adoption order is granted. For instance, if it does not take long then the initial pre-adoption care period may satisfy section 59(5). However, if it takes about a year before the order is issued, circumstances may change. For example, in the case of a non-resident Tanzanian who fosters the child for six months before petitioning the court for an adoption order, they could be forced to return to their country of residence for employment or business engagements before the order is issued. The subsection implies that, if this occasions a break in the continuous care, the non-resident Tanzanian must ensure another three-month period of

continuous care before the order can be granted. In addition, there is a prescribed sixty-day waiting period before the court can issue an adoption order provided under regulation 13(3) of the Adoption of Children Regulations. This is a two-month grace period during which parents or guardians may withdraw their consent to the adoption. Again, the Act and Regulations do not specify how these durations interact with each other. However, it is reasonable to assume that the required period of continuous care before the order runs concurrently with the stipulated grace period.

The definition of foster care given above implies that relatives applying for open adoption are not bound by the foster care requirement since it is a practice for non-relatives. However, this exception is not expressed anywhere in the Act or Regulations. Instead, there is a requirement under section 54(2) of the Act and regulation 21(2) of the Adoption of Children Regulations for open adoption to follow the procedures and conditions set under the Act and Regulations. The pre-adoption foster care practice in open adoption is discussed further in chapter six.

It is significant to note that the Act and Regulations do not expressly require pre-adoption foster care to be done within Tanzania; and that regulation 60(5) of the Child Protection Regulations stipulates that the court can grant a care order for a child to live outside the United Republic. This means that non-resident Tanzanians may do pre-adoption care in their host countries, provided they apply to adopt children whose care orders permit living outside the United Republic.

4.4.3.8 Suitability for Adoption

The previous sections have discussed in detail the concept of eligibility for adoption. However, the law introduces another criterion known as suitability for adoption. An adoption application cannot be approved unless a social welfare officer determines that both the applicant and child are suitable for adoption. According to regulation 11(6) of the Adoption of Children Regulations, the obligation to determine suitability lies with a social welfare officer. To do this, a social welfare officer must visit the applicant's home. Assessment of the home and the views of the applicant's existing children are the cited criteria for the suitability to adopt assessment under regulation 11(10). Additional criteria under regulation 11(13) include background information about the applicant, such as criminal record and health status, as well as the child's health status, and, where applicable, a description of special needs. A.C. Form No. 7 provides a template for a social investigation report, with further criteria for suitability to adopt under its paras. 2.6 and 7-12. These criteria revolve around general and personal information on the prospective adopters from their referees and personal profile.

In the case of the child, para 10.1 of A.C. Form No. 7 requires a social welfare officer to state whether the child is suitable for adoption. The officer can do so after considering the child's background, care history and needs guided by questions under paras. 3-6 of A.C. Form No. 7. Based on the assessment, the officer is required to record under para 11 whether the child and the applicant(s) can be recommended for adoption.

In adoptions by non-resident Tanzanians and resident non-Tanzanians, apart from social investigation under Regulation 11, additional assessment of an applicant's suitability to adopt is required. Section 74(1) (e) of the Act and regulations 26(2) and 28(b) of the Adoption of Children Regulations demand assessment of an applicant's suitability to adopt by a recognised authority or other competent authority in the applicant's country of residence or origin where appropriate. The Regulations provide no procedure for obtaining such an assessment from abroad.

The Law of the Child Act and the Adoption of Children Regulations do not list comprehensive criteria for suitability to adopt or be adopted that social welfare officers may uniformly adhere to. The social investigation report template (A.C. Form No. 7) is the only guidance available.

4.4.3.9 Criminal Record

Regulation 11(13) (a) of the Adoption of Children Regulations requires additional background information about every applicant, including criminal record. According to para 9.9 of A.C. Form No. 7, this background check is intended to determine whether the applicant has been convicted of offences that pose a danger to children. For example, the investigation will focus on offences related to child exploitation and sexual abuse. Persons with such a record are likely to be deemed unsuitable to adopt. The assumption here is that the adopted child may not be safe in the hands of such a person. Thus, proceeding with the adoption may be against the child's best interest.

Section 74(1) (d) of the Law of the Child Act specifically prohibits child adoption by a non-Tanzanian with a criminal record. It is immaterial whether the crime happened in his or her country of origin or any other country. In attempting to be thorough, the law extends the investigation beyond Tanzania. In addition to the information gathered during the social investigation in Tanzania, regulation 28(d) of the Adoption of Children Regulations requires details of an applicant's criminal record from the country of origin or residence. Further, such a record is not confined to child abuse but extends to other criminal issues. Regulation 26(2) demands a similar investigation for a non-resident Tanzanian applicant. However, even if the

non-resident Tanzanian has a criminal record, there is no specific ban on adopting in the law, unlike for resident non-Tanzanians.

Detailed provisions on the applicant's criminal record are necessary, especially because offences against children are rampant. Thus, without proper checks, adoption may end up being a mechanism for legally obtaining children for exploitation. Thus, strict measures relating to criminal records serve to promote the child's best interest in adoption. The law, therefore, applies caution in automatically disqualifying a non-Tanzanian from adopting if he or she has a criminal record. Interestingly, however, a Tanzanian, whether resident or not, remains eligible despite having a criminal record unless the social welfare officer finds that the crime committed renders the applicant unsuitable to adopt. This is because there is no specific provision in the law prohibiting the adoption in such a circumstance. The court relies on the social investigation and the discretion of the social welfare officer.

4.4.3.10 Subsidiarity Principle

The word subsidiary is synonymous with subordinate. It means something is placed in or assigned to a lower priority, rank, class, or position.[807] Regarding adoption, subsidiarity traces its meaning to Articles 21(b) of the UNCRC and 24(b) of the ACRWC. In these provisions, the subsidiarity principle requires that international adoption be an alternative child care measure of last resort. This means international adoption should only be considered if the child cannot be placed in a foster or adoptive family or cared for in any suitable manner within the country of origin. Tanzania maintains that it does not practise international adoption but allows domestic adoptions by non-citizens resident in the country. Under section 74(1) (a) of the Law of the Child Act, the law applies this principle to child adoptions by resident non-Tanzanians. It qualifies the principle by adding the child's best interests as the test for a suitable manner of care within Tanzania. It means adoption by a resident non-Tanzanian should not be denied just because a child has been placed in a children's home within Tanzania. The question should be, is this manner of care suitable for the child and in his or her best interest? The phrase 'within Tanzania' takes into account a possible change of country of residence for a child adopted by a resident non-Tanzanian, which is characteristic of international adoptions. Thus, it emphasises the 'internationality factor' in the child adoptions under study.

Regulation 28(a) of the Adoption of Children Regulations requires social welfare officers to comprehensively inform the court of all efforts made to provide suitable alternative care for

[807] Garner, *Black's Law Dictionary*, above footnote 229, at p. 1562.

the child within Tanzania. The regulation stipulates that the information required is beyond what is provided in the social investigation report. Para 3 of A.C. Form No. 7 asks social welfare officers to provide a chronology of events that depicts interventions attempted before considering child adoption as a long-term solution. Further, under para 5.4 of A.C. Form No. 7, in case of adoption by non-resident Tanzanians and resident non-Tanzanians, social welfare officers must give an account of national placements considered and steps taken for the child to be adopted within the country.

Here some questions may arise concerning what the subsidiarity principle guards against. The researcher finds that it seeks to ensure, among others, compliance with the principle requiring due consideration of the desirability of continuity in a child's upbringing and of the child's ethnic, religious, cultural, and linguistic background. Another question arises concerning whether the subsidiarity principle should apply in any way to the two types of adoption that are regarded as domestic, considering that the UNCRC and the ACRWC apply it specifically to international adoption. Also, although adoptions by non-resident Tanzanians have an international element, the Act and the Regulations do not specifically apply the principle to them. Thus, it is not clear whether para 5.4 in A.C. Form No. 7 is sufficiently binding in the case of adoptions by non-resident Tanzanians without any provision in the Act and the Regulations to that effect. Further discussion on the meaning and application of the subsidiarity principle in child adoption practice in Tanzania follows in chapters five and six.

4.4.3.11 Financial Gain

Any payment or reward made, given, or received for adoption is prohibited unless sanctioned by the court. Section 59(1) (d) of the Law of the Child Act provides that the court may not grant an adoption order unless it is satisfied that the applicant has not received or agreed to receive any payment for the adoption, and also that no person has made or given or agreed to make or give any payment or reward to the applicant for the adoption unless ordered by the court. In addition, section 72 of the Act stipulates a general prohibition on any person giving or receiving payment or reward for an adoption order or any arrangement which may or may not lead to an adoption order unless the court approves. As per regulation 19 of the Adoption of Children Regulations, approved payments are limited to the costs of the petition and do not extend to personal gain. Contravention of the prohibition on financial gain is a criminal offence penalised by a maximum of five million shillings fine or two-year imprisonment term or both.

4.4.3.12 Recognition of Adoption Award

An adoption order must be recognised as valid for it to take legal effect. Adoption orders granted by Tanzanian courts are recognised by the state and become operational upon issuance. The effects of the order under section 64 of the Law of the Child Act apply, and sections 69 and 70 confirm the transfer of parental rights and responsibilities by registering the adoption and providing an adoption certificate. Such recognition may not be as automatic in other states. Section 74(1) (f) requires the court, before issuing an adoption order for a non-Tanzanian adopter, to prove that it will be recognised and respected in his or her country of origin. The burden of proof in the provision lies with the applicant. The Regulations include no procedure or conditions for the fulfilment of this requirement.

Non-resident Tanzanians may adopt children in Tanzania while intending to take the children abroad to live with them. In this case, proof of recognition of the adoption award in the country in which they reside is also crucial. There is, however, no provision to such effect in the Act and Regulations.

4.5 Child Adoption Procedure

As discussed in the previous sections, the criteria for eligibility for adoption are a stepping stone to understanding the entire procedure for child adoption. This part clarifies each stage along the way to an adoption order. It depicts the involvement of various authorities mandated to act in the child adoption process. Based on field research findings, brief insights into practice at each stage are provided where necessary.

4.5.1 Application to Adopt a Child

Child adoption is a process that involves petitioning in a court of law. However, the child adoption application process culminates rather than commences with the court. Sections 56(3) (b), 59(5), and 74(1) (c) of the Law of the Child Act require all prospective adoptive parents to first foster a child for at least three or six months, depending on the circumstances, before lodging a child adoption petition. Therefore, an application to adopt begins with a foster care application. According to section 32(2) of the Law of the Child Act and regulation 4(1) of the Foster Care Placement Regulations, such an application must be submitted to the Commissioner of Social Welfare. The application must be in a prescribed form, F.C. Form No. 1, as provided for under Regulation 4(1) of the Foster Care Placement Regulations. A template of the form is available in the Regulations' Schedule.

Even though the application for foster care must be made to the Commissioner, it is not necessarily received directly by the Commissioner. Section 53 (2) specifies that an application

to foster a child made to the Commissioner shall be forwarded to a social welfare officer or a patron or manager of an approved residential home. This means that these persons may receive the application on behalf of the Commissioner. However, regulation 6(1) of the Foster Care Placement Regulations requires the Commissioner to assign to a social welfare officer the duty to assess the applicant(s) within seven days after receiving the application. Based on these provisions, the Commissioner receives all foster care applications in Tanzania and then specifically appoints social welfare officers to evaluate them.

The direct top to bottom chain of command presumed in the provisions does not exist within the Department of Social Welfare.[808] Here, the Regulations fail to build on the foundation of section 53(2) referred to above. They do not provide a straightforward procedure for where to go and whom to contact during the initial steps of an application to foster a child. However, during field research, it was observed that in practice social welfare officers at the ward, district, or municipal social welfare offices, as the case may be, are responsible for receiving applications on behalf of the Commissioner. Typically, an initial visit by prospective foster parents is to a ward or district social welfare office. One goes to the municipal or regional office if an area lacks a district social welfare office. Thus, where it mentions the Commissioner, the law is referring to the mandate of the office rather than the individual. This mandate is delegated to social welfare officers who discharge the requirements of the law.

Just like in child adoption, not everyone is eligible to apply for foster care. Section 52 of the Law of the Child Act and regulation 5 of the Foster Care Placement Regulations give eligibility criteria for foster parents. A person who is not a parent of the child, who is of high moral character and proved integrity, and who is willing and capable of undertaking the care, welfare, and maintenance of the child may apply for recognition as a foster parent. According to Regulation 5(2) of the Foster Care Regulations, such a person should be at least twenty-one and not more than sixty-four years of age. For someone older than sixty-four, fostering a child is only possible under exceptional circumstances; the Regulations do not specify these. Both Tanzanian and foreign couples and single persons can foster a child in Tanzania. For foreigners, regulation 5(1) (c) requires residence of at least two and a half consecutive years before the application. However, there is no criterion regarding non-resident Tanzanian applicants.

Some provisions under the Foster Care Placement Regulations delete the distinction between foster care as an independent alternative care measure and as a form of pre-adoption care. For

[808] The institutional structure of the Department of Social Welfare explained in chapter two depicts the breaks in the chain of command.

instance, the eligible age for prospective adopters is set at a maximum of fifty years, while for foster carers is at sixty-four years. When only the age limit under the Foster Care Regulations is considered, an older adoption petitioner will be barred from adopting in court on the grounds of age. Also, regulation 12 (4) of the Foster Care Placement Regulations provides for the right of every foster parent to apply for adoption after six months of foster care. It presumes that all foster care placements should culminate in child adoption.

4.5.2 Assessment of Applicants

Rule 6 of the Foster Care Placement Regulations charges social welfare officers with conducting a thorough assessment of prospective foster parents to establish their suitability to care for a child. Within seven days of receiving an application, the Commissioner sets the assessment's wheels into motion.

The assessment, among others, involves visiting the applicant's homes to investigate whether it is adequate for fostering. During such visits, the social welfare officers gather the views of resident children on the prospective foster care placement. Further, in collaboration with medical personnel and the police, the officers investigate whether the people residing in the applicant's home have a mental illness or criminal record that may affect a foster child in any way. Social welfare officers, through meetings, also test the ability of the applicant to meet the requirements of any or a specific child.

To complete the assessment, the officers require three written references from persons who have known the applicant or applicants for at least three years, vouching for their good character and suitability to foster a child. The references should be from a close relative, an immediate neighbour, and a ward, village, or street executive officer or, where appropriate, an employer. References of this nature may be more readily available for resident Tanzanians than non-resident Tanzanians or non-Tanzanians. Regulation 6 of the Foster Care Placement Regulations does not provide for the procedure to obtain references where applicants are non-resident Tanzanians or non-Tanzanians. Close relatives or neighbours of such applicants, who have known them for at least three years, may be unavailable in Tanzania at the time when needed by social welfare officers for interviews. Further, the 'at least three years' threshold also contradicts Rule 5(1) (c) and (d), which makes non-Tanzanians who have been in Tanzania for at least two and a half years eligible to foster a child.

Once the assessment is complete, social welfare officers must submit their report in the prescribed form and with all requisite attachments within sixty days of receiving the

application.[809]According to regulation 6(8), the Commissioner, giving due regard to the assessment report, considers the application and informs the social welfare officer and applicant(s) of the decision to approve or reject the application within ninety days of receiving the application.

4.5.3 Child Identification

Foster Care Placement Regulations play a significant role in the identification of a child for adoption. This is so because the adoption procedure commences with an application to foster a child. Regulation 6(3) (b) of the Foster Care Placement Regulations stipulates that a prospective foster parent may apply to foster any child or a specific child. According to regulation 9(1) (a), it is a specific child if he or she is already identified in the foster care application. Under regulation 9(1) (b) and (c), it is any child if he or she is to be selected from those recommended or identified as potentially suitable for foster care placement by social welfare officers, managers, or patrons of approved residential homes or other institutions.[810] In both cases, the child must meet the criteria listed under regulation 8(1) of the Foster Care Placement Regulations.

Children eligible for foster care placement under regulation 8(1) include those under a care order according to section 18(3) (c) of the Law of the Child Act. Further included are children committed to approved residential homes or institutions by a care or supervision order, by a social welfare officer as the most suitable place for the child or by any person in accordance with sections 32(1) and 53(1) (a) – (c) of the Act. Also, children in need of temporary custody under foster care placement according to section 53(7) of the Act are eligible.

Children eligible for foster care placement are, however, not necessarily adoptable. The Foster Care Placement Regulations do not differentiate between children eligible for foster care with a view to adoption and those whose eligibility is limited only to foster care placement. For instance, children requiring temporary custody according to section 53(7) of the Act (which may be read together with section 104) are eligible for foster care under regulation 8(1) (e) of the Foster Care Placement Regulations. Nonetheless, these children may not be eligible for adoption. A clear distinction would be advantageous in practice. For instance, integrating child identification provisions under the Foster Care Placement Regulations with regulations 49 and 50 of the Child Protection Regulations, 2014, which provide for the procedure to free

[809] See F.C. Form No. 2 of the Foster Care Placement Regulations.

[810] A social welfare officer in conjunction with a manager or patron of an approved residential home or institution may recommend a child for foster care placement according to section 32(1) of the Law of the Child Act, 2009.

children for adoption during care order proceedings, would be the first step towards establishing a distinction.

The Foster Care Placement Regulations do not clearly state how and where a specific child in a foster care application is obtained. In practice, if not relatives' children, specific children are those whom prospective adopters have met before deciding to adopt them. Practice shows that the prospective adopter and adoptee usually meet in the community or children's home or institution before the adoption application.

The Regulations do not specify how a prospective foster parent obtains a child from among those identified as potentially suitable for foster care. In practice, the applicants detail the characteristics of the child they would like to foster and ultimately adopt.[811] Social welfare officers include this information in their assessment reports. Once the Commissioner approves the application, he or she issues a letter allowing the applicant to visit a children's home or institution to identify a child that matches the characteristics. The letter allows the applicant to foster a child of their choice for adoption purposes.

It is worth noting here that social welfare officers do not select a child for the applicants. Instead, the applicants get to select a child independently. This practice is purely subjective and depends on the applicant's wishes and preferences. It may be criticised as not child-centred as the determinant factor is not the child's needs but the adopter's preferences. It is the opposite of what regulation 4(3) of the Foster Care Placement Regulations suggests. This provision empowers managers of approved residential homes or institutions to recommend a specific child to be fostered by a foster parent listed in the foster parents' register. Such a recommendation is based on the needs of the child, and hence more child-centred.

4.5.4 Consent

Once a child has been identified and meets the eligibility criteria for foster care placement, the next step is obtaining parental and child consent. Regulation 8(3) of the Foster Care Placement Regulations places on social welfare officers the duty to inform parents or guardians of prospective foster children on the purpose and legal effect of foster care placement. The objective is to ensure that parents or guardians can give their informed consent. Thus, the Regulations have gone a step further in the F.C. Form No. 6 under the Schedule to the Foster Care Regulations to provide a template for obtaining such consent.

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[811] Information obtained from interviews with social welfare officers during field research in January-March 2019.

The requirement for consent extends to the prospective foster child as well. According to regulation 8(2) (d), social welfare officers, when practicable, are required to ascertain the wishes of a prospective foster child regarding the proposed foster care placement and give them due weight during decision-making depending on the child's age and maturity. In other words, a child who can reasonably articulate his or her wishes must have a say in decisions concerning the placement.

However, there are circumstances where consent may not be readily given. As provided for in regulation 8 (4) (a) of the Foster Care Placement Regulations, these include cases where the parents have neglected or persistently ill-treated the child. In such cases, the Commissioner has the power to dispense with the consent requirement. Further, as provided in regulation 8(4) (b)-(d), the Commissioner may dispense with the consent requirement where parents cannot be located, are unable to give consent, or one or both parents withhold consent, as long as foster care placement, according to the social investigation report, is in the child's best interest.

Under the Law of the Child Act and its Regulations, it is unclear whether a prospective adopter must seek parental consent twice, first to foster and later to adopt the child. However, considering that the Foster Care Placement Regulations and the Adoption of Children Regulations lay down distinct procedures for each measure, consent, which is a requirement in both, may be procured at both stages. As already explained, if the procedure for care order proceedings has been followed and a child has been declared free for adoption, there is no further need to seek parental consent in the adoption process. The Child Protection Regulations under regulation 49(4) direct that a child for whom parental consent has been obtained and who has been declared free for adoption, should be placed with adoptive parents.[812] However, regulation 49(5) specifies that placement must be according to the adoption procedure under the Law of the Child Act and the Adoption of Children Regulations. Regulation 49(6) directs that a person with parental rights and responsibilities towards the child who has given consent to the adoption need not be a party to the adoption proceedings. This means their earlier recorded consent is sufficient for adoption order purposes.

4.5.5 Social Investigation Report

In child welfare practice, social investigation and reporting are among the crucial undertakings of social welfare officers. A social investigation is central to almost all decisions

[812] Rule 99(1) of the Juvenile Court Rules, 2016 supports the same position. In the case that the court dispenses with consent, the position is the same as when consent is given as provided under regulation 50(4)-(6) of the Child Protection Regulations, 2014 and rule 99(11) and (12) of the Juvenile Court Rules, 2016. However, there is a contradiction in regulation 50(6) and rule 99(12) (a) which should be noted.

that affect children's welfare, including care, supervision, custody, access, maintenance, fostering, adoption, and the like.[813] Social investigations are crucial because they form the basis for judicial and administrative decisions concerning the child. For example, sections 45(2), 74(3), 74(4), and 75(2)(d) of the Law of the Child Act and regulations 9 and 11 of the Foster Care and Adoption of Children Regulations require the Commissioner and courts of law to arrive at their decisions on the basis of social investigation reports. In conclusion of investigations regarding foster care placements, the Commissioner receives the findings of the social investigations in the prescribed form.[814]

Typically, social investigation touches on a wide array of issues that affect child welfare. The investigation may concern the child, caregivers, or any other person who may be affected by a child welfare decision. For instance, in the case of foster care, regulation 9(2) and (4) of the Foster Care Placement Regulations specifies that the investigation covers the child, his or her biological family, and the prospective foster parent(s) to establish the suitability of foster care placement in respect of each. While conducting the social investigation, social welfare officers must ascertain the views of each party regarding the foster care placement. Among other things, regulation 9(5) of the Foster Care Placement Regulations requires them to consider the possibility of reuniting the child with the biological family and, in the absence of such a family, to obtain a police report declaring the status of the child's parents. Further, they are also responsible for determining whether the envisaged foster care placement or child adoption is in the child's best interests.[815]

A social investigation may be done at two different stages of the foster care placement process, depending on the circumstances of each case. In the case where a child is specified in the foster care application, the investigation is carried out alongside assessment of the applicant according to regulation 6(7) of the Foster Care Placement Regulations. If the child is unspecified, the social investigation comes after the prospective foster parents have selected a child with the Commissioner's approval. In this instance, the Commissioner under regulation 8(5) of the Foster Care Regulations must decide on the application within thirty days of receiving the social investigation report. The Commissioner may also direct a social welfare officer to approve foster care placement on his behalf, which should be done within thirty days after the social investigation report is completed. According to Regulation 8(6) and (7),

[813] See for example Sections 31, 45, 59(2), 74(3) and 75(2)(d) of the Law of the Child Act, 2009.
[814] See F.C. Form No. 7 on Social Investigation Report as provided for in the Schedule to the Foster Care Placement Regulations.
[815] Regulation 9(6) of the Foster Care Placement Regulations and regulation 11(5) of the Adoption of Children Regulations.

particular attention must be paid to obtaining parental consent and ensuring that siblings, especially twins and triplets, are not separated.

4.5.6 Registration of Foster Carers

Once a foster care application has been approved, the applicants are registered as foster carers according to regulation 6 (9) of the Foster Care Placement Regulations. The Commissioner of Social Welfare and officers of the department are responsible for maintaining a register of approved foster carers in a prescribed form at the district and national levels.[816] In the register, foster carers individually or as a couple are given unique serial numbers which identify them in all foster care placement documents.[817] Regulation 7(3) of the Foster Care Placement Regulations portrays the register for foster carers as a source for foster parents for both short-term care (such as temporary custody) and long-term care of children. Maintaining such a register guarantees the existence of standby or emergency foster carers who can be called upon to foster any child according to regulation 4(3) of the Regulations.

Prospective adoptive parents who foster children only to fulfil the legal requirements for adoption must also be registered. This procedure, in response to regulation 7(5) of the Regulations, may lead to unnecessarily numerous 'no longer interested in fostering' entries in the register after the pre-adoption foster period.

There is also a requirement under regulation 7(6) of the Foster Care Placement Regulations that children in foster care must be registered in the prescribed form at both district and national levels.[818] Similar to foster parents, regulation 7(7) of the Foster Care Placement Regulations requires social welfare officers to give unique placement serial numbers to identify a child at all levels in documents related to foster placement. According to this provision, a prospective adoptive child in foster care must also be entered in the register.

According to regulation 7(2) and (8), social welfare officers are responsible for maintaining up-to-date district registers of foster carers and placements that they should submit to the Commissioner monthly. The Foster Care Placement Regulations, under regulation 7(9), require social welfare officers to make an entry in the register of foster carers and the register of placements to the effect that the foster parent is unsuitable for fostering where a child has been removed from their care for reasons of abuse under regulation18 (1) (a) of the

[816] Regulation 6(9) and (10) read together with regulation 7 of the Foster Care Placement Regulations, 2012. The prescribed form is F.C. Form No. 3, Foster Carers' Register, made under regulation 7(1) of the Foster Care Placement Regulations found under the Schedule to the Regulations.
[817] Regulation 7(1) of the Foster Care Placement Regulations, 2012.
[818] F.C. form No. 4 in the Schedule to the Foster Care Placement Regulations.

Regulations. The Regulations do not require a similar entry once a child has been removed from foster care placement or if there is a change of status for other reasons such as adoption.

The spirit of regulation 4(3) of the Foster Care Placement Regulations, 2012 can be interpreted as meaning that the register of foster carers should include persons volunteering and on standby to foster children whenever the need arises. However, in practice, only those who apply to foster children, especially in pre-adoption care, are registered.[819] Further, there is a gap between the law and practice regarding keeping the foster care register. Practice shows that social welfare officers do not keep such registers as required by regulation 7. No social welfare office visited during field research could produce a comprehensive, up-to-date register of foster carers.

4.5.7 Foster Care Placement

Section 32(4) of the Law of the Child Act entitles the Commissioner to approve or reject a foster care application after considering the suitability of the applicant(s) to foster a child and whether the placement is in the child's best interest. In arriving at a decision, the Commissioner is aided by the assessment report, social investigation report, and other relevant documents attached to the application.[820]

When the application is approved, the identified child is placed with the foster care parent(s).

4.5.8 Home Visits/Supervision Visits

The responsibilities of social welfare officers towards a child do not end upon placement. Regulation 16 of the Foster Care Placement Regulations requires them to carry out post-foster placement follow-up. During their visits, social welfare officers make observations about the child's welfare, progress, conduct and changes, if any, in the foster family. They also elicit the child's views on the placement, taking into account the child's age, maturity, and stage of development. The observations made are then recorded in a report and filed. This type of monitoring is essential for safeguarding the best interests of the child after placement. If the child's interests are no longer upheld, social welfare officers deal with existing protection issues and may even consider termination of placement.

Although the law requires these visits to monitor and evaluate placements, social welfare officers do not consistently execute them in practice according to the time schedules

[819] Interview with social welfare officer at the adoption desk in MoHCDGEC headquarter offices in Dodoma, on 25.02.2018. The respondent showed the researcher a book in which prospective foster carers are listed in shorthand and explained that most of them are applying to foster a child for adoption purposes.

[820] See regulations 6(8), 8(5), and 9(7) of the Foster Care Placement Regulations, 2012.

prescribed in the Act and Regulations. The previous chapter expounding the child protection procedure already sheds light on this matter, and it is also further discussed in chapter six.

4.5.9 Child Adoption Approval

Applications for adoption orders, unlike those for foster care placement, are lodged in a court of law.[821] Before a foster parent lodges an application for an adoption order, he or she must notify the Commissioner of the intention to adopt at least three months before an adoption order is made, as provided for under Section 56(3) of the Law of the Child Act. However, although the law only requires notification, in practice, before the court process commences, the Commissioner must approve the adoption in the form of a letter submitted to the court.[822] As already noted, the Commissioner's decision, among others, is aided by the reports of a social welfare officer on supervision visits during placement and the developed foster care plan.

4.5.10 Child Adoption Petition

A child adoption petition is an application for an adoption order lodged in a court of law. It is a document drawn up in the prescribed format of A.C. Form No. 1 found in the Schedule to the Adoption of Children Regulations. The petition may be filed in the High Court, Resident Magistrate's Court, or District Court, depending on the type of adoption order sought. Section 54(1) (a) and (b) of the Law of the Child Act directs that an application for closed adoption goes to the High Court, while an application for open adoption goes to the Resident Magistrate's or District Court. The petitioner must meet all eligibility requirements, as discussed above, and attach relevant documents to support the petition. The required documents include identification documents, marriage certificates, and affidavits verifying the petition.

Further, as discussed above, evidence of parental consent must accompany the petition. Section 75(2) (b) of the Act provides for the admission of consent as documentary evidence for purposes of the adoption order. According to regulations 5 and 7 of the Adoption of Children Regulations, consent from parents and guardians should be obtained before filing the child adoption petition unless it cannot be obtained and the court has dispensed with it.

As stipulated under Regulation 4(4) of the Adoption of Children Regulations, the applicant may apply for an adoption order before a judge or magistrate in person or through an advocate. While sitting in chambers, the judge or magistrate may give preliminary

[821] Details are in section 54 of the Law of the Child Act, 2009.

[822] Practice observed in the perusal of court files on child adoption during field research in Dar es Salaam and Arusha, in January-March 2019.

instructions as to service of documents, the appointment of a guardian *ad litem* or requirement of further consent. These are prerequisites of the adoption petition proceedings.

4.5.10.1 Service of Documents

Following regulation 4(6) of the Adoption of Children Regulations, a court process server oversees tendering and delivery of all petitions, notices or documents regarding child adoption applications unless directed otherwise by the court. All parties to an adoption petition must receive relevant documents regarding the proceedings in court. The documents must be copies of the original, signed by the registrar or magistrate in charge and bearing the court seal. Service of the documents requires verification by affidavit unless directed otherwise by the judge or magistrate.

According to regulation 8 of the Adoption of Children Regulations, replies to the petition may be made by persons whose consent is required by the Act and should be made by way of swearing an affidavit.[823]

4.5.10.2 Appointment of a Guardian *ad litem*

'*Ad litem'* is a Latin phrase that means 'for the suit'. A guardian *ad litem* is a person appointed by a court order to represent the interests of incapable persons such as minors for the duration of legal action. The Adoption of Children Act, 1953, under its section 11(2), had empowered the court to appoint 'some person' to act as guardian *ad litem* and safeguard the child's interests before the court. This person could be a relative, a close friend, neighbour, or a street or ten cell executive officer who could sufficiently represent the child's best interest in court. The Law of the Child Act, 2009, together with Adoption of Children Regulations, have retained the practice of appointing a guardian *ad litem* in adoption proceedings, although there is a slight change.

Today, regulation 4(5) of Adoption of Children Regulations provides that a guardian *ad litem* for purposes of adoption proceedings must be a social welfare officer. Regulation 2 of the Adoption of Children Regulations defines a guardian *ad litem* as "a social welfare officer appointed by the Commissioner for Social Welfare to represent the rights of the child in court during the entire process of child adoption application". The power to appoint a social welfare officer to act as guardian *ad litem* is now vested in the Commissioner of Social Welfare and not the court. According to section 74(4) of the Law of the Child Act and regulation 4(4) of

[823] The researcher was able to view samples of these affidavits and other documents in the child adoption court files during permitted perusal of files in courts visited in Dar es salaam and Arusha during field research in January-March 2019.

the Adoption of Children Regulations, the court retains the power to make an order requiring the Commissioner to appoint a social welfare officer to act as guardian *ad litem*.

Section 59(2) of the Law of the Child Act stipulates that the court must not make an adoption order without a social investigation report that supports the adoption. Once a guardian *ad litem* is appointed, the duty to undertake a social investigation and report to the court befalls him or her.[824] As analysed above in the context of eligibility criteria, the purpose of the investigation is to establish the suitability of the adoption and determine whether it is in the child's best interest. The court relies on the social investigation report to determine whether granting an adoption order is in the child's best interest.

Under Regulation 11(12), a guardian *ad litem* is also required to provide information beyond the social investigation report on the background of the prospective adopter. Such information may include criminal records, especially for child abuse, the adopter's and the child's health status, and a description of any special needs. Specifically, for adoption by non-resident Tanzanians and resident non-Tanzanians, a background check on the prospective adopters is added in the terms of reference for a guardian *ad litem*. The requirement to conduct an additional background investigation on the prospective adopters is embedded under section 74(3) of the Act and regulations 26 and 28 of the Adoption of Children Regulations, 2012.

Apart from guardian *ad litem*, according to section 59(2) of the Act, the court may also order any other person or local government authority to make a report regarding the application. According to regulation 11(11) of the Adoption of Children Regulations, when another person or authority prepares a social investigation report, a copy should be submitted to a social welfare officer who must review it and give feedback to the court.

4.5.10.3 Hearing

Regulation 10 of the Adoption of Children Regulations authorises the registrar or magistrate in charge to set a date for hearing the petition. They can do so after confirming that all required documents have been filed and served to the satisfaction of the court and the guardian *ad litem*. The parties are informed of the date of hearing by notice drawn up in the format set out under A.C Form No. 6 found in the Schedule to the Adoption of Children Regulations. The notice should be served on all parties not less than seven days before the appointed day of the hearing.

[824] Sections 59(2), 74(3), 74(4) (b) and 75(2) (d) of the Act read together with regulation 11 of the Adoption of Children Regulations, 2012. The information unearthed in the investigation and in the course of the adoption matter, according to regulation 17, is confidential and a social welfare officer can only divulge it in the required execution of his or her duties.

Child adoption hearings, as prescribed under regulation 10(2) of the Adoption of Children Regulations in line with section 75(2) (a) of the Law of the Child Act, are held in camera where the presiding judge or magistrate does not interpose any other matter in the duration of the hearing. Once the adoption matter is called for determination, all parties to the application should appear in court as required. According to Regulation 14(2), the court may compel attendance of the parties (which may be in person or through an advocate) or decide to determine the matter in their absence. The court might also, however, require each party to appear before it separately for an interview. For the child, such interviews may be of utmost importance. Sections 11 and 59(1) (b) - (c) of the Act, together with regulations 3(a) - (b), 5(3), and 11(6) - (7) of the Adoption of Children Regulations, require the court to consider the child's views if the child is capable of forming an opinion on the adoption.

4.5.11 Child Adoption Order

Once satisfied that all the conditions for the order have been met and that the adoption is in the child's best interest, the court grants an adoption order. This is in accordance with the conditions set out in section 59 of the Act and regulation 13 of the Adoption of Children Regulations. However, since the law allows a grace period of sixty days to withdraw consent for the child adoption, regulations 6 and 13(3) of the Adoption of Children Regulations preclude the court from issuing an order within this time. Only after expiry of this period can the court proceed to grant the adoption as petitioned. The order, when issued, should be in the prescribed format set out in A.C. Form No. 9 (a) or (b) for closed or open adoption, respectively.

The two forms referred to in the previous paragraph are substantially similar, both in format and content. However, they do not reflect the content of section 59(4), which specifies that particulars of the adopter and adoptee should be in the adoption order. Thus, in practice, the court departs from the format of A.C. Form No. 9 to include the specified particulars in the order.[825] The downside of this is the production of orders that considerably differ in format and content from one another.

Granting of an adoption order does not signify the end of the court's influence on the adopted child's life. When granting the adoption order, according to section 59(3), the court may make other conditions concerning the child. For example, the court may require the adopter to enter a bond to make provision for the child as it thinks necessary. This provision implies that the court has the mandate to ensure that the adopted child's best interests are safeguarded beyond

[825] The researcher observed that the court used templates with different formats when issuing adoption orders. These formats differ in content, not only with regard to the particulars but other information as well.

child adoption proceedings. It emphasises the significance of post-adoption monitoring and support.

An adoption order can also be amended or appealed against. Section 71 of the Act allows adoptive parents and children to apply to the court to amend errors in their particulars as appearing on the adoption order. The court is empowered to make amendments that include insertion of the country of birth of the child or the child's date of birth if it was not specified and the court considers it to be the date or probable date of the child's birth. When the court allows an appeal, it restores the child to the status before the adoption order was made.

Adoption orders are not the outcome of all child adoption proceedings. In some adoption matters, as stipulated under section 60 of the Act, the court may postpone determination of the petition and instead make an interim order. According to section 60(3) and (4) of the Act, although all provisions regarding consent for adoption apply to the interim order, it is not equivalent to an adoption order. An interim order grants custody of the child to the applicant for not more than two years as probation before granting an adoption order. The order may include terms regarding the child's maintenance, education, and supervision as the court finds fit. While the order subsists, the child shall be under the supervision of a social welfare officer and cannot travel outside the country without the court's permission.

The Act does not provide grounds for interim orders. Since the Adoption of Children Regulations are also silent in this respect, there are no set criteria in the law to guide the court in its decision to grant an interim instead of a full adoption order. Further, during field research the researcher did not come across child adoption rulings in which the court has granted such an order. Thus, it remains unclear under which specific circumstances the court may find it necessary to issue interim orders. One can only assume that an interim order is given when adoption is in the child's best interests, but the court has some doubts about the adopting parent's ability or commitment to care for the child. In such circumstances, placing him or her under probation is a safer alternative.

The court may also decide to issue neither an adoption order nor an interim order. In such a case, depending on the reasons for not granting the order, the court may dismiss or strike out the petition.[826] The Law of the Child Act and Adoption of Children Regulations do not specify the course the court should take. Nevertheless, according to Regulation 13(4) of the Adoption of Children Regulations, the status quo prevails in such an occurrence. This means

[826] For instance, in the ruling of High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, 2009 and In the Matter of A (Infant) and In the Matter of an Application for an Adoption Order by JVPB and EG of Dar es Salaam" (23.12.2011) the Judge struck out the petition due to defects in it.

the child shall remain in the care of the applicant as a foster child. Circumstances will only change when the court so directs or the social welfare officer in charge decides to terminate the foster care placement.

4.5.11.1 Registration of an Adoption Order

Just like birth, a child's adoption requires registration. Section 69(1) of the Act requires the Registrar-General to register all adoption orders. The Registrar-General is the custodian of a register of adopted children as per section 69 of the Act.[827] According to section 70(1), the court must include in every adoption order a directive to the Registrar-General to make an entry in the Adopted Children Register following the prescribed format in the Schedule to the Act. Section 69 requires the Registrar-General also to register interim orders in the Adopted Children Register. This is an anomaly as interim orders are not full adoption orders, and the court may rescind them at its discretion.

To ensure no loopholes in the registration process, the law under sections 69(2) and 70(6) of the Law of the Child Act, and regulation 18(1) of the Adoption of Children Regulations, require registration to be done within thirty days from the day when the adoption order was issued. Also, the provisions place the duty to serve the adoption order to the Registrar-General on a High Court registrar. For adoptions handled in lower courts, i.e. open adoptions, the responsibility lies with the magistrate in charge. Apart from adoption orders, Regulation 18 also requires that adoption petitions and every consent to the adoption be submitted to the Registrar-General.

The registration process makes official the legal recognition of an adopted child. Since the child's status has changed, section 70(4) of the Act directs the Registrar-General to mark the word 'Adopted' against the entry of the identified child in the Register of Births. In the case of a child previously adopted, the entry must reflect that fact, marking the child's registration with the word 're-adopted' as stipulated under section 70(5) of the Act. Subject to section 70(2) and (3) of the Act, there are other particulars that the order requires the Registrar-General to enter in the Register. Their entry follows the scheduled prescribed format (under columns 2-6), similar to the particulars required under section 59(4) of the Act. The records pertaining to the adoption of children in both Registers of Births and Adoptions remain confidential and not accessible to the public or any person except with a court order.

[827] Registrar-General is defined under section 3 of the Law of the Child Act, 2009 as the Registrar-General of births and deaths appointed in accordance with the provisions of the Birth and Deaths Registration Act, 1920 (Cap. 108, R.E 2002).

The Registrar-General has similar obligations regarding amending entries to the Registers following court orders resulting from amended adoption orders. As provided under section 71 of the Act, the court may amend the adoption order pursuant to an adopter or adoptee's application to correct errors in the particulars. According to section 71(2), the amendments may include the insertion of the country and date of birth of the adopted child. Once made, the court must communicate such amendments to the Registrar-General to effect changes in the Register. Also, where an appeal against an adoption order is allowed, the court that made the order is responsible for directing the Registrar-General to delete any marking made against an entry in the Register of Births and cancel any entry made in the Adopted Children Register.

4.5.11.2 Legal Effects of an Adoption Order

An adoption order creates life-altering changes in parent-child relations. Section 64 of the Law of the Child Act enunciates the impacts of an adoption order on family and other existing relations. Concerning pre-adoption relations, an adoption order severs all rights and obligations of any nature, even those existing under customary law, of the child's parents or any other person connected with the child.[828] Concerning post-adoption relations, the order bestows all rights and obligations pertaining to custody, maintenance, and education of the child on the adoptive parent(s) as if the child was born to them in lawful wedlock and has never been a child of any other person. In the case of orders made jointly to a husband and wife, they assume the new parental rights and responsibilities together. In such a joint venture, the adopted child relates to the husband and wife as his or her parents, as if born to them naturally.

In simple terms, an adoption order erases all legal ties that bound the child before the adoption. Phrases 'was not the child of any other person' and 'as if born to them naturally' under section 64(1) (b) and (2) have a significant legal impact on relations between the birth family and the adoptive family. They obliterate any legal standing that the birth parents, guardians, relatives, or persons with parental responsibilities over the child by agreement or court order ever had regarding the child. The legal rights and obligations are entirely transferred to the adoptive family.

Section 14(4) of the Law of Marriage Act, 1971 is a good illustration of the legal effects of an adoption order on the two families. The sub-section declares adoptive children and parents to be in the prohibited degrees of consanguinity. This means that they cannot intermarry. Nevertheless, the law does not declare such prohibition with regard to birth parents and other

[828] For details on parental obligations, see sections 6 to 10 of the Law of the Child Act, 2009.

close blood relatives of the child after the adoption order.[829] The law is also silent on prohibited relationships with close relatives of the adoptive parents. However, section 66(1)(d) of the Law of the Child Act refers to them as relatives of the adopted child. Here, the question of the social effects of an adoption order arises. The new legal relations created by the adoption order impact already existing and future social relations. Depending on the social values of a given society, especially as influenced by other prevailing normative orders such as customary and religious laws, clashes are bound to occur. For instance, Muslims in Mainland Tanzania can adopt a child under the formal law of adoption. However, Islamic law does not recognise formal adoption but only *kafala*, a weaker version of it. Muslim adoptive parents and their extended family who live by the principles of Islam may not recognise and abide by the effects of an adoption order in their social life.

A different dimension emerges where a birth parent adopts his or her child. Adoption is done to either legitimate their parent-child relationship or integrate the child into a new family to which the birth parent belongs.[830] The adoption may be sole or joint with a spouse of the birth parent. This type of adoption contains a puzzle regarding the legal effects of the adoption order on parental relations. Does the order erase the natural parent-child relationship only to supplant it with a new legal relationship as articulated under section 64 of the Law of the Child Act? Parental rights and obligations remain with the birth parent; hence, in that regard, the order only serves to cement the relationship. For an illegitimate child, the order additionally confers a parent-child relationship as if born within lawful wedlock. And for both legitimate and illegitimate children, it serves to create a parent-child relationship with the birth parent's spouse. However, strictly speaking, the adoption order changes the legal status of the birth parent and child. They become adoptive parent and child, and instead of a birth certificate, the child will have an adoption certificate. During field research at the RITA offices in Dar es Salaam, the researcher learnt that the birth certificate of an adopted child must be surrendered during the adoption order registration process.[831]

[829] The rest of section 14 of the Law of Marriage Act, 1971 prohibits relationships between blood relatives with a broad spectrum of degrees of consanguinity. Sexual relations between such relatives are incestuous and forbidden under sections 158, 160 and 161 of the United Republic of Tanzania, Penal Code, 1945 [Cap. 16. R.E 2009].

[830] The law provides for this type of adoption. An illegitimate child may be adopted by his or her birth father alone or together with his spouse to legitimise their relationship or a birth father or mother may, together with a spouse, adopt a legitimate child of a former union to integrate him or her in a new family of which the parent is a member. See Sections 55(1)(b) and 56(2) of the Law of the Child Act, 2009.

[831] Interview with a high-ranking officer, and a legal officer and custodian of the Adopted Children Register, RITA headquarter offices, Dar es Salaam, on 21.01.2019 and 15.03.2019.

An adoption order affects an adopted child's residence and nationality. When adoptive parents choose to live abroad with their adopted child, the child's residence changes in cases of adoption by non-resident Tanzanians, and both the child's residence and nationality may change in cases of adoption by resident non-Tanzanians. After an adoption order has been issued, according to section 73 of the Act, only a written thirty-day notice to the Commissioner of Social Welfare is required before a child may permanently depart from the country. Before travelling abroad, however, the adoptive parents must procure a new passport for their adoptive child. Then, the national laws of the receiving country will govern the entry, residence, and nationality of the adopted child. Tanzania's relevant immigration and citizenship laws, particularly the Immigration Act[832] and the Citizenship Act,[833] do not specifically provide for the effects of adoption orders on the child's migratory and citizenship status. Section 10 of the Citizenship Act allows for the naturalisation of a minor child of Tanzanian citizens, which may include adopted children. However, in adoptions with an international element, this provision may only apply to non-resident Tanzanian adopters who adopt a non-Tanzanian child resident in Tanzania, for instance a refugee.

The legal effects of formal adoption extend to property rights and succession. On intestacy, according to section 65 of the Law of the Child Act, an adopted child is by no means entitled to inherit from his or her birth parents. The child, however, will inherit from the adoptive parent on intestacy as if he or she is a natural child of the deceased. In the testamentary disposition of property post-adoption, whether oral or in writing, according to section 66 of the Act, any express or implied reference to an adoptive parent's children shall be construed as including the adoptive child. Section 66(3) of the Law of the Child Act, 2009 clarifies the term disposition as used in the section to mean, "disposition of any interest in property by any instrument whether *inter vivos* or by will, including codicil." Sections 66 and 67 of the Act ensure that whether the testament was made pre or post the adoption order, the adoptive child's right to inherit from the adoptive parent is still protected.

Whether an adoptive parent is entitled to inherit from an adoptive child is a question not addressed in the Act. However, since the effects of the adoption make their relationship synonymous with that of birth parent and child, if birth parents can inherit from the estate of their deceased children, so can adoptive parents. Also, the Act does not articulate whether an adopted child can or should (where so provided) inherit from his or her birth parents in

[832] Immigration Act, 1995.
[833] Citizenship Act, 1995 (Act No. 6 of 1995 [Cap. 357 R.E. 2002]).

testamentary disposition. Since Tanzania's law on wills allows for testamentary freedom, this remains within the birth parents' discretion.[834]

The effects of an adoption order in relation to customary law under the Act raise some questions. According to section 64(1) (a), all rights, duties and liabilities of the birth family and others connected to the child pre-adoption, including under customary law, cease to apply. Nevertheless, section 68 of the Act subjects adopted children to customary law as if they are natural children of the adoptive parents, provided the adoptive parents are also subject to it. This provision may conflict with the effects of an adoption order regarding the rights and responsibilities of members of the bloodline recognised under customary law. For instance, in open adoption, where the birth and adoptive families are related by blood and are both subjects of customary law, it is questionable whether the legal effects of adoption will still hold in the social reality of life in view of section 68. Would customary law recognise the permanent change in familial relations, for example, between grandparents and grandchildren? Also, where customary laws on property rights and inheritance apply, will the provisions of section 65 be justified? These questions on legal pluralism and its effects on child adoption are discussed further in chapter six.

4.5.12 Post-adoption Monitoring

The child adoption process involves gradual evolvement of trust and relinquishment of control by the state as it passes to the adoptive parents. To ensure a child is protected beyond adoption, state actors have the mandate to monitor the adoptive family after the adoption process has been concluded. According to regulation 16 of the Adoption of Children Regulations, monitoring should begin three months after the adoption order. Social welfare officers are responsible for making supervision visits to the homes of adopters residing in Tanzania. While there, they should meet in private with the adopted children to elicit their views on the adoption, bearing in mind each child's age, maturity, and stage of development. Afterwards, officers are obligated to write reports on every monitoring visit and put them in respective children's files. According to regulation 16(4) of the Adoption of Children Regulations, if there are any protection issues, the provisions of the Act and Regulations on child protection must be applied.[835]

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[834] A recent decision of the High Court of Tanzania discusses and delimits this freedom; for further details, see High Court of the United Republic of Tanzania (Dar es Salaam District Registry), At Dar es Salaam, "Benjamin Benson Mengi and 3 Others vs. Abdiel Reginald Mengi and Benjamin Abraham Mengi", Unreported (18.05.2021).

[835] There is no specific provision under the Law of the Child Act, 2009 or the Child Protection Regulations, 2014 for the protection of adopted children. Therefore, the same procedure applies as for children with protection issues generally.

For adopters who do not reside in Tanzania, regulation 16(5) of the Adoption of Children Regulations provides for their post-adoption monitoring. Such adopters include non-resident Tanzanians and non-Tanzanians who have left Tanzania to return to their home or their host countries. In these cases, the Commissioner has the mandate to consult the International Social Service to conduct post-adoption monitoring on behalf of the Department of Social Welfare.

4.6 Conclusion

The legal framework of child adoption in Tanzania is characterised by multiple legal orders that do not stand at par. However, they interplay in practice and may be invoked alternatively depending on the nature of a specific case. For instance, customary or religious laws may also apply in pre- or post-adoption decision-making where involved parties are subject to such laws. The legal framework is also broad and complex, and the multiplicity of applicable laws may occasion errors with other rules being overlooked or disregarded. For instance, it is challenging for a social welfare officer who is not trained in law to understand the constellation of legal orders involved and how they apply to child adoption practice.

The existence of multiple unharmonised national policies and strategic plans also confuses the practice of child welfare in Tanzania. The implementation of these policies and plans is inconsistent and may be counter-productive.[836] The other challenge is the lack of smooth succession from one strategic plan to the next. In practice, once the period of implementation of a plan has lapsed, the plan is wholly abandoned without any further follow-up. Lack of proper review of a previous plan's success and failure results in making new plans that may not fully cater to the needs in the field. This practice occasions a disconnection that affects the implementation of laws and policies on child welfare, including child adoptions. For instance, the NPA-VAWC, which is the current leading strategic plan in social welfare, focuses mainly on violence and its effects on women and children, while NPA I & II, its predecessors that are no longer implemented, were broader based and had more potential for addressing child welfare problems in Tanzania.

The Law of the Child Act, 2009, and the Regulations made under it are riddled with misconceptions, contradictions, ambiguity, omissions, and errors in language, typos, numbering, and cross-referencing. Despite the recent law review in 2019 that edited some parts of the Law of the Child Act, the flaws still subsist. The translation of the Regulations into Kiswahili only helps in part as the translator does not correct the problems of the original

[836] These were the findings of the ACPF's research reported in African Child Policy Forum (ACPF), *Implementing Child Rights in Tanzania: What is working well, what is not*, above footnote 570.

document. For example, open adoption is misconceived under the Act. There are omissions in setting specific legal requirements and procedures that may apply exclusively to this type of child adoption. In practice, it results in contradictions or uncertainties, for instance regarding whether a relative who is a prospective adopter needs to foster a child for six months or not. During field research for this study, social welfare officers gave contradictory answers when asked this question. Adoptions by non-resident Tanzanians face similar challenges. The Act and the Regulations do not provide precise requirements and procedures to regulate this type of child adoption.

Erroneous cross-referencing between the Act and the Regulations is seen in the case of the Child Protection Regulations, 2014. This document was drafted two years after most of the other Regulations and makes multiple mistakes when referring to their provisions. These mistakes are more pronounced when referring to the Juvenile Court Rules because it refers to the revoked Rules of 2014 and not the current ones of 2016. The Regulations are, therefore, in need of amendment.

Another weakness in the law of child adoption is the fact that several different procedures for formal care measures influence child adoption. These include the rules and procedures for Child Protection, Children's Homes, Foster Care Placement, and, ultimately, the Adoption of Children Regulations. What makes it such a challenge is the lack of clarity and uniformity in the requirements laid down in these different procedures. Where an international element comes in, such as in child adoption by non-resident Tanzanians and non-Tanzanian residents, matters are further complicated. For instance, the Foster Care Placement Regulations provide for the eligibility of non-Tanzanians to foster under regulation 5(1) (c) and (d), but there is no further mention of non-Tanzanians throughout the Regulations even where different procedures are required. Also, the Foster Care Placement Regulations provide no procedural guidelines for foster care by a prospective adoptive parent who is a non-resident Tanzanian.

Further, there are shortcomings in the law that may obscure the Department of Social Welfare's operations in child adoption. For example, foster care placement as a prerequisite for adoption is regulated in the same way as foster care placement as an independent care measure. Joining the two in the same procedure raises practical challenges, such as registering prospective adoptive parents as foster carers. They are usually foster carers for only six months and are not willing to foster any other child apart from the one they intend to adopt.

The Law of the Child Act and its Regulations require some reforms. The latter were enacted at different times and not in the proper sequence. The Child Protection Regulations, which should have been drafted first, came only in 2014, after the regulations on children's homes,

foster care, and adoption. As a result, they set requirements and procedures which may be beneficial to a child deprived of parental care but are not followed in practice because the earlier regulations have already taken root. Also, since the Act and the Regulations were drafted at different times by different drafters, they do not form a harmonious body of law and hence create difficulties in implementation.

Chapter 5: The Best Interests of the Child Principle

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[837]

5.1 Introduction

Children, due to their tender age, are physically and mentally immature, hence vulnerable. Being so, they require special care and protection. For this reason, different societies at different times have developed various measures to protect their children. One of them, which appears to have gained universal acceptance, is the best interest concept.[838] It requires that all decisions made for or on behalf of children be in their best interest. The development of the concept has led to its incorporation in international, regional, and national legal instruments as a guiding principle in all actions concerning children.

Before most nations incorporated the best interests of the child principle into their domestic legal frameworks, they were already applying the welfare principle to children's matters.[839] For instance, Tanzania's law of marriage which has been in application since 1971, enshrines the welfare principle.[840] The welfare principle differs from the best interest principle primarily in terms of scope. The welfare principle requires that children's welfare should be the main consideration when making decisions concerning them, rather than the broader spectrum of their 'best interests'.[841] The child rights movement, which led to a change of paradigm whereby the child ceased to be an object of care and started being a subject of rights, occasioned the move from the welfare principle to the best interest principle.[842] The UNCRC marks the culmination of that movement and incorporates Article 3(1), which articulates the

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[837] Article 3(1) of the United Nations, Convention on the Rights of the Child.

[838] Alison Diduck, Felicity Kaganas, *Family Law, Gender and the State*: *Text, Cases and Materials* (London: Hart Publishing, 2012), p. 373.

[839] For a discussion on inclusion of the best interests of the child principle in domestic laws prior to the UNCRC, see Alston, Gilmour-Walsh, *The Best Interests of the Child*, above footnote 82, at pp. 3-4.

[840] See section 125 of the Law of Marriage Act. A number of other national jurisdictions still have the welfare principle in their laws concerning children, for example the United Kingdom under Section 1 of the Children's Act, 1989 and Ghana under Section 2 of the Children's Act, 1998, Act No. 560 of the Parliament of the Republic of Ghana. The UK still applies the welfare principle since no domestic statute incorporates the UNCRC, hence there is no obligation for English authorities to apply the best interest of the child principle as articulated in the Convention. See Nigel V. Lowe, Gillian Douglas, *Bromley's Family Law* (Oxford: Univ. Press, 2007), at p. 454, fn. 33.

[841] For a discussion of the differences between the two principles, see Lowe, Douglas, *Bromley's Family Law*, above footnote 840, at pp. 450-479.

[842] For further details, see contributions in Detrick, *The United Nations Convention on the Rights of the Child*, above footnote 403. For a summarised version, see Judith Ennew, "The History of Children's Rights: Whose Story?" https://www.culturalsurvival.org/publications/cultural-survival-quarterly/history-childrens-rights-whose-story.

best interests principle. Recognition of children's rights, such as the right to be heard and participate in decision-making as articulated in Article 12 of the UNCRC, played a significant role in elevating the child to a subject of rights. Thus, children are no longer passive objects of care but active holders of rights.

Section 4(2) of Tanzania's Law of the Child Act incorporates the best interests of the child principle. However, the Act, like the UNCRC, which it domesticates, does not include an interpretation of the principle. Therefore, its interpretation, determination, and application are flexible depending on each case's circumstances. Achieving this in practice is not as straightforward as it may appear to be. This is because, in most cases, children are not able to say what is best for them. Thus, determining what is best for them largely depends on views expressed by other people.

The indefinite state of the principle, in Cantwell's opinion, breeds misconception and manipulation.[843] This is because it potentially renders the principle vague and susceptible to subjectivity. As a result, authorities mandated to determine children's best interests may rely primarily on their discretion and understanding of what exactly constitutes the best interests of a particular child in a specified situation.[844]

There have, however, been efforts to address the principle's indeterminacy. These include institutional and professional efforts in the form of guidelines and minimum standards, court decisions and commentaries on the principle. For instance, United Nations institutions such as the UN CRC's Comment[845] and UNHCR's Guidelines[846] have made attempts to shed light on the principle. Nevertheless, as exhaustive and enlightening as the institutional and professional efforts may be, the best interests principle remains an interpretative and determinative challenge in practice.

This chapter analyses the jurisprudence on the principle at international, regional, and national levels. The main objective is to deduce how the principle works in practice to safeguard children's interests in child adoptions with a foreign element. The chapter commences with tracking the principle's development from its debut in the international legal arena to its articulation in recent instruments such as the UNCRC. It then goes regional, where its exploration of the principle is limited to Africa and nationally to Tanzania. The legal analysis

[843] Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, p. 9.
[844] Stephen M. Cretney, J. M. Masson, Rebecca J. Bailey-Harris, Rebecca Probert, *Principles of Family Law* (London: Sweet & Maxwell, 2008), p. 730.
[845] Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)".
[846] UN High Commissioner for Refugees (UNHCR), "Guidelines on Determining the Best Interests of the Child".

aims to achieve a better understanding of the concept by examining its construction in several instruments. Considering the various formulations may aid its interpretation. This, however, is not the only intention of the analysis. The laws are also investigated to see whether they establish any criteria, procedures, or other mechanisms to determine the child's best interests and guide application of the principle.

Then, based on available guidelines and literature, the chapter discusses what is generally meant by the child's best interests and how to determine them. After this, the scope is narrowed down to consider the meaning and application of the principle in child adoptions, particularly with an international element. Lastly, the chapter provides a practical example of how mandated authorities in Tanzania interpret, determine, and apply the principle in this type of child adoption. Throughout the chapter, there is a weighing of how the deliberate decision to leave the principle's determinacy flexible to allow for diversity in individual cases and varying socio-cultural perceptions affects its application.

The conclusions drawn from this chapter partly answer the research question regarding how adoptions with an international element in Tanzania are determined in the child's best interest.

5.2 The International Context

There is sufficient evidence to show that some national legal systems had already incorporated the best interests of the child principle, albeit in varying forms, before its enshrinement in international legal instruments. For instance, some authors demonstrate that the best interests principle already existed in English jurisprudence before the adoption of the UNCRC.[847] They argue that the British Empire had already incorporated the principle in its national laws and included it in those exported to its colonies. However, it is significant to note that the principle referred to was essentially the welfare principle rather than the best interests principle.[848]

The best interests principle has developed in different forms in different communities throughout centuries of making decisions affecting children. Most domestic laws, formal and informal, have conceived and applied it as the welfare principle. Thus, the advancement of the welfare principle and its application contributes to understanding the evolution of the best interests principle. Tracing the development of the welfare principle in the UK, for instance, shows that relying on the child's welfare as a guiding principle in determining disputes evolved out of the Chancery Court's practice in wardship and guardianship cases in the late

[847] Alston, Gilmour-Walsh, *The Best Interests of the Child*, above footnote 82, at pp. 3-4.

[848] For examples of countries that have already enshrined the principle and its formulations in their laws, see *ibid.*

eighteenth and nineteenth centuries.[849] During the early nineteenth century, common law still upheld paternal rights over the child's well-being unless doing so endangered the child's welfare in a severe and significant way.[850] Fathers had near-absolute rights over their children in the sense that they could exercise paternal rights exclusively without consulting the children's mothers and without considering the welfare of the children.[851] Departure from this practice came through women's struggle for equality in relation to parental rights.[852]

In 1886, the English parliament, for the first time, enacted legislation directing courts to pay heed to the infant's welfare.[853] The Guardianship of Infants Act, 1925 elevated the child's welfare to a first and paramount consideration while deciding on a child's custody or upbringing.[854] For many years since, the English parliament and courts have kept enhancing the meaning and scope of applying the welfare principle.[855]

However, the children's rights movement saw a shift from the welfare to the best interests principle. In most societies, the UNCRC has played a central role in the change. For instance, in Tanzania, reliance on the welfare principle in child custody and maintenance disputes under the 1971 Law of Marriage Act changed after the domestication of the UNCRC under the 2009 Law of the Child Act. In the UK, nevertheless, the welfare principle has held fast.[856]

The best interest of the child principle became an internationally renowned standard after its inclusion in the UNCRC.[857] This inclusion, however, does not mark the debut of the principle in the international legal arena.[858] The earliest international formulation of the principle can be traced back to the 1959 Declaration of the Rights of the Child.[859] The 1959 Declaration originates from the League of Nations' 1924 Geneva Declaration of the Rights of the Child orchestrated by the joint efforts of acclaimed child rights activists Eglantyne Jebb and Janusz Korczak.[860] However, the 1924 Declaration did not include an express formulation of the best

[849] Cretney, Masson, *Principles of Family Law*, above footnote 242, p. 717.
[850] Diduck, Kaganas, *Family Law, Gender and the State*, above footnote 838, pp. 378–379.
[851] Cretney, Masson, *Principles of Family Law*, above footnote 242, p. 579.
[852] Diduck, Kaganas, *Family Law, Gender and the State*, above footnote 838, p. 379.
[853] See Section 5(4) of the Guardianship of Infants Act (Great Britain) (1886).
[854] Diduck, Kaganas, *Family Law, Gender and the State*, above footnote 838, p. 379.
[855] For a discussion of the principle's advancement, see Lowe, Douglas, *Bromley's Family Law*, above footnote 840, at pp. 450-479.
[856] See reference to this, above footnote 840.
[857] United Nations, Convention on the Rights of the Child.
[858] See details at para 2 of the UN Committee on the Rights of the Child (CRC), "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)", p. 3.
[859] See Principle 2 of United Nations, "Declaration of the Rights of the Child". Also, the authors in Alston, Gilmour-Walsh, *The Best Interests of the Child*, above footnote 82, at p. 4 refer to the principle's enshrinment in the Declaration as an "embryonic formulation".
[860] Therborn Goran, "Child Politics", Childhood 3(1) (1996): pp. 29–44.

interests of the child principle but provided five statements on the child's general welfare.[861] These statements were amended and augmented, resulting in the ten Principles of the 1959 Declaration adopted by the United Nations.[862]

The 1959 Declaration laid a foundation for the UNCRC. During the UN International Year of the Child, 1979, the UN Commission on Human Rights began considering transforming the 1959 Declaration into a convention on children's rights.[863] In this year, the UN Commission on Human Rights began to consider the Polish government's proposal of 1978, which suggested that the Principles of the 1959 Declaration should be converted into binding international law in the form of a convention on children's rights.

An assembly of government delegates formed drafting working groups and met annually in Geneva for about a decade (1979-1988).[864] They ultimately produced a 54-Article instrument in 1989.[865] Others, such as representatives of non-governmental organisations and United Nations bodies and specialised agencies, also participated in deliberations during the drafting period.[866] The UN General Assembly adopted the resultant instrument in 1989 as the UNCRC, famed as the most successful international instrument.[867] The UNCRC was not the first human rights treaty to provide on the protection of the child, though it was the first to enshrine children's rights in the strict sense.[868] In the previous instruments, for instance in the 1959 Declaration, the child was still an object rather than a subject of rights.[869] Also, the previous instruments were Declarations, making the UNCRC the first instrument with obligations. Therefore, the UNCRC is the most authoritative and comprehensive legal instrument stating the fundamental rights of children.[870]

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[861] Geneva Declaration of the Rights of the Child (26 September, 1924).

[862] Ennew, "The History of Children's Rights: Whose Story?", above footnote 842.

[863] Cretney, Masson, *Principles of Family Law*, above footnote 242, at p. 585; and Ennew, "The History of Children's Rights: Whose Story?", above footnote 842.

[864] Ennew, "The History of Children's Rights: Whose Story?", above footnote 842.

[865] *Ibid.*

[866] See Paragraph 21 of Part 1 of "Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights in Vienna on 25 June 1993", https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx, 5.6.2020.

[867] There were 140 signatories and 196 parties as of June 2021. See United Nations, "Convention on the Rights of the Child: Status as at: 11-06-2021 01:37:41 ED", https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

[868] Under the earlier international instruments, such as the 1924 and 1959 Declarations, the child was still not an owner of rights hence what they recognised were still not sufficiently clear as children rights compared to the UNCRC. This is also the same under the Universal Declaration of Human Rights (10 December 1948) for instance as stipulated under Article 25(2)

[869] Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", above footnote 399, at p. 4.

[870] Andrew Bainham, *Children*: *The Modern Law* (Bristol: Jordan Publishing Limited, 2005), at pp. 66-67.

The UNCRC contains a broadly accepted formulation of the best interests principle.[871] One author argues that when discussing the Convention, of its 54 Articles, Article 3 is of 'primary importance'.[872] Others argue that the principle has gained a central and unassailable position.[873] Adding substance to this, the Committee on the Rights of the Child affirmed that Article 3 (1) provides not only a principle of interpretation for the whole Convention but also a right in itself and a rule of procedure.[874]

The best interests of the child principle was a subject of considerable debate during the drafting period of the UNCRC.[875] Although it was modified to suit different socio-cultural and economic realities of the international community's members, it remains a contentious topic of debate.[876] Despite this, the principle is likened to a golden thread that runs through and highlights not only the rights embodied in the UNCRC but the entire international child rights jurisprudence.[877] The next part traces this thread as it flows through various relevant international legal instruments that enshrine the best interests principle. The main objective is to identify provisions of the principle in the instruments and analyse their literal formulations to gauge their meaning.

5.2.1 United Nations Instruments

International instruments providing mainly for the child are not the sole instruments enshrining the best interests of the child principle. Rather, the principle is spread across several instruments touching on children's matters in a general or specific way. This part concentrates on the principle's provisions in instruments adopted by the United Nations.

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[871] Alston shows that the UNCRC has achieved a universal character, as has the best interests principle under Article 3(1) of the Convention. Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", above footnote 399, at pp. 1-5.

[872] Kate Standley, *Family Law* (Basingstoke: Macmillan, 1997), p. 164.

[873] Diduck, Kaganas, *Family Law, Gender and the State*, above footnote 838, p. 373.

[874] See paragraph 6 of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", p. 4.

[875] See part of the discussion in Detrick, *The United Nations Convention on the Rights of the Child*, above footnote 403, at pp. 131-140.

[876] The state delegations brought different proposals and suggested amendments to the text of Article 3(1) to suit the socio-cultural and economic circumstances of their countires during its deliberations. *Ibid.*, at p. 132-140.

[877] The phrase and implication of 'a golden thread' is borrowed from the expression of Tebutt AJ (as he then was) in the case of Kaiser v. Chambers (1969) 4 SA 224 (C) at 228G read in B. Clark, "A "golden thread"?: some aspects of the application of the standard of the best interests of the child in South African family law", Stellenbosch Law Review 11(3) (2000).

5.2.1.1 Declaration on the Rights of the Child, 1959

After witnessing how the devastation of the Second World War affected children, the Member States of the United Nations resolved that the child is owed the best that humanity can give.[878] To protect children in the future, the UN declared the ten Principles in the 1959 Declaration on the Rights of the Child. The 1959 Declaration amended and added substance to the earlier declaration of 1924 under the League of Nations. Principle 2 of the 1959 Declaration articulates the best interests of the child principle. It advocates that when enacting laws for the child's special protection and total development, facilitated by all means, in a manner healthy and normal, promoting freedom and dignity, the child's best interests shall be the paramount consideration.[879]

The wording of Principle 2 expresses three main points: the subject, purpose and scope of the best interests principle. Together with the status accorded to the principle, these three aspects will guide the following analysis of the principle's formulations in this Declaration and other subsequent instruments.

First, 'the child' is the subject of the best interests of the child principle. The Declaration does not define the term child. Nonetheless, its provisions refer to a human person below the age of legal majority.[880] The wording of each Principle suggests the Declaration provides for individual children as opposed to a group of children or all children.[881] The only difference is under Principle 1, which extends the rights under the Declaration to 'every child' without discrimination. However, the Principle uses the possessive and reflexive pronouns his/himself at the end of the provision limiting it to individual children. In the end, the Declaration covers all children, albeit independently.

Second, the purpose of invoking the best interests of the child principle, according to Principle 2, is the life, survival, and development of the child. Interestingly, the Declaration sets one of the later cardinal principles of the UNCRC (principle of life, survival and development of the child) as the ground for applying the best interests of the child principle.[882] The principle requires the child to have all opportunities and facilities within the

[878] See the preamble to the United Nations "Declaration of the Rights of the Child", p. 19. Para 5 reiterates the 1924 Declaration of the Rights of the Child's preamble.
[879] Ibid., Principle 2.
[880] See *ibid*., Paragraphs 1, 3, and 5 where a child is considered as a human person before birth and afterwards but limited to the time when such person is still of physical and mental immaturity.
[881] The Declaration mainly uses the third-person singular pronouns he/his/himself. There is no gender sensitivity, and presumably the male pronouns include the female child as well.
[882] Article 6 of the Convention on the Rights of the Child, UNCRC (20 November 1989).

means of the law or otherwise to ensure a healthy and normal development while being free and dignified.

Third, the scope for invoking the best interests of the child principle extends only to the enactment of laws for the above purpose. This means Principle 2 is limited only to legislative action for the child's life, survival, and development in exclusion of all other actions that may also concern the child. The Principle makes the best interests of the child principle the ultimate determinant of the legislation as it has the status of paramount consideration.

Principle 7 of the Declaration adds another dimension to the best interests of the child principle. It makes the best interests principle a guiding standard for those responsible for the education and guidance of the child. Parents occupy the front seat in this respect. In addition, the provision refers to a wide range of other individuals, such as teachers, religious leaders, and the community in general, as well as governmental and non-governmental institutions responsible for children's upbringing and education. Thus, Principle 7 extends the scope of the best interest principle beyond the legislators specified under Principle 2. However, it does not specify whether the best interests of the child principle is of primary or paramount importance in this context.

This Declaration benchmarks the first inclusion of the best interests of the child principle in an international human rights instrument. It holds a unique position because it serves as a foundation for other contemporary formulations of the best interests principle. As the 1924 and 1959 Declarations laid the basis for the future of international children's rights, one cannot help speculating about their influence on present-day formulations of the best interests of the child principle. An analysis of the ensuing instruments will unveil the connection if any.

5.2.1.2 Convention on the Elimination of All Forms of Discrimination against Women, 1979

Sex is a present-without-fail ground against discrimination in almost all international human rights instruments. It comes as no surprise because one of the central goals of the United Nations is to reaffirm faith in the equal rights of men and women.[883] Despite this assurance, the Commission on the Status of Women (CSW) found the general non-discrimination guarantees insufficient to protect and promote women's rights and fundamental freedoms in

[883] Preamble to the The Charter of the United Nations (1945).

certain vulnerable areas.[884] The CSW produced several Declarations and Conventions to increase such protection and promotion.[885]

These instruments created a piecemeal framework on the basis of which the Commission, later on, found incompetent to wage an effective war against women's discrimination. Therefore, in 1967, an initial comprehensive instrument was adopted, the Declaration on the Elimination of Discrimination against Women. However, there remained a relentless demand for a binding instrument with normative force. To satisfy the demand, the Commission, in collaboration with other UN bodies and agencies, produced the 1979 Convention on the Elimination of Discrimination against Women (CEDAW).[886]

A question may arise here: why seek the best interests of the child principle in a women's Convention? The simplest explanation is that CEDAW addresses the girl child, the role of women in the family, parenting, and children's upbringing.[887] This naturally brings in the interests of the child. Moreover, the Convention enshrines the best interests of the child principle in Articles 5 (b) and 16(1) (d) and (f).

Article 5 fights against gender stereotypes and the fixing of parental gender roles based on social and cultural prejudices. The provision suggests the use of family education to champion an understanding of the maternal biological role of women as a social function and that the upbringing and development of children is a duty shared by both men and women. It further requires that, in all cases, the primordial consideration be the interest of the children.

Article 5 (b) says that children belong to the men and women charged with their upbringing and development, and includes any, every, and all children. In this Article, the formulation of the best interests principle does not include the usual qualifying superlative 'best' but only the word 'interest'. It thus broadly implies the advantage, benefit, or welfare of children. The scope of application of the principle given in this provision is "in all cases". Although one could interpret this as meaning in all cases concerning the child, it is limited to the cases

[884] UN Women, "A brief history of the CSW | Commission on the Status of Women", https://www.unwomen.org/en/csw/brief-history, 2021-06-14.

[885] Such as the Convention on the Political Rights of Women, 1952, the Convention on the Nationality of Married Women, 1957, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962, and the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1965.

[886] United Nations, *Convention on the Elimination of All Forms of Discrimination against Women* (New York, 1979) A brief history of the process is available at https://www.un.org/womenwatch/daw/cedaw/history.htm.

[887] See Para 13 of the Preamble to, and Artilce 4(2), 5(b), 9(2), and (16) of the Convention on the Elimination of All Forms of Discrimination against Women (New York, 1979).

under Article 5 (b). The word primordial (from Latin *primordialis*) gives to the interests of the children the status of primacy of consideration.[888]

Article 16 of the Convention is dedicated to eliminating discrimination against women at the inception of, during, and on dissolution of marriage.[889] The interests of children come into play when seeking to establish the same rights and responsibilities for men and women in cases of parenthood, guardianship, wardship, trusteeship, adoption and the like.[890] The subject and scope of application of the best interests of the child principle in Article 16(1) (d) and (f) is similar to that under Article 5 (b). However, the two Articles invoke the principle for different purposes. Here, it is required that the interests of the children be considered whenever the rights and responsibilities of men and women are determined, be it in parenthood, wardship or adoption. The status of the principle has also changed from primordial to paramount. This means the interests of the children and not of the men or women are supreme in these cases.

CEDAW is a Convention dedicated to women's and girls' rights. It deals with children collectively in the context of care by their parents. There is an argument that the inclusion of the best interests of the child principle in the Convention shifts the central focus of some provisions from women to children.[891] It appears to shift the intention of Article 5 (b) and Article 16 (1) (d) and (f) from promoting and protecting women's rights to promoting and protecting children's rights by demanding their interests be the first or the determinative consideration in all such cases. This part is not concerned with this debate; rather, its aim is to show that the inclusion of the principle in CEDAW was a big step towards protecting the rights of the girl child and of all children.

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[888] See discussion on the use of terms primordial, primary, and paramount and what they may mean in Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights", above footnote 399, at pp. 12-13.

[889] See Para 6 of the Committee on the Elimination of Discrimination against Women, "General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women", https://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf (CEDAW/C/GC/29) (26 February 2013), at p. 2.

[890] See Article 16 (1) (d) and (f) of the Convention on the Elimination of All Forms of Discrimination against Women (New York, 1979).

[891] H.M.T. Holtmaat, "Article 5 CEDAW", in B. Rudolf, M. A. Freeman, C. M. Chinkin, S. Kroworsch, A. Sherrier, S. Wittkopp (eds.), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A commentary* (Oxford: Oxford University Press, 2012), p. 153.

5.2.1.3 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1986

In 1985 the United Nations Economic and Social Council asked a group of experts on family and child welfare to draft a Declaration on foster placement and adoption of children.[892] The Declaration was adopted in 1986.[893] It emphasises the need to bring up children within a family environment under the responsibility of parents in an atmosphere of affection and security.[894] This need defines the purpose of the Declaration: to provide for alternative family care, be it kin, foster, adoptive or institutional, when the birth family is unavailable or inappropriate for the child.

From the word go, the Declaration warns of the need to bear in mind that in foster care and adoption procedures, the child's best interests must be the paramount consideration.[895] The formulation of the principle in this Declaration is precise. It is limited to foster placement and adoption procedures which are the subject of the Declaration. However, under Article 5 of the Declaration, the scope is further extended to issues not necessarily limited to foster care and adoption. It refers generally to alternative care for children who cannot be cared for by their birth parents. In all cases, the best interests of the child remain paramount; that is the definitive consideration. The Declaration further mentions what interests are paramount in this context. Specifically, they include the need for affection, security and continuing care. This brings one clear advantage; it leaves no room for wondering which child interests must be considered in respect of the matters covered by the Declaration. There is no uncertainty regarding which interests the Declaration intends to be the paramount consideration. This reduces the principle's indeterminacy though it could be argued that it does not guarantee the flexibility of the UNCRC.

5.2.1.4 United Nations Convention on the Rights of the Child, 1989

The United Nations Convention on the Right of the Child (UNCRC) marks the shift from regarding children as objects which require care and protection to recognising them as

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[892] United Nations, "General Assembly Resolution Adopting the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption", International Legal Materials 26(4) (1987): pp. 1096–102.

[893] Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption (3 December 1986).

[894] *Ibid*., Preamble.

[895] *Ibid*., paragraph 5 of the Preamble.

independent subjects of rights.[896] Since this Convention is almost universal due to its high number of ratifications, children around the globe enjoy this new status. The Convention is the core child rights instrument that provides comprehensive cover of the child's welfare. It embeds, among other rights, the right to consider the child's best interests in all actions concerning the child.[897] Thus, apart from being a right, the principle has acquired the status of a general principle of the Convention. It must be considered when interpreting every right enshrined in the Convention.[898] Moreover, it is a rule of procedure used to justify any decision concerning the child during the best interests assessment and determination process.[899]

The Convention contains several formulations of the best interests of the child principle. Article 3(1) of the Convention contains the most general and internationally distinguished formulation. The subject of this provision is 'children' used in the plural form as opposed to the singular form 'the/a child' used in previous instruments. The shift can be interpreted as the intention of drafters to subject actions concerning every child individually and all children collectively to the best interests test. The Committee on the Rights of the Child has duly explained the word as referring to children as an individual, a group or a constituency.[900] The Convention under Article 1 defines a child as a human person below the age of eighteen years.[901]

The words 'in all actions' give the scope of application of the best interests of the child principle under Article 3 (1). In other terms, it means that applying the principle extends to all undertakings or interventions relating to the child. Actions may include decisions, proposals,

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[896] Jean Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation* (Sion, 2010), p. 2.

[897] See Article 3 (1) of the Convention on the Rights of the Child, UNCRC (20 November 1989). The principle is said to be a substantive right under Para 6(a) of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)". However, Zermatten, J. (2010)., p. 7, argues that the BIC principle is a foundation for a substantive right and not a right in itself as it requires the state to lay mechanisms for assessment of best interests during the decision-making process.

[898] Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, p. 1.

[899] Para 6(c) of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at p. 4.

[900] See Paragraph 13 (a) and (b) of Committee on the Rights of the Child, "General comment No. 7 (2005): Implementing Child Rights in Early Childhood", https://www.refworld.org/docid/460bc5a62.html, 2021-06-21. Also see Paragraph 30 of Committee on the Right of the Child, "General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]", https://www.refworld.org/docid/49f6bd922.html, 2021-06-21T10:20:19.000Z; and Paras 21-24 of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at pp. 7-8

[901] It subjects the definition to the age of majority in other legal systems in which it could be attained earlier than at 18.

care, protection, services, procedures and legislation.[902] The actions, however, must be those "concerning" children. This means that the action must directly or indirectly affect children individually, as a group or generally.[903] Examples of direct actions include health services, care systems and schools, while indirect actions may consist of environment, housing and transport.[904]

Article 3 (1) brings in an institutional aspect that was missing in the prior formulations. It names four categories of authorities that must be bound by the best interests of the child principle in their undertakings concerning children. The first category consists of public or private social welfare institutions. These include but are not limited to social work institutions. They extend to economic, cultural, civil and political institutions concerned with children. It certainly includes public and private organisations working for children's rights and freedoms in all spheres of life.[905]

The second category comprises courts of law. These involve all bodies conducting either judicial, conciliatory, mediatory or arbitral proceedings presided over by professional judges or lay persons.[906] The third category is administrative authorities. These cover a broad spectrum of state agencies administering various services such as care systems, health services, protection and security, education, living conditions, environment and many others.[907] The fourth is legislative bodies. These are all institutions responsible for legislative and parliamentary activities such as policy formulation, enactment of laws from national down to municipal levels, budgeting, and domestication of bilateral and multilateral agreements concerning children.[908]

The phrase 'best interests of the child' is at the root of the principle. Foremost, in phrasing the principle, the superlative 'best' is used as opposed to some preceding formulations such as those under CEDAW. The researcher interprets the qualifier 'best' as referring to those interests or rights-based solutions among a cluster of many interests or solutions that best

[902] Paras 17-18 of the UN Committee on the Rights of the Child (CRC), "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)", at p. 7.
[903] *Ibid*., paras 19-20.
[904] See Paragraph 13(b) of Committee on the Rights of the Child, "General comment No. 7 (2005): Implementing Child Rights in Early Childhood", above footnote 900.
[905] Para 26 of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at p. 8.
[906] *Ibid*., paras 27-29, at pp. 8-9.
[907] *Ibid*., para 30, at p. 9.
[908] *Ibid*., para 31. See also Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation*, above footnote 896, at p. 10

serve the child.[909] For instance, when determining whether to allow child contact with a separated abusive parent, there will be conflicting interests such as the child's safety and psychological health, and the right to maintain personal relations with the parent. In consideration of the child's best interests under the circumstances, a decision-maker may find that the safety and health of the child override the right to maintain parent-child relations and may proceed to deny contact based on this finding. Hence, the qualifier is a significant nuance.

The status of the principle is that it is 'a primary consideration', meaning children's interests must take priority among other considerations in a particular case.[910] In other words, the children's interests are not on the same level as other considerations.[911] However, they are not the determining factor. There is room to consider other relevant aspects such as the rights and interests of parents, siblings, family, relatives, other children, or the general public.[912] Thus, it becomes necessary to balance and compromise between competing interests when determining what is best for the child. Under the UNCRC, the approach is different from when the principle enjoyed a uniform paramountcy status in the 1959 and 1986 Declarations. In that case, it was the ultimate determinant factor concerning the specified actions. However, in the UNCRC, the principle is the determinant factor for select matters such as child adoption under Article 21 and not in all actions under Article 3 (1). However, this does not mean that the authorities concerned can dismiss consideration of the child's best interests in some matters. Article 3(1) uses the word 'shall' which imposes a definite obligation and removes any room for discretion in considering the child's best interests.[913]

The UNCRC contains other formulations of the best interests of the child principle that apply to specific situations. They are divided into three groups depending on the status of the principle. In the first group the principle has the status of primacy. This is evident under Article 18 (1), which requires parents and legal guardians to have the child's best interests as their 'basic concern' while discharging their responsibilities towards the upbringing and development of the child. In the second group it has the status of determinant criterion. This

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[909] Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation*, above footnote 896, at p. 11. Zermatten argues that the use of the qualifier 'best' together with the word interests reflects the ultimate goal of the Convention which is the well-being of the child.

[910] The drafting history of 'a primary consideration' is available in Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, at p. 16.

[911] See Para 37 of Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at p. 10.

[912] *Ibid*., para 39.

[913] *Ibid*., para 36. Under section 53 of the Interpretation of Laws Act, Cap 1 [Laws of Tanzania R.E. 2002] it is provided that "may" imports discretion and "shall" is imperative.

status makes the principle one of the criteria that determines the outcome. This is seen in Articles 9 (1) and 20 (1), which provide that separation from parents must be in the child's best interests. Also, Article 9 (3) requires that the child's best interests be the determinant factor in curtailing the right of the child to maintain regular contact and personal relations with separated parents. In matters of juvenile justice, Articles 37 (c) and 40 (2) (b) (iii) require that detention of a child together with adults and the presence of parents, guardians or legal assistants during penal proceedings be in the best interests of the child.[914] In the third group it has the status of paramountcy. Article 21 requires that the child's best interests be the paramount consideration in every State Party's child adoption system. The Article sets the child's best interests as the absolute determinant.

The UNCRC revolutionised the concept of the best interests of the child. It promoted the concept from a mere decision-making guideline used in the absence of a human rights system to the core principle in the child rights system.[915] Unfortunately, besides its long, extensive use, the principle has remained contentious and often been misapplied. However, the Committee on the Rights of the Child has provided guidelines for the interpretation, assessment and determination of the child's best interests.[916] Still, there is work to be done: a case-by-case assessment and determination in the light of child rights under the Convention and other relevant legal instruments.

5.2.1.5 United Nations Convention on the Rights of Persons with Disabilities, 2006

This Convention, herein CRPD, is the first international human rights instrument exclusively providing for persons with disabilities. Its main agenda is to end all forms of discrimination and restrictions against persons with disabilities.[917] The intention is to allow these people the full enjoyment of human rights. For example, Article 3 (a) and (b) of the Convention propagates equality and dignity of treatment as accorded to everyone else without distinction.

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[914] Zermatten elaborates that Article 37 (c) may apply to a child incarcerated together with one parent for instance in the case of a new-born baby. In the case of Article 40 (2) (b) (iii) he suggests that it might be not in the best interests of the child to have his parents present if they have victimised him or are involved in the commission of the offence. See Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation*, above footnote 896, pp. 14–15.

[915] Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, at pp. 6–10.

[916] Committee on the Rights of the Child, General Comment No. 14 (2013) On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3 Para. 1) (2013), CRC/C/GC/14 adopted by the Committee on the Rights of the Child at its sixty-second session (14 January - 1 February 2013), https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf. However, Cantwell has argued that over the decades, perceptions of what constitutes the best interests of the child have varied considerably and that despite clarifications under General comment No. 14 (2013) there still lacks a formal consensus on the subject. See *ibid.*, at pp. 5–6

[917] See Article 3 (b) of Convention on the Rights of Persons with Disabilities.

The convention covers not only adults but also children with disabilities. In furthering the promotion and protection of children with disabilities, the Convention enshrines the best interests principle. Article 7 (2) contains the first formulation of the best interests of the child principle. It has similar wording to Article 3 (1) of the UNCRC with only two main differences. One, the subject of the formulation is more specific than under the UNCRC; it applies solely to children with disabilities. The scope of application of the principle is therefore limited to actions concerning disabled children. Two, the authorities that can take action relating to such children are not specified. This can be interpreted as a broader formulation. It may mean that it does not matter who takes action. What matters is that such action concerns children with disabilities. Under this Article the principle has the status of a primary consideration.

Article 23 (2) embeds another formulation of the principle. It is invoked in the context of the rights and responsibilities of persons with disabilities acting as guardians, wards, trustees, adopters of children, or similar status. The provision requires that the best interests of the child be the paramount consideration in all cases. This Article can be compared to Article 21 of the UNCRC. It provides for the decision-making process when the child is separated from the birth parents and needs alternative care. However, Article 23 (2), in contrast to Article 7 (2) above, does not limit the principle to children with disabilities. Taking the interpretation of the Committee, reference to 'the child' under this provision includes children individually, as a group or generally.[918] Therefore, this formulation extends the application of the principle to all children.

In the past, persons with disabilities were treated akin to children, as objects to be cared for and decided for.[919] The concept of best interests was applied to them a long time before the international recognition of human rights.[920] It is this Convention, however, and not the universal human rights system that breaks the medical and charity-based approaches to persons with disabilities and brings about a rights-based approach.[921] In its promotion and protection framework, the Convention limits the best interests principle only to children. Interestingly, the Convention, though dedicated to persons with disabilities, strives to protect all children's interests irrespective of their condition.

[918] See Para 32 of Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at p. 9.
[919] Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, at pp. 6 and 12.
[920] *Ibid.*, at pp. 6-10.
[921] *Ibid.*, at pp. 12–13.

5.2.2 Hague Conference on Private International Law Instruments

The Hague Conference on Private International Law (HCCH) is an intergovernmental organisation formed in 1893 with the aim of harmonising the rules of private international law.[922] It makes and assists in implementing multilateral instruments geared to unifying the rules and procedures of private international law. This part looks at three of its instruments on child issues that incorporate the best interests of the child principle.

5.2.2.1 Hague Convention on the Civil Aspects of International Child Abduction, 1980

This multilateral treaty was drafted and concluded before the UNCRC. It strives to protect children against the harm of wrongful removal to or retention in another state by laying down specific procedures for their immediate return home.[923] The Convention seeks to ensure that the laws of one state regarding children's custody and access rights are respected in another.[924] It applies when an alleged abduction relates to a child below the age of 16 years habitually resident in a contracting state immediately before a breach of custody or access rights.

The Convention incorporates the best interests of the child principle in two ways. The first way is incorporation as an express formulation. The preamble to the Convention states unequivocally that in matters of child custody, the interests of children are without doubt of paramount importance. The formulation omits the qualifier 'best' and refers only to the interests of children. It applies the principle to all children within the limits of custody matters. However, the principle is found in the preamble, a seat deemed legally inoperative. Its presence, nonetheless, adds to the protective framework of the Convention.

The second way of incorporation is as an implied formulation. The Convention under Article 1(1) guarantees any abducted child a prompt return to his or her place of habitual residence. However, under Article 13 (b), the Convention departs from its objects by opposing the return of an abducted child if there is a grave risk of exposure to physical or psychological harm or being placed in an intolerable situation. This implies that the authorities responsible must consider the best interests of any child before ordering a return. It has been argued that this provision is more concrete than an outright formulation of the best interests of the child principle.[925] This is because it defines clear criteria for the decision for or against return. It

[922] Further details on the HCCH are available at https://www.hcch.net/en/home.
[923] See the Preamble and Article 1 (a) of the Hague Conference on Private International Law, "Hague Convention on the Civil Aspects of International Child Abduction", https://www.refworld.org/docid/3ae6b3951c.html, 2021-06-21.
[924] *Ibid*., Article 1(b).
[925] Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, at p. 14.

does not, for instance, merely reiterate the standard formulation that in ordering return, the interests of children are of paramount importance.

This Convention has been described as being widely successful against international child abduction. Hans van Loon names it as a significant precedent in creating the 1993 Hague Convention on Intercountry Adoption.[926] It showed that a multilateral treaty can create a robust framework for protecting children at the international level, the best interests of the child principle being an unassailable component of such a framework.

5.2.2.2 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993

The spread of intercountry adoption escalated after the Second World War. It was considered a humanitarian response and protective measure for orphaned and abandoned children after the war. Therefore, many perceived it as desirable for the welfare of the children.[927] However, with time and for several reasons, children available for adoption in Europe became scarce.[928] Some of the reasons included growing infertility, increased use of contraceptives and adapting to single parenthood.[929] This reversed the need to find a family for a child, which had been associated with intercountry adoption. Motives for adoption increasingly changed from being child-centred to being family-centred. Thus, there was a high demand for children to adopt in the developed countries, which was answered by a supply of such children from developing countries.[930] This practice marked the beginning of social controversy relating to intercountry adoption.

In its efforts to regulate intercountry adoption, the HCCH came up with the 1965 Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption.[931] Among other things, this Convention introduced international legal and procedural regulation as well as professionalism in the practice of intercountry adoption. For example, Article 6 of the Convention expressly required adherence to the best interests of the child principle, introduced best interests assessment (inquiry) by private authorities, and demanded that social workers should possess a set of skills and experience in intercountry adoption matters.

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[926] Loon, J.H.A. van, "Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption", The International Journal of Children's Rights (3) (1995): pp. 463–68.

[927] Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, at p. 26.

[928] Mezmur, "From Angelina (To Madonna) to Zoe's Ark: What Are the 'A-Z' Lessons for Intercountry Adoptions in Africa?", above footnote 99, at p. 146.

[929] *Ibid.*, p. 146.

[930] Loon, J.H.A. van, "International Co-operation and Protection of Children with Regard to Intercountry Adoption (Volume 244)", in *Collected Courses of the Hague Academy of International Law* (Leiden: Brill, 1993), at p. 230.

[931] Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions (1965).

However, the Convention was narrow in scope, making it insufficient to handle the dimensions and problems of intercountry adoption, which had expanded since the 1970s.[932] This was because the Convention was drafted to deal with the situation within Europe in the 1960s. It came into force in 1978 when there were already drastic changes in the realities of intercountry adoption. The inapplicability, coupled with the low rate of ratifications, rendered the Convention defunct. The inoperativeness of the 1965 Convention paved the way for the 1993 Hague Convention on Intercountry Adoption.[933]

The 1993 Convention is designed to establish safeguards and a system of international cooperation to ensure intercountry adoptions are in the child's best interests and respect fundamental child rights, thus preventing child abduction, sale, and trafficking. [934] The best interests of the child principle is portrayed in three different forms in the Convention. One, as a rule of procedure: the Convention endeavours to put in place measures or safeguards to ensure that intercountry adoptions 'are made in' or 'take place in' the best interests of the child.[935] The wording of the provisions indicates that the best interests of the child principle should govern all steps during the due process of intercountry adoption. All individuals and authorities concerned must ensure that every aspect of the adoption satisfies the best interests test. For example, the eligibility of adopters, adoptability of the child, consent requirements, and residence requirements must all conform to the best interests of the child principle.

Two, as a determinant factor: the Convention makes the principle a determinant factor in deciding whether to proceed with the adoption or not. Article 4 of the Convention says that intercountry adoption may take place only if it complies with the best interests of the child principle. This gives the competent authorities a mandate to conduct a best interests determination (BID). Article 16 also requires BID to establish whether a child's placement is compliant with the principle. Under Article 21, the position of the best interests principle as a determinant factor is well demonstrated. It says that a child's adoption in the receiving country will not be successful if the central authority responsible determines that it is contrary to the child's best interests.

Three, as a factor to be taken into account: the Convention requires, for instance, that a Contracting State must take the principle into account when refusing to recognise an adoption. In this case, as stipulated under Article 24 of the Convention, the determinant factor is the

[932] Loon, J.H.A., "International Co-operation and Protection of Children with Regard to Intercountry Adoption (Volume 244)", above footnote 930, at p. 463.
[933] The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993.
[934] *Ibid*., Preamble para 4 and Article 1.
[935] *Ibid*., Preamble para 4 and Article 1.

public policy of such a State. The best interests of the child are simply a factor to be considered when refusing such recognition.

This Convention does not include the standard formulation of the best interests of the child principle. For instance, it does not require it to be either a primary or paramount consideration but instead factors it in in all aspects of intercountry adoption. Also, despite the best interests of the child principle being at its core, the Convention does not explicitly give any interpretive or determinative criteria. The competent and central authorities of individual Contracting States are left to their own devices in this respect. They have to rely on the Guide to Good Practice and consider the circumstances of each case.[936]

5.2.2.3 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996

The 20th century witnessed the commitment of the Hague Conference on Private International Law to secure child protection. In succession, the Conference passed three Conventions on the subject.[937] The last of the three, the 1996 Convention on Protection of Children,[938] was more extensive and successful than its predecessors.[939] The main aim of the 1996 Convention is to provide measures for the protection of children by avoiding conflicts over jurisdiction, applicable law, recognition and enforcement of judgments.[940] It also provides for cooperation between state authorities in the discharge of parental responsibilities. Article 1(2) of the Convention extends parental responsibility to guardians or other legal representatives recognised as parental authorities to protect the person and properties of children.

The best interests of the child principle is an integral part of the 1996 Convention. In the preamble, the State Parties confirm that the child's best interests are to be a primary consideration. This means that the principle has primacy in implementing the entire Convention. The words 'are to be' reflect an obligation rather than discretion in considering

[936] Hague Conference on Private International Law, The implementation and operation of the 1993 Hague Intercountry Adoption Convention, above footnote 384.

[937] The earlier two Conventions are: Hague Conference on Private International Law, Convention Relating to the Settlement of Guardianship of Minors, 12 June 1902 and Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, 5 October 1961 as published in the United Nations Treaty Series, 1969, pp. 145.

[938] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (19 October 1996).

[939] Peter Nygh, "The Hague Convention on the Protection of Children", Netherlands International Law Review 45(01) (1998): p. 1.

[940] See Article 1 (1) (a)-(e) of Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. See also *ibid.*, p. 8.

the child's best interests. Under this Convention the principle seems to encompass children individually, as a group, or generally.

Apart from the preamble, the Convention embodies some other formulations of the best interests of the child principle. These can be divided into two categories. One category includes those which recognise the best interests principle as a determinant factor. Article 8 states the need for the best interests of the child to be assessed by state authorities.[941] Article 8 (4) says that the best interests of the child must be a determinant factor when an authority otherwise without jurisdiction accepts jurisdiction over assessment of the child's best interests. This formulation simply requires the child's best interests to be the foreign authority's basis for assuming jurisdiction. Article 10 (1) (b) also makes the child's best interests a determining factor in deciding whether a state authority has jurisdiction to take measures to protect the person and property of the child in the case of the parents' divorce, separation, or marriage annulment.

The other category includes those formulations that name the child's best interests as a factor to be 'taken into consideration' in the decision-making process. Article 22 mentions the need for the child's best interests to be a consideration when refusing application of the law designated by provisions of chapter three of the 1996 Convention. The main reason for such refusal, however, is a manifest contradiction to public policy. Article 23 (2) (d) has the same formulation as Article 22, only that here it relates to the refusal by one state to recognise child protective measures taken by another contracting state. Under Article 28, the child's best interests are to be taken into consideration while enforcing measures taken in another state, according to the extent of the law of the enforcing state. Article 33, relating to decisions on alternative care, subjects the requesting state's decision for placement or care to the consent of the requested state. The provision requires the best interests of the child to be considered in making such a decision.

It can be argued that the 1996 Hague Convention is somewhat obscure with regard to the protection of children, especially when compared to the more definitive 1980 Hague Convention on Child Abduction and the 1993 Convention on Intercountry Adoption.[942] However, Bainham comments that the three have become sister Conventions forming a solid

[941] Similar provisions are found in the 1993 Hague Convention on Intercountry Adoption. It seems that only these two Conventions specify the need for a State to establish and carry out a best interests assessment. See Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, p. 14.

[942] Andrew Bainham, "Hague Conference on Private International Law. Proceedings of the Eighteenth Session (1996). Volume 2: Protection of Children (with accompanying CD ROM: The Children's Conventions). Edited by The Permanent Bureau of the Conference. The Hague: SDU Publishers, 1998. 615 pp", British Yearbook of International Law 70(1) (2000): pp. 256–57.

child protection framework.[943] Reinforcing the protection agenda, all three Conventions enshrine the best interests of the child principle.

5.3 African Regional Context

Africa is the second largest continent in the world both by size and population. It is characterised by racial, ethnic, cultural, traditional, religious, legal, economic, and political diversity.[944] Africa, believed to have been host to the first human life, has progressed albeit gradually from living in the state of nature to achieving the African civilisation known today. Undoubtedly, the systems of law also advanced with society. This part looks at the development of children's rights in Africa, particularly relating to the best interests of the child principle.

5.3.1 African Union Instruments

Most African communities in the era before external influence had systems of law based on customs and traditions, deriving their authenticity from morality and traditional religion.[945] The continent's current legal systems, with a mix of common, civil, customary, and religious laws, are outcomes of colonial rule. A deep valley separates the pre- and post-colonial legal systems. It follows that the definitions of a child and children's rights and duties vary considerably in the old and the current African societies. One African researcher has argued that there can never be a universal conception of childhood and children's rights.[946] This is because of the dynamic historical, socio-cultural, economic, political, and legal variables at play in world societies. Even within the African continent, though it is undebatable that children have rights, the concept of the child and children's rights is not harmonious in the fifty-four states.[947] This part, however, does not concentrate on the varying concepts of childhood, children, and their rights. Instead, it traces the emergence and advancement of the best interests of the child principle within African jurisprudence.

In pre-colonial Africa, human rights were fully enjoyed by members of communities, excluding aliens.[948] The concept of universal human rights did not exist then, but a person's rights were guaranteed provided he or she belonged to the community and executed his or her

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[943] *Ibid.*, p. 256.

[944] "History of Africa - New World Encyclopedia", https://www.newworldencyclopedia.org/entry/History_of_Africa, 2021-06-22.

[945] Umozurike O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague: Nijhoff, 1997), pp. 12–19.

[946] Welshman Ncube, "The African Cultural Fingerprint? The Changing Concept of Childhood", in W. Ncube (ed.), *Law, culture, tradition and children's rights in eastern and southern Africa* (Aldershot: Ashgate, 1998), p. 12.

[947] African Child Policy Forum (ACPF), *In the Best Interests of the Child*, above footnote 414, p. 10.

[948] Umozurike, *The African Charter on Human and Peoples' Rights*, above footnote 945, p. 15.

duty.[949] With the coming of colonialism, African overtures towards promoting and protecting human rights were destroyed. It was not until the fight for independence started to bear victorious fruits in the 1960s that Africa could hope for respect of human rights and restoration of dignity.

Numerous struggles and efforts led to the formation of the Organisation of African Unity (OAU) and the adoption of the OAU Charter in 1963. However, the OAU Charter's objects did not include promoting and protecting human rights but only made general reference to them.[950] Therefore, to fill the gap, the OAU, with the support of the UN and other African organisations, adopted a comprehensive human rights instrument named the Banjul Charter on Human and Peoples' Rights in 1981.[951]

In 1979, recognising the need to promote and protect the welfare of the African child, and while still deliberating on a draft human rights Charter, the OAU adopted the Declaration on the Rights and Welfare of the Child.[952] Although the Declaration recalled the 1959 UN Declaration on the Rights of the Child, it did not contain a formulation of the best interests of the child principle. Nonetheless, it appealed to the Member States to take measures towards securing the welfare of the child. The OAU, two years later, adopted the African Charter on Human and Peoples' Rights.[953] The Charter provides for the rights and freedoms of children because Article 2 says that it applies to every individual without distinction. Article 18(3) of the Charter specifically requires protection of the rights of the child. However, the Charter, like the Declaration, contains no formulation of the best interests of the child principle.

Fortunately, it did not end there for the African child. As foreshadowed by the 1979 Declaration and as influenced by the drafting activity of the 1989 UNCRC, the OAU set the machinery in motion for adopting a binding comprehensive instrument peculiar to the rights and welfare of the African child. In 1990 the African Charter on the Rights and Welfare of the Child (ACRWC) was adopted.[954] This Charter differs from the UNCRC only in its reflection of the socio-cultural and economic setting of the African continent. It considers and confronts African values, views and experiences that pertain to and conflict with children's rights. It embeds the principle of the child's best interests to ensure that the rights under the Charter are

[949] *Ibid.*, p. 19.
[950] Charter of the Organization of African Unity (25 May 1963).
[951] OAU, African Charter on Human and Peoples' Rights, 1981.
[952] Declaration on the Rights and Welfare of the African Child (1979).
[953] African Charter on Human and Peoples' Rights, 1981.
[954] African Charter on the Rights and Welfare of the Child, 1990

respected in all actions concerning the child.[955] This Charter is the first regional codification of children's rights and the best interests of the child principle in a treaty.

In the domestic setting, pre-ACRWC, most national laws enshrined and applied the welfare principle for children's protection. This is because the welfare principle was part of the law received from the colonial rulers.[956] However, the coming into force of the ACRWC in 1999 added momentum to the process of enacting and harmonising domestic child laws to mirror the provisions of the UNCRC and the Charter. Although this process may still be ongoing, considerable progress has been achieved. The ACPF reviewed about nineteen eastern and southern African countries in 2007, and most had or were in the process of enacting or harmonising their laws to be in line with the UNCRC and ACRWC.[957] Therefore, national legislation in Africa currently embodies formulations of the best interests of the child principle. Others have even gone a step further and provided criteria for the interpretation and determination of children's best interests, which are missing in the international and regional instruments relating to the principle.[958]

The following part examines and briefly analyses the provisions of the ACRWC concerning the best interests of the child principle.

5.3.2 African Charter on the Rights and Welfare of the Child, 1990

A small percentage of African countries represented the continent in the drafting process of the UNCRC.[959] For this reason, and because of the need to have an instrument true to Africa's unique realities, the OAU adopted the ACRWC to complement the application of the UNCRC in Africa. While it retains the spirit and substance of the UNCRC, the African Charter brings a distinctive view of child's rights through the specs of African cultural values and experiences. It reflects issues pertinent to Africa, such as child marriage, harmful cultural practices like female genital mutilation (FGM), use of children as beggars, recruitment of children in armed conflict, rights and obligations of parents, the role of the family in adoption and fostering, children's duty and responsibility to the family and community, and the

[955] The best interests of the child principle is formulated in Articles 4, 9 (2), 19 (1), 20 (1) (a), 24 and 25 (2) (a) and (3).
[956] Barthazar Rwezaura, "Domestic Application of International Human Rights Norms – Protecting the Rights of the Girl-child in Eastern and Southern Africa", in W. Ncube (ed.), *Law, culture, tradition and children's rights in eastern and southern Africa* (Aldershot: Ashgate, 1998), p. 39.
[957] African Child Policy Forum (ACPF), *In the Best Interests of the Child*, above footnote 414, at p. 10.
[958] Section 7 of the South African Children's Act, 2005 apart from providing for the principle, also lists fourteen guiding factors to assist in determining the best interests of the child on a case-by-case basis.
[959] Ennew, "The History of Children's Rights: Whose Story?", above footnote 842.

overarching supremacy of the Charter over all customary, traditional, cultural and religious practices.[960]

The Charter has several formulations of the best interests of the child principle. Echoing Article 3 (1) of the UNCRC, Article 4 (1) of the Charter also provides a general version of the principle. However, there are three slight differences in the wording of these two formulations. First, as opposed to 'children' in Article 3 (1) of the UNCRC, Article 4 (1) of the Charter refers to 'the child'. This could be interpreted as limiting the application of the principle to actions concerning individual children only, to the exclusion of children as a group or generally. Second, the Charter gives 'any person or authority' undertaking actions affecting the child the responsibility to consider the child's best interests. This is a broader formulation compared to Article 3 (1), which specifies targeted authorities. The Charter eliminates the uncertainty of whether the principle binds individual persons such as parents, relatives or members of the community.[961] Third, the best interests principle is given the status of 'the' and not 'a' primary consideration. The use of these two articles in formulations of the best interests of the child principle has attracted its share of the debate, which will be briefly discussed in the following parts.

In a nutshell, the use of the article 'the' suggests that the child's best interests should be considered above the interests of other involved person(s) in all actions concerning the child. It implies that the child's best interests be given utmost priority over other competing interests such as those of parents, siblings, other children, the general public, or the state. It is opposed to the use of the article 'a', which suggests that the child's best interests are a fundamental consideration, but that they do not override other competing interests.[962]

The other formulations of the best interests principle under the Charter can be studied on the basis of the status accorded to the principle. One, it can be a factor to take into account. Under Article 9 (2), parents or legal guardians must take the child's best interests into account when guiding and directing the exercise of a child's right to freedom of thought, conscience, and religion. This formulation is unique to the ACRWC. Two, it can be a determinant factor. Article 19 (1) allows parental separation only when a judicial authority, according to appropriate law, determines it to be in the child's best interests. Also, under Article 25 (2) (a),

[960] Not in any particular order, reference is made to Articles 1(3), 19, 20, 21, 22, 29 (b) and 31 of the ACRWC, 1990.

[961] In Article 3 (1) of the UNCRC this is unclear, hence one must rely on Article 18 (1).

[962] Para 39 of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at p. 10 See also Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation*, above footnote 896, at p. 11.

removing a child to alternative family care can be occasioned if it has been determined that it is not in the child's best interests to remain in the environment of the birth family. Three, it can be a basic concern. Parents and other people responsible for the upbringing and development of the child, under Article 20 (1), must always have the best interests of the child as their basic concern. Four, it can be a paramount consideration. Article 24 of the Charter gives the child's best interests the high status of being a paramount consideration in child adoption.

The best interests of the child principle is also a general principle of the ACRWC. Although its formulations in the Charter appear similar to those of the UNCRC, they bring a world of interpretive differences, since the Charter provides a wide range of rights unique to the African child. Therefore, due to the atypical African context, the implications of the general and the specified formulations in practice differ considerably from those of the international instruments.

5.4 The Tanzanian Context

The guarantee of fundamental human rights and freedoms in Tanzania has come a long, turbulent way. While it would have been entirely counter-productive to expect such guarantees during colonialism, refusal to incorporate a Bill of Rights into the Constitution at independence was perhaps more unexpected.[963] One would anticipate promotion and protection of human rights to be among the priorities of a newly independent state emerging from colonialism. However, the new Tanzanian rulers viewed a Bill of Rights as a hindrance to development and a tool for the still foreign-constituted judiciary to meddle with government affairs.[964] Unfortunately, the impacts of the refusal may be traced in Tanzanian society from the first government's rule to the present: undemocratic actions, general disregard for the rule of law and failure to respect fundamental human rights and freedoms.[965]

The government's reluctance to address human rights issues in the constitution did not hold for long. Initially, the government attempted to resolve the matter by placing the Bill of Rights in the preamble to the 1965 interim Constitution. This was ingenious since provisions of the preamble do not have any force of law. However, increasing pressure from Tanzanians both from Mainland and Zanzibar saw the incorporation of the Bill of Rights in the 1977 URT Constitution in 1984. It was incorporated through the Constitutional (Fifth) (Amendment)

[963] Constitution of Tanganyika, 1961, Cap 8.
[964] Chris M. Peter, *Human rights in Tanzania*: *Selected cases and materials* (Köln: Rüdiger Köppe Verlag, 1997), p. 3.
[965] *Ibid.*

Act, 1984 (Act No. 15 of 1984).[966] It is also possible that Tanzania finally decided to incorporate the Bill due to the enormous influence the Banjul Charter had on African human rights jurisprudence.[967]

The Bill provides for general human rights and specific rights and duties of Tanzanian citizens.[968] There is no express guarantee of children's rights in the Bill. Instead, children's rights can be inferred from the general guarantees under the Bill's framework. Tanzania's approach is in stark contrast to constitutions in other jurisdictions that address children's rights in specific terms. For instance, Section 28 of the Constitution of the Republic of South Africa of 1996 contains an exemplary children's rights constitutional provision. Regarding the best interests principle, Section 28 (2) of the South African Constitution says that 'A child's best interests are of paramount importance in every matter concerning the child.'

International and regional child rights instruments incorporated in Tanzanian legislation assist in covering the constitutional gap. The Law of the Child Act, 2009 is currently the key legislation in promoting and protecting children's rights as it domesticates the UNCRC and ACRWC. [969] The Act is the most comprehensive and unified law on children's matters that the country has ever had. Its enactment was a long-awaited and highly recommended action for the Tanzanian child.[970] In its protection agenda, the legislation reiterates the best interests of the child principle. Regarding the principle, it echoes the UNCRC and ACRWC under section 4 (2). The development of the law of the child in Tanzania, particularly as relating to the best interests of the child principle, has been a long process. The paragraphs below give a brief overview.

The child in Tanzania has been and is still governed by multiple laws. Customary and religious laws were the first legal orders that addressed child matters. With colonialism came statutory laws transferred from the metropolis of the colonial power. Statutory laws in Tanzania were largely received from or enacted under the British. In the case of the child, related laws governed a wide range of matters. These included registration of births and deaths,[971] child delinquency,[972] affiliation,[973] child adoption,[974] marriage,[975] and succession.[976]

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[966] *Ibid.*, pp. 11–12.
[967] *Ibid.*
[968] Articles 12-29 of the Constitution of the United Republic of Tanzania, 1977.
[969] Law of the Child Act, 2009.
[970] See concluding remarks in Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 161.
[971] The Births and Deaths Registration Ordinance, No. 12 of 1920.
[972] The Children and Young Persons Ordinance, No. 3 of 1937.
[973] The Affiliation Ordinance, 1949: Ordinance No. 42 of 1949 which provided for maintanance of children born out of wedlock.

Tanzania retained some of these laws and they are still applicable to date. However, some of the colonial laws held some exceedingly child-unfriendly provisions, such as the *filius nullius* principle in the law of affiliation.[977]

Received English law introduced the welfare of the child principle in Tanzania.[978] For example, the 1937 Children and Young Persons Ordinance contained formulations of the welfare principle in its sections 4 and 14.[979] Also, the Adoption Ordinance of 1953, under section 7 (1) (d), required the court before granting an adoption order to consider whether it was in the interests of the welfare of the child to do so.[980]

Most of the received laws were retained after independence. With time, demands increased for laws that reflected and catered for the realities of Tanzanian society. The law of marriage was one of the areas that were reformed. It resulted in the Law of Marriage Act (LMA) enacted in 1971.[981] The Act attempted to integrate Islamic religious laws, African customary laws and received English common law, as well as reforming the status of women in marriage and improving the framework for the protection of children.[982]

The Law of Marriage Act embarked upon the protection of children's welfare. Children, however, were not the main agenda of the legislation; rather, women's rights were. Children's welfare surfaces as an issue on the occasion of parental separation or divorce. The Act contains varying formulations of the welfare principle and the requirement to consider the child's best interests to protect the child in the aftermath of such occurrences.[983]Although the LMA was a celebrated law at its enactment, it later became apparent that it was still short on

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[974] The first adoption law in Tanzania (then Tanganyika) was the Adoption of Infants Ordinance, 1942: Ordinance No. 5 of 1942.

[975] The Marriage Ordinance, Cap 109 repealed and replaced by the Law of Marriage Act, No. 5 of 1971.

[976] Succession was governed by statutory, religious and customary laws. Received statutory law included the Non-Christian Asiatic (Succession) Ordinance, 1923. Religious and customary laws applied under the Judicature and Applications of Laws Ordinance, No. 7 of 1920. Customary laws became unified after independence in the Declaration of Customary Laws, 1963 as reported in Barthazar A. Rwezaura, Ulrike Wanitzek, "Family Law Reform in Tanzania: A Socio-legal Report", International Journal of Law, Policy and the Family 2(1) (1988): pp. 1–26.

[977] Section 160(1) of the Law of the Child Act, 2009 repeals the Affiliation Act.

[978] Reception date was 22 July 1920 through the reception clause found under section 2 (3) of the Judicature and Applications of Laws Ordinance, 1920 (now Judicature and Applications of Laws Act, Cap 358).

[979] Section 4 is a bail provision for remanding a person under sixteen years of age if doing so will disassociate him or her from an undesirable person. Section 14 gives the court a duty to obtain information about a convicted child so as to deal with the case in the best interests of that child.

[980] The court gives a good discussion of the welfare principle as provided under the Ordinance in the ruling of the adoption petition In the Matter of Master Ayaz and Two Others, LRT 1978, n. 25 as read in Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 130.

[981] Law of Marriage Act, 1971.

[982] See Barthazar A. Rwezaura, "Tanzania: Building a New Family Law out of a Plural Legal System", University of Louisville Journal of Family Law 33 (1994-1995): pp. 523–40.

[983] Sections 67, 108, 125 and 134 of the Law of the Child Act, 2009.

children's protection. The inadequacy of the LMA's framework to protect children was one of the reasons for advocacy concerning a comprehensive law of the child.

It is commendable that Tanzania has enacted a law of the child that reflects the UNCRC and ACRWC. Significant to this study is the new children's rights framework established under the law and its operation. The special focus of this study is to consider adoptions with an international element, and it uses the best interests of the child principle as a key analytical tool in its examination of the law and practice in this field.

The following part examines the provisions of the best interests of the child principle in the relevant Tanzanian laws. Since the child was protected under the welfare principle since colonial times, this part looks briefly at the role of this principle in the LMA. It will seek to identify the principle's purpose and scope of application under the Act. This examination sets the stage for understanding the transition from the welfare principle to the best interests principle. Also, it will clarify the distinction between the welfare and best interests principles in terms of their meaning and application under the laws of marriage and the child.

However, the main aim of this part is to analyse the provisions for formulations of the best interests principle in the current legal and policy framework in respect of children. This is because the Law of the Child Act applies the best interests principle to all matters concerning the child, even those previously only covered under the LMA.

5.4.1 Law of Marriage Act, 1971

The children's issues dealt with in the LMA, 1971 are connected with the aftermaths of marriage breakdown. They feature in provisions regarding custody, maintenance, distribution of matrimonial property and other matrimonial reliefs. The Act urges the court to be guided by the child welfare and best interests principles when determining such matters. The welfare principle is provided for under section 125(2) of the Act, which requires 'the welfare of the child' to be the paramount consideration in determining custody. This provision limits the principle to a specific action, makes the court the determining authority, and gives paramountcy to the child's welfare. This section also provides for factors which the court must take into account subject to the welfare principle. As provided for under Section 125 (2) (a)-(c) of the Act, these include the wishes of the child's parents, the wishes of the child if capable of independent opinion, and the customs of the parties' community. These factors are not the determinant factors. The court needs to take them into account while deciding on the child's welfare. The child's welfare is the absolute determinant factor in custody arrangements. Section 125 (4) of the Act adds a requirement that there should be a separate

determination of each child's welfare in the case of siblings. Also, section 134 emphasises the welfare principle by giving power to the court to vary any agreed custody or maintenance arrangements if ascertained that it is reasonable and serves the interest of the child's welfare.

While the LMA does not incorporate the best interests principle directly, it requires the court to safeguard the child's best interests in post-marriage breakdown arrangements. For instance, under section 67, which allows spouses to agree to live apart, the court is empowered to vary or set aside certain provisions in the agreements if determined that they are contrary to the child's best interests. Another example is in section 108(c), dealing with separation or divorce proceedings. The law states that the court must inquire into arrangements for custody and maintenance of children of the broken-down marriage and ensure that these arrangments satisfy the best interests of the child test. These provisions specify the subject, purpose and scope of the best interests principle but do not formulate it as a general principle as in the UNCRC, ACRWC or the Law of the Child Act. The LMA was enacted before the children's rights movement; hence, it could not enshrine the principle as evidence of a change of paradigm which revolutionised the child's status into a rights holder.

For a long time, Tanzanian laws only applied the welfare principle and required consideration of the child's best interests in certain child-related matters. The LMA, 1971, which has been the core source of family law in the country since 1971, could have ensured child protection by reiterating Article 3(1) of the UNCRC but did not do so. Instead, it allowed (and still allows) practices such as child marriage that are by no means in the child's best interest. The rationale for the Act's shortcomings seems to be that the Act focused on women's rights rather than those of children. However, even after considerable international and regional developments in respect of the rights of women and girls, the Act maintained the *status quo*. This has attracted continued criticisms of the Act.[984] Some of the criticism has powered the push for child law and policy reform, resulting in the 2008 Child Development Policy and the 2009 Law of the Child Act. Nonetheless, domestic and international calls for marriage law reform still echo in the country.[985]

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[984] The Law Reform Commission collected criticisms and complaints against the LMA since 1983 and reported them in Law Reform Commission of Tanzania, Report of the Commission on the Law of Marriage Act, 1971 (Act No. 5 of 1971) Presented to the Minister for Justice and Constitutional Affairs, above footnote 729. Other public and private authorities and individuals engaged in family-related work still issue recommendations for reform. For instance, one lady challenged sections 13 and 17 of the Law of Marriage Act, 1971 pertaining to early marriage and had them recently declared unconstitutional and in need of amendment by the Court of Appeal of Tanzania in the case of Court of Appeal of Tanzania, "Attorney General vs Rebeca Z. Gyumi".

[985] "Magufuli urged to address loopholes in marriage law", The Citizen (12th December 2015). Further calls for change are also heard in Agness Odhiambo, "Victory against Child Marriage in Tanzania: Court of Appeal Upholds 2016 Ruling Barring Marriage Before 18", https://www.hrw.org/news/2019/10/25/victory-against-child-marriage-tanzania.

5.4.2 Child Development Policy, 2008

In 1996, the Tanzanian Government endorsed a new policy having child development as its key theme. Being a State Party to the UNCRC motivated Tanzania to formulate the child policy. The policy was formed in line with the Convention's provisions on the rights of the child.[986] The policy served for about eleven years until 2008 when a revised Child Development Policy was adopted to address the existing socio-economic situation and hindrances that curtailed the realisation of children's rights in Tanzania.[987] Its main objective is to see that children's rights, welfare and development are promoted and protected in Tanzania.[988]

Policy issues and statements in the Child Development Policy, 2008 revolve around a child's right to life and survival, development, protection, participation, and non-discrimination. Reading chapter five of the policy, which expounds on these rights, one observes that the Ministry intended to uphold the best interests of the Tanzanian child.[989] Unfortunately, however, the Policy does not refer to the best interests of the child principle as a guiding standard in the realisation of the rights it recognises. This gap may be filled by the promotion and protection of the rights stated in the policy, but it is remarkable because the policy statements are based on the other UNCRC's pillars of children's rights. In addition, the policy lays a foundation for the enactment of a unified law of the child, which incorporates the best interests of the child principle.

5.4.3 Law of the Child Act, 2009

In 2009 Tanzanian children and child rights actors had two causes for celebration. These were the 20th anniversary of the UNCRC, and the brand new Law of the Child Act passed by the Tanzanian Parliament in November 2009. The Act qualified for celebration because it marked a monumental achievement in unifying children's laws that for decades had been scattered among different statutes, most of which were inherited from the British and thus outdated. It also filled some gaps in the existing laws. For instance, the Act repealed the Affiliation Act and introduces under sections 34-36 a procedure to determine parantage that includes the use of DNA testing, and thus matches the technological advancements of today's world. Apart from reforming and consolidating laws relating to children, the Act also gives effect to

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[986] Para 20 of the Government of the United Republic of Tanzania, Ministry of Community Development, Women Affairs and Children, "Child Development Policy", http://www.tzonline.org/pdf/childdevelopmentpolicy.pdf (Dar es Salaam, October 1996), at p. 12.

[987] Para 4 of the United Republic of Tanzania, Ministry of Community Development, Gender and Children, "Child Development Policy", at pp. 5-6.

[988] See *ibid.*, Paras 35, 40 and 41, at pp. 14–15.

[989] *Ibid.*, at pp. 15–25.

international and regional conventions on the child's rights through its dedication to promotion, protection and maintenance of the welfare and rights of the child.[990] Also, the law is the first legal enshrinement of fundamental child rights in Tanzania. Crucial to this chapter is that the Law of the Child Act is founded on the best interests of the child principle. Numerous provisions under the Act demand consideration of the best interests of the child. However, the main question is what constitutes the best interests of the child principle under the Act?

First and foremost, the Law of the Child Act, 2009 takes after the UNCRC and ACRWC in incorporating a general formulation of the best interests of the child principle. Section 4 (2) of the Act provides for the principle. The subsection reads,

> "The best interest of a child shall be the primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies." [2009 version]
>
> "The best interests of a child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies." [2019 version]

While this subsection attempts to domesticate Article 3 (1) of the UNCRC and Article 4 (1) of the ACRWC, it shows some considerable differences from them. These differences impact the interpretation and application of the principle in the following ways:

First, the subsection differs in respect of who is protected under the principle. It has already been noted above that the African Charter's formulation departs from the UNCRC's in using 'the child' instead of 'children' as its subject. The 2009 version of the Law of the Child Act differed from both instruments as it refered to 'a child'. This difference raised the question of whether the interpretation of section 4(2) can extend to the interests of particular groups of children and children generally, or whether it only considers the interests of an individual child. However, the revision of the subsection in 2019 widened the application of the principle to 'all actions concerning children' as under Article 3(1) of the UNCRC.

Second, while the ACRWC broadened the horizon of those bound to implement the principle, the Act limits it. Attempting to mirror the authorities listed under the UNCRC, the Act omits a crucial one; legislative bodies. This omission substantively cripples the power of the child's best interests as a general principle of the Act. If the law itself is not in the child's best interests, how can actions implementing the law be? The 2019 revision of the Law of the Child Act did not effect changes in this respect.

[990] See the long title of the Law of the Child Act, 2009.

Third, similar to the ACRWC, section 4 (2) of the previous version of the Act (before the 2019 revision) gave the principle the status of 'the primary consideration'. This is a different status from 'a primary consideration' under the UNCRC, making a child's best interests the first consideration among equals *'primus inter pares'* or even greater consideration.[991] The use of the definite article 'the' requires the child's best interests to be the sole fundamental consideration, excluding all other contesting interests. While some have argued that this is the best position, others have championed the rights of other concerned parties whose interests should be considered equally with those of the child.[992] While the reason for changing the status of the principle during the revision of section 4(2) of the Act in 2019 is not clear to the author, it could have been to mirror Article 3(1) of the UNCRC.

The Act extensively uses the child's best interests as a guiding standard, as a factor to be taken into account, or as a protective measure in connection with an array of actions concerning the child. This can be observed in many provisions throughout the Act.[993] While the great significance attached to the principle in the Act is apparent, it contains no established criteria and procedures for interpreting or determining the child's best interests. For example, section 7(3) of the Act requires competent authorities to determine the child's best interests according to applicable laws and procedures, but without specifying these The Act could have avoided this gap to ensure the principle is correctly applied to safeguard the child's interests. Section 4 of the Zanzibari Children's Act is exemplary as it provides an extensive list of criteria for best interests determination,

> "In determining the best interests of a child, the following factors
>
> shall be taken into consideration:-
>
> (a) the nature of the personal relationship between:
>
> (i) the child and the parents, or any specific parent; and
>
> (ii) the child and any other care-giver or person relevant in those circumstances;
>
> (b) the attitude of the parents, or any specific parent, towards:
>
> (i) the child; and
>
> (ii) the exercise of parental responsibilities and rights in respect of the child;

[991] Para 121 of Detrick, *The United Nations Convention on the Rights of the Child*, above footnote 403, at p. 137.
[992] See paras 21-28 of the United Kingdom Supreme Court, "ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)", https://www.asylumlawdatabase.eu/en/case-law/uk-zh-tanzania-fc-v-secretary-state-home-department-1-february-2011, [2011] UKSC (1 February 2011), at pp. 11-15.
[993] See Sections 7(2) (c), (3), 8(4), 19(8) (a), 23, 26(1) (b), (2), 27(2), 28(2), 29(5), 31(5), 32(4), 37(4), 39(1), 56(1), 57(3), 59(1), 61(1), 74(1) (a), (2), (4) (a) & (b), 75(d), 89(e), 90(4), 92(1), 95(2), 111(1), 137(4), 138(2) & (3), 143(1), 151 (2), 158 (d), and 169 of the Law of the Child Act, 2009.

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any changes in the child's circumstances, including the likely effect on the child as a result of any separation from:

(i) both or either of the parents; or

(ii) any relative, or any other child or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child:-

(i) to remain in the care of his parent, family and extended family;

(ii) to maintain a connection with his family, extended family, culture and tradition;

(iii) not to be removed from his place of residence;

(g) the child's age, maturity and stage of development, sex, background and any other relevant characteristics of the child;

(h) the child's physical and emotional security and his intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;

(l) the need to protect the child from any physical or psychological harm that may be caused by:

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviours;

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards any other person; or

(iii) any family violence involving the child or a family member of the child;

(m) the appropriate action or decisions which would avoid or minimise further legal or administrative proceedings in relation to the child; and

(n) any other relevant factor."[994]

[994] Section 4 of the Zanzibar's Children's Act, 2011.

Section 7(3) of the Law of the Child Act specifies that competent authorities and courts of law have a mandate to conduct best interests determination in alternative child care cases. The Act does not define competent authorities. However, apart from the court, the only other authority the Act charges with determining the child's best interests is the social welfare department. Social welfare officers conduct best interests determination while carrying out a social investigation, as provided for under Section 31(5) of the Law of the Child Act. The question arises whether the broad range of actions requiring best interests determination can be managed by only these authorities. Moreover, the work of the authorities is further complicated by the lack of a clear definition of the principle, with criteria and procedures for determining the best interests of the child.

In all its references to the child's best interests, the Law of the Child Act does not change the status of the principle. It remains a primary consideration (section 4(2)) in all actions provided for by the Act. Unlike the UNCRC and the ACRWC, the Act does not specify a different status for particular actions such as child adoption. However, the Act gives a higher status to the principle for another statute. It does so under section 169, which amends the Education Act by inserting section 59A, which requires every teacher, artisan, and trainer to ensure that the "best interest of a pupil is of paramount consideration".[995]

5.4.4 Subsidiary Legislation

Section 157 of the Act empowers the Ministers responsible for social welfare and children's affairs to make regulations and rules for a child's protection, alternative care, and labour. Some regulations and rules covering specific subjects are already in place. These include the Foster Care Placement Regulations, 2012; the Children's Homes Regulations, 2012; the Adoption of Children Regulations, 2012; the Retention Homes Rules, 2012; the Apprenticeship Regulations, 2012; the Child Employment Regulations, 2012; the Child Protection Regulations, 2014; and the Juvenile Court Procedure Rules, 2016. These legal texts have been briefly examined in chapter four, when analysing subsidiary legislation. The assessment showed that the legislation reflects the spirit of the parent Act in upholding the best interests of the child principle. However, except for the Adoption of Children Regulations, the subsidiary legislation does not contain criteria for determining the child's best interests. This means they demand adherence to the child's best interests without actually defining such interests in the specific cases to which they apply. Also, all the subsidiary legislation under the Act does not provide a best interests determination procedure. As a

[995] Section 59A (2) of the Education Act, as inserted by section 169 of the Law of the Child Act. This provision is contained in the original edition of the Law of the Child Act, 2009, before the 2019 revision.

result, the determination relies on the discretion of the deciding authorities. Without proper guidance, the authorities may consider other competing interests and fail to promote the child's rights and welfare.

Nonetheless, although most of the subsidiary legislation does not specify criteria for best interests determination, some of their provisions offer criteria. For instance, regulation 11(1) (a) – (j) of the Foster Care Placement Regulations, 2012 providing for responsibilities of foster parents, could form part of the criteria for best interests determination. However, it is not quite logical that under regulation 11(1) (e), a foster parent is required to promote the child's best interests, while the whole of regulation 11 is actually about promoting the child's best interests.

The Adoption of Children Regulations, 2012 contain one general formulation of the best interests principle under regulation 3:

> "The Court or any public body shall, in making a decision for adoption of a child consider the best interest of child and in particular it shall…"

This formulation is different from the formulation under section 4(2) of the Law of the Child Act. The formulation under the Regulations limits the principle's scope of application to child adoption. However, it omits to specify the subject of the principle as 'the' or 'a' child. Also, it does not specify whether consideration of the principle is of primary or paramount importance. As already said, the Regulations under GN No. 197 of 2012 have some gaps which were not apparent in their earlier drafts. For instance, from the draft Regulations in Word format obtained from the Department of Social Welfare during field research, regulation 3 reads,

> "In making any decision regarding the adoption of a child, the best interests of the child shall be the primary consideration and in particular court or any public body shall…"

This formulation specifies the subject of the principle as 'the' child as opposed to 'a' child under the Law of the Child Act. In addition, it fixes the status of the principle as 'the' primary consideration, as opposed to 'a' primary consideration under the Act. Both formulations, however, exclude private institutions as mandated authorities. They also refrain from categorising the authorities as administrative or legislative, for social welfare or not. Since the draft version is unofficial, the text of regulation 3 under GN No. 197 of 2012 is the one with legal effect. However, it is significant to note that the Kiswahili version of the Regulations, GN 164 of 2016, translates regulation 3 as it appears in the draft Regulations rather than in the

official English version, GN No. 197 of 2012.[996] Nonetheless, according to section 84(5) of the Interpretation of Laws Act as revised in 2021, where there is a conflict between the original and a translated version of a written law, the language of the enacting version takes precedence.[997] In the case of the Adoption of Children Regulations, GN No. 197 of 2012, takes precedence.

Regulation 3 of the Adoption of Children Regulations provides a list of criteria to assist the authorities in best interests assessment and determination. The language of the criteria under GN No. 197 of 2012 also contains slight language errors but is reproduced as follows:

> "(a) ascertained the child's wishes and feelings;
>
> (b) consider the age, maturity and understanding of a child;
>
> (c) pay regard to the desirability of continuity in a child upbringing, ethnic, religious, and culture;
>
> (d) avoid delay in making decision on the child future; and
>
> (e) not separate the child from his siblings unless the separation is for the best interest of that child."

The criteria provide a minimum guidance to the authorities mandated to interpret, determine, and apply the best interests principle in child adoption. Although the list of criteria is not as extensive as that under section 4 of Zanzibar's Children's Act above, it is the only list of criteria under the framework of the Law of the Child Act. The application of these criteria in child adoption practice is discussed in part 5.8 of this chapter.

5.5 Components of the Best Interests of the Child Principle

The principle of the child's best interests is incorporated in an array of international, regional and national legal texts. It is only natural that it is presented in varying formulations. An analysis of the different formulations (above) produces different interpretations or implications of the principle. Therefore, the following sub-part attempts to briefly state the meaning of some components of the best interests of the child principle.

5.5.1 'A' Child, 'the' Child, or 'Children'?

The Committee on the Rights of the Child, while discussing the rights of indigenous children, proclaimed that the best interests of the child principle is a collective as well as an individual right.[998] This means that the principle applies to children individually, as a group or

[996] Tafsiri ya Kanuni za Uasili Watoto za Mwaka 2012.
[997] Written Laws (Miscellaneous Amendments) Act, 2021: Act No. 1 of 2021, GN No. 18 of 30.04.2021.
[998] Para 30 of the Committee on the Right of the Child, "General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]", above footnote 900, at p. 7.

generally.[999] Zermatten argues that even where the French and Spanish versions of the UNCRC use the singular, "*l'intérêt supérieur de l'enfant"* and *"el interés superior del niño*", it can be concluded that this is not intended to limit the principle to children individually.[1000] Cantwell also argues that the inclusion of legislative bodies as authorities that must consider the child's best interests without a doubt applies the principle to children who form groups and children generally.[1001] Freeman agrees that the UNCRC gives the best interests of the child principle a broad construction by referring to children, so that it does not relate to actions affecting children only individually but also collectively.[1002]

Further, section 8(c) of Tanzania's Interpretation of Laws Act specifies that words in the singular also include the plural and vice versa. Therefore, where statutes refer to the best interests of 'a' or 'the' child in the singular, this also includes children in the plural, hence it may be interpreted to include childen individually and collectively.

Conclusively, this study adopts the stance that the best interests of the child principle governs all actions concerning children either individually, as a group or generally. This stance is maintained even where the African Charter and Tanzanian law mainly refer to 'the child' and 'a child', respectively.

5.5.2 'A' or 'The' Primary or Paramount Consideration?

In the legislative history of the UNCRC, the determinative status of the child's best interests has been a subject of considerable debate.[1003] The original text of today's Article 3(1) evolved from the United Nations Declaration on the Rights of the Child, 1959. Principle 2 of the Declaration quoted the best interests of the child principle as 'the paramount consideration'. This status gave the best interests of the child principle a determinative quality. In decision-making where children are concerned, the ultimate determinant of the course of action to take would be the children's best interests. During the deliberations of the 1981 Working Group on the UNCRC, the status of the principle was changed into 'a primary consideration'.[1004] The previous status was retained only for adoption under Article 21 of the Convention.[1005]

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[999] *Ibid.*, para 23, at pp. 7-8.
[1000] Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation*, above footnote 896, at p. 8.
[1001] Cantwell, *The Best Interests of the Child in Intercountry Adoption*, above footnote 89, at p. 16.
[1002] Freeman, Michael (ed.), *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child* (Leiden: Martinus Nijhoff, 2007), at pp. 45–47.
[1003] Detrick, *The United Nations Convention on the Rights of the Child*, above footnote 403, at pp. 131–140.
[1004] *Ibid.*, at p. 133.
[1005] *Ibid.*, at p. 135.

The Committee on the Rights of the Child regards the current status given to the best interests of the child principle under Article 3(1) as 'strong'.[1006] Some authors, for example, Parker, agree that Article 3 (1) broadens the application of the principle.[1007] However, he shows discontent with 'a primary consideration' and explicitly calls it a 'weakening' of the status of the principle.[1008] Dissenting, Zermatten opines that instead of weakening, the use of 'a' puts the principle in its 'rightful place'.[1009] Freeman, on the other hand, while theorising on the matter, raises an intriguing point: he says that policies relating to children in poorer nations may consider the corrupt elite's interests as being more important than children's.[1010] These arguments raise the question of whether giving the principle a stronger status, such as paramount importance, would make a difference. This researcher finds that the answer lies in a robust legal regulation of best interests assessment and determination in terms of defined criteria and procedures. This is because making the best interests of the child a consideration of high priority, for instance, does not clarify whether it carries more weight than all other competing interests.[1011]

The 1989 Working Group of the UNCRC justified adopting 'a' as opposed to 'the' primary consideration with the argument that the latter is more fitting for limited circumstances than those of Article 3(1).[1012] It is also argued that most actions to be taken by authorities listed under Article 3(1) possibly concern children in one way or another.[1013] In other words, some competing interests that cannot or should not be overridden entirely by children's interests may come into play. Having the child's best interests as 'a' and not 'the' primary consideration allows for equal or even greater weight to be placed on these other competing interests. We may ask whether this formulation does not vitiate the protective value of the best interests of the child principle.

Where the best interests of the child are of paramount importance, this complicates consideration of other competing interests. Take the United Kingdom as an example: section

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[1006] Para 37 of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at p. 10.
[1007] Parker, "The Best Interests of the Child-Principles and Problems", above footnote 408, at pp. 27–28.
[1008] *Ibid.*, pp. 27–28.
[1009] Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation, above footnote* 896, at p. 11.
[1010] Freeman, Michael (ed.), "Article 3: The Best Interests of the Child", above footnote 1002, p. 64.
[1011] A question posed by Lord Simon of Glaisdale in 1975. Hansard, H.L. vol. 359, col. 544, cited *ibid.*, at p. 61.
[1012] Detrick, *The United Nations Convention on the Rights of the Child*, above footnote 403, at pp. 137–138.
[1013] Freeman, Michael (ed), "Article 3: The Best Interests of the Child", above footnote 1002, at p. 46 In his argument on 'concerning children' part of the best interests of the child principle says that it is hard to think of decisions made by the government which will not concern children. He provides examples of decisions he finds not directly concerning children but must affect them relating to road building, war, military service conscription, global warming, abortion etc.

1(1) of the Children's Act 1989 provides for paramountcy of the child's welfare principle. Balancing decisions in cases involving the welfare of more than one child has proved incredibly difficult.[1014] By contrast, one may assume that the paramountcy principle should make the outcome of child welfare cases where the other party is not a child quite obvious. Yet, Lowe and Douglas argue that this status does not ease the court's duty in custody and adoption cases.

Therefore, this researcher understands the status of 'a' primary consideration as necessary for the broad interpretation and application of the best interests of the child principle under Article 3(1) of the UNCRC. The use of 'the' primary consideration as found under Article 4(1) of the ACRWC which is intended to provide the child with strong protection is peculiar to the specific intentions and situations of this instrument.[1015] In section 4(2) of the Law of the Child Act, 'the' in the 2009 version has been changed to 'a' in the 2019 version. Nevertheless, despite these differences, the obligation to consider children's best interests expressed by the word 'shall' in all three instruments guarantees some degree of protection.

5.5.3 Authorities Undertaking Actions Concerning the Child

Article 3(1) of UNCRC encompasses the governing arms of most states in the world: the executive, legislature and judiciary. Moreover, the Article does not limit itself to public institutions but also extends to private institutions. The Committee on the Rights of the Child provides the broadest possible interpretation of the authorities and institutions mentioned under Article 3(1).[1016] This interpretation of the principle binds all official entities that perform actions affecting children. Zermatten underlines that under Article 3(1), the principle is binding for legal, administrative, and legislative authorities, as well as all other actors in the children's sector.[1017] However, natural persons such as parents or guardians are left out of the principle's grip. The Committee argues that Article 18(1) of the UNCRC comes to the rescue here.[1018] But Article 18(1) has been said to weaken the principle as far as the private family is

[1014] See Birmingham City Council v. H (A Minor) [1994] 2 AC 212, HL and In Re A (Children) (Conjoined Twins: Surgical Operation) [2001] Fam 147 as initially read in Lowe, Douglas, *Bromley's Family Law*, above footnote 840, at pp. 465–467.

[1015] Chirwa, "Children's rights, domestic alternative care frameworks and judicial responses to restrictions on inter-country adoption: A case study of Malawi and Uganda", above footnote 382, at p. 160.

[1016] Paras 25-31 of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at pp. 8-9.

[1017] Zermatten, *The Best Interests of the Child: Literal Analysis, Function and Implementation*, above footnote 896, at pp. 9–10.

[1018] Para 25 of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at p. 8.

concerned.[1019] This is because it does not impose a strict obligation (it uses the word "will" in place of "shall") and makes the best interests of the child only a basic concern.

The ACRWC under Article 4(1), as opposed to the UNCRC, specifies that the best interests of the child principle binds any person or authority taking action concerning the child. This is undoubtedly a more extensive formulation of the principle compared to that of the UNCRC.[1020] It leaves no exceptions for any persons, be it natural or artificial, in any dealings concerning children. They must all consider childrens' best interests in all actions concerning them. However, not all national laws on the child in Africa reproduce the same formulation. For instance, the spirit of the Charter is evident in the Children's Act of Ghana of 1998 under section 2(2), which reads, "The best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child".[1021] However, this is different in the Children's Act of Kenya,[1022] which mirrors Article 3(1) of the UNCRC; and in the Law of the Child Act of Tanzania,[1023] which does the same except that it omits legislative bodies. The South African Children's Act provides an altogether different formulation of the principle, where the authorities are not stated under Article 9 but must be extracted from other provisions of the Act.[1024]

All in all, whether one adopts a literal or purposive interpretation of the various formulations of the principle, it is clear that every person and entity, whether official or unofficial, must consider the best interests of the child when planning measures concerning the child. When coupled with appropriate assessment and determination of the child's interest in practice, this principle guarantees robust promotion and protection of children's rights and welfare.

5.6 General Interpretation, Determination and Application of the Principle

This part attempts to establish a general interpretation of the best interests principle and examine its determination and application. The body of legal texts discussed above contributes to the collective comprehension of the principle. Also, each instrument or statute, in its specific way, provides insights into the principle's determination and application. However, this part uses the UNCRC as the core instrument in working out the interpretation, determination, and application of the principle. The rationale for reliance on the UNCRC lies in it being of the most general nature and having acquired almost a universal status.

[1019] Freeman, Michael (ed.), "Article 3: The Best Interests of the Child", above footnote 1002, at pp. 47–48.
[1020] *Ibid.*, at p. 21.
[1021] Children's Act, 1998, Act No. 560 of the Parliament of the Republic of Ghana.
[1022] Section 4(2), Children Act, Chapter 141 [Laws of Kenya, Revised Edition 2012].
[1023] Section 4 (2), Law of the Child Act, Act No. 21 of 2009.
[1024] Children's Act No. 38 of 2005.

It is undeniable that the best interests principle has been the subject of extensive scholarly debate. The intention here is not to extend or conclude that debate but only to discuss the principle in order to build a foundation for understanding its application in child adoption practice in Tanzania. Thus, international, and regional instruments, national legislation, court decisions, institutional guidelines, and scholarly work interpreting the best interests of the child principle are used here only to advance this discussion.

5.6.1 What are the Best Interests of the Child?

What the best interests of the child entail is a question whose answer is elusive. The best interests of the child is a complex and dynamic concept. Its content changes with time, socio-cultural attitudes, legal standing, and the context of each case. Relevant international and national legal instruments provide no clear definition of the concept. However, the need for flexibility and adaptability of the concept provide justification for this. Yet, in practice, understanding what the concept means is crucial in the name of clarity and consistency.

There have been multiple attempts to define the concept of best interests, evidenced by how broadly debated it is in the literature. Rwezaura, in one of his writings, identifies two versions of the principle.[1025] He distinguishes between the child's best interests as a narrow principle in received family law in Africa, and the broader pre-capitalist concept of the principle as perceived in African communities and families. While his article focuses on the latter, this study concentrates on the former. Rwezaura refers to this version of the principle in the following way:

> "…the term 'best interests of the child' or 'welfare of the child', with its various levels of weighting, is to be found in received statutory provisions of many African countries. It is not a principle of African law but came to Africa via the colonial received law but has now been accepted as part of the local law."[1026]

Several scholars have likened the best interests principle to the welfare principle. Diduck and Kaganas also regard the two concepts as synonymous.[1027] However, in this study they are distinguished in the light of the child's change of status from an object of care to a holder of rights, and the scope of application of the two concepts. Nonetheless, for analysis purposes, the meaning of the welfare principle is taken into account while seeking to ascertain the meaning of the best interests principle. It is thus worth examining the statement on the meaning of 'welfare' in the New Zealand judicial decision in the case of *Walker v. Walker*

[1025] Rwezaura, "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa", above footnote 88, at p. 100.
[1026] *Ibid.*
[1027] See Diduck, Kaganas, *Family Law, Gender and the State*, above footnote 838, at p. 378.

and Harrison, which gives a comprehensive idea of what the welfare principle entails.[1028] To quote:

> "'Welfare' is an all-encompassing word. It includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place, they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents."[1029]

This statement is compared to Rwezaura's conclusion after considering sub-Saharan Africa's socio-economic conditions and their effects on interpreting the best interests of the child principle. He says,

> "The contemporary economic realities, at least for the majority of Africans, require that the principle of the best interests of the child be construed rather narrowly to mean the satisfaction of material needs of the child."[1030]

From these two statements, it is apparent that both the best interests and the welfare principle seek to secure the child's needs. Thus, they can both be used to assess what the best interests of the child entail. The statement from *Walker v. Walker and Harrison* does not list all the needs but introduces a significant feature, i.e. their categorisation. The Judge argues here that a child's material and emotional needs should be considered separately. He provides pointers to aid in identifying a child's interests under each category. Unfortunately, his terminology is subjective. Perceptions of a pleasant home and a comfortable standard of living vary significantly from one continent to another, let alone from one family to another. Stability and security are also relative concepts that may be perceived very differently, for instance, in a peaceful country and in a war-torn country. Very thought-provoking is his argument that emotional needs are more important than material needs. For example, in a third world country, the availability of stable and secure housing, food, clothes, and health services may be regarded as having precedence over warm and compassionate relationships—circumstances which bring Rwezaura's statement to the fore.

[1028] Walker v Walker and Harrison [1981] NZ Recent Law 257 quoted and discussed in Lowe, Douglas, *Bromley's family law*, above footnote 840, at p. 467.
[1029] *Ibid*.
[1030] Rwezaura, "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa", above footnote 88, at p. 110.

5.6.2 Assessment and Determination of Interests

The analysis above shows clearly that it is impossible to fashion a one-fits-all definition of the child's best interests. Instead, it is important to understand the core elements of the standard. From the statements quoted above, it can be deduced that the child's best interests are, in reality, the essential needs of any child. The division into material and emotional, or physical and metaphysical, does not change the fact that children need both. Whether the needs are current or future-oriented, experiential, or developmental, they are crucial. Therefore, the importance attached to these different needs in various societies is immaterial. The fact is that children have needs, needs that must be met. And every need corresponds to the responsibility to meet such a need. This responsibility can be parental, social, institutional, judicial, or legislative. Thus, when the responsible parties satisfy the needs of a child or children, they act in the child's or children's best interests.

Keeping this argument in mind, it is obvious that not all children have the same needs. Defining the best interests of a child or children in a specific situation or context requires ascertaining the needs of that child or children. The Committee on the Rights of the Child resolutely maintains that the child's best interests must be understood on a case-by-case basis depending on the child's circumstances (needs, situation, and context).[1031] Such an understanding demands assessment and determination of the best interests of the child.

States Parties to the Convention have the duty to provide the requisite machinery for such assessment and determination.[1032] During the assessment and determination process, it is important to take into account that children, parents, legal practitioners, and judicial and social welfare officers will probably perceive the child's best interests differently. For instance, parents may define their children's needs in terms of their ability and willingness to satisfy them. On the other hand, children may have views and feelings that are contrary to their best interests in a particular situation (such as medical treatment). Therefore, there must be legal procedures, criteria and trained personnel to assess and determine what is in the child's best interests.

Unfortunately, the UNCRC does not provide criteria to act as a checklist for the required assessment and determination. There is a debate on the reasonability and practicality of including such criteria in an international instrument. However, Freeman argues that the availability of a checklist would assist decision-makers in ascertaining the child's best

[1031] Para 32 of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at p. 9.
[1032] *Ibid.*, para 33.

interests.[1033] In response to this debate, the Committee on the Rights of the Child, in a non-binding instrument, provides elements to be considered and procedural safeguards in assessing and determining the child's best interests.[1034] Also, some domestic legal systems have established factors to be considered in the determination. The Children's Acts of Tanzania Zanzibar and the Republic of South Africa contain good examples of factors to be considered in the implementation of the best interests of the child principle.[1035] The remaining concern is that the lack of internationally accepted minimum criteria eliminates any expectations of a common judgment concerning the child's best interests in an international setting such as intercountry adoption.

Another way of interpreting and determining the child's best interests is by taking into consideration the other three general guiding principles and rights established under the UNCRC. This is because these principles and rights concretise the best interests of the child. For example, the right to participation under Article 12 of the Convention is a significant consideration in establishing a child's best interests. Also, the subsidiarity principle established under Article 21 (b) of the Convention holds substantial sway in determining whether intercountry adoption is in the child's best interests. However, a difficulty may arise in determining whether the implementation of a particular right is in itself in the child's best interests. For instance, is it appropriate to leave a child in his home country when he or she refuses to be transnationally adopted even though this has been determined as the most suitable measure of alternative care by the mandated authorities? In the famous "*Zulu Boy*" case, the child's views were (erroneously?) entirely disregarded by the court, which believed it was deciding in the boy's best interests.[1036]

5.6.3 Application of the Principle

In the light of the theories upon which this study is founded, observing the interplay between the best interests principle as an international cultural norm and customary law or local practice is imperative to its interpretation. In a community that recognises customary and religious laws as a formal source of law, there is a need to reconcile local cultural norms with the child's best interests.[1037] This may prove quite a challenge as even the definition of

[1033] Freeman, Michael (ed.), "Article 3: The Best Interests of the Child", above footnote 1002, p. 31.
[1034] Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at pp. 13–21.
[1035] See section 4 (a) – (n) of Zanzibar's Children's Act, No. 6 of 2011 and section 7(1) (a) – (n) of the Republic of South Africa's Children's Act No. 38 of 2005.
[1036] England and Wales Appeal Division, "Re M", FLR 2 (1996).
[1037] For further discussion on the interplay between culture and the best interests of the child principle, see Alston, Gilmour-Walsh, *The Best Interests of the Child*, above footnote 82.

childhood varies considerably from one culture to another.[1038] Very often a sieve must be employed when attempting reconciliation because while some cultural norms may be reconcilable, others may not.[1039] Some examples are practices such as FGM, early and forced child marriages, or the sale of children.

Other cultural practices are in a grey area where no one can rule beyond doubt whether they are in the child's best interests or not. For instance, child circulation within kinship care arrangements may be deemed to be in the child's best interests, especially where the child stands to benefit, such as getting a better education and better nutrition. However, it can be detrimental to a child's development, especially where a child is obliged to constantly move from one relative to another or is overburdened with household chores (not uncommon in kinship care). Thus, achieving common judgments regarding the child's best interests across different cultures or communities is a challenge. This level of subjectivity may render interpretation of the principle arbitrary.

While commenting on country reports, the Committee on the Rights of the Child has depicted how cultural and religious considerations hinder the implementation of the best interests of the child principle.[1040] The Committee wields the principle to criticise laws, policies, and practices in State Parties that in their view do not uphold the principle.[1041] Freeman, while discussing culture, childhood and rights from the perspective of the tension between Articles 24(3) and 30 of the UNCRC, shows how difficult it may be to determine whether cultural and religious practices affecting children in different communities are guided by the standard of the child's best interests or not.[1042] The challenge, he argues, lies in the lack of a common judgement on children's best interests across different communities.[1043] How then can reconciliation be achieved under such circumstances? For instance, adoption of a Tanzanian child by a non-resident Tanzanian is supported by the Tanzanian Law of the Child Act, but this is not perceived as intercountry adoption and can be affected by customary law under section 68 of the Act. In such a scenario, the host country's laws must also come into play, especially in connection with entry, residence, and implementation of the best interests of the child principle. How then can the differing cultural norms and national laws of the two communities be reconciled, especially regarding the child's best interests? Freeman argues

[1038] Ncube, "The African Cultural Fingerprint? The Changing Concept of Childhood", above footnote 946, at pp. 11–12.
[1039] See discussion in Michael Freeman, "Culture, Childhood and Rights", The Family in Law 5(15) (2011): pp. 15–33.
[1040] Freeman, Michael (ed.), "Article 3: The Best Interests of the Child", above footnote 1002, at pp. 41–42.
[1041] *Ibid.*, at pp. 41-42.
[1042] Freeman, "Culture, Childhood and Rights", above footnote 1039.
[1043] *Ibid.*, at p. 27.

that this can be achieved by spreading universal visions of children's rights, and by creating links and engaging in dialogue between communities, in order to enlarge shared views and increase the chances of achieving judgments with universal validity.[1044] This may be another way of interpreting and determining the child's best interests, albeit in a collective manner.

Summing up, interests may not necessarily be rights. Yet, the best interests of the child principle fills the role of a substantive right. Article 3(1) of the UNCRC establishes a child's right to have his or her best interests assessed and taken as a primary consideration.[1045] It also places a corresponding obligation on the State Parties and all their public and private authorities to consider the best interests of the child principle in all actions concerning children. This principle is, however, not only a right but also a primary interpretative legal tool through which all rights under the Convention are understood. It is also a rule of procedure, through which any action taken in furtherance of the UNCRC may be supported, negated, justified, or clarified.[1046] In addition, it is used as an evaluating tool for State Parties' laws, policies and practices relating to children. In view of these multiple roles, there is a great need for the principle to be accurately understood and implemented in order to give children the best chances in reality.

The principle of the child's best interests can only be effective in practice when appropriately interpreted, determined, and applied. Although this part has attempted to shed some light on what these three aspects imply in practice, it remains the duty of every state to ensure proper processes and safeguards in their law that guarantee the child's interests in every case.

The next part looks at concretisations of the principle unique to adoptions with an international element. It lays a foundation for understanding the application of the best interests principle in child adoptions with an international element as practised in Tanzania.

5.7 The Principle in Adoptions with an International Element

Various legal instruments providing for child adoption contain specific provisions on intercountry adoption. Such inclusions have one feature in common: the need for intercountry adoption to be in the child's best interests. In this study, adoptions that have some features of intercountry adoption are analysed. However, Tanzania's law regards them as domestic adoptions. Therefore, a middle ground has been selected by calling them adoptions with an international element, and the analysis involves examination of how provisions on

[1044] Freeman, Michael (ed.), "Article 3: The Best Interests of the Child", above footnote 1002, at pp. 36–40; Also in Freeman, "Culture, Childhood and Rights", above footnote 1039, at pp. 27-29.
[1045] Para 6(a) of the Committee on the Rights of the Child, "General comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3 para. 1)", at p. 4.
[1046] Freeman, Michael (ed.), "Article 3: The Best Interests of the Child", above footnote 1002, at p. 32.

intercountry adoption also apply to them. In this part, some of the legal provisions in international, regional, and national legal texts on adoptions with an international element are studied. These include the UNCRC, the ACRWC, the 1993 Hague Convention on Intercountry Adoption and the Tanzanian Law of the Child Act, 2009. The main aim is to observe the status accorded to the best interests of the child principle and the application of other related protective standards in the regulation of adoption. In addition, this part also assesses the implications of the specific provisions on adoptions with an international element.

Article 21(b) of the UNCRC and Article 24(b) of the ACRWC recognise intercountry adoption as an alternative child care measure. The 1993 Hague Convention on Intercountry Adoption also recognises that intercountry adoption has the advantage of providing a child in need with a permanent family even if this is outside his or her country of origin.[1047] In Tanzania, sections 62 and 74 of the Law of the Child Act recognise adoptions with an international element as an alternative care measure. These include adoption by resident non-Tanzanians and non-resident Tanzanians. All these legal provisions specify that adoptions with an international element must be in the child's best interests.

5.7.1 Status of the Best Interests of the Child Principle

Article 21 of the UNCRC and Article 24 of the ACRWC require that the child's best interests be the paramount consideration in child adoption. This applies to all types of child adoption under both Conventions. Thus, the child's best interests are an absolute determinant in child adoptions with an international element. The main objective of the 1993 Hague Convention on Intercountry Adoption, as stated in Article 1(b), is to ensure that intercountry adoptions are concluded only when in the child's best interests. However, despite the Convention's dedication to the principle of the child's best interests, it does not specify the status of the principle. This sets the best interests standard as an absolute requirement without weighing its significance in comparison to the interests of other concerned persons.[1048]

As already seen above, the Law of the Child Act, 2009 names the best interests principle as an overarching principle under section 4 (2). This provision requires that the best interests of the child be 'a' primary consideration. The Adoption of Children's Regulations do not set a specific status for the principle in connection with adoptions. Thus, the status under the Act

[1047] Preamble to the The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993, above footnote 933.

[1048] Erica Briscoe, "Comment, The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: Are Its Benefits Overshadowed by Its Shortcomings?", Journal of the American Academy of Matrimonial Lawyers 22(2) (2009): pp. 437–60.

applies to adoptions with an international element which are provided for in sections 62 and 74. For Tanzania, the best interests of the child are not the absolute determinant in adoptions with an international element but are a fundamental consideration to be given priority over other people's interests.

5.7.2 Other Standards that Regulate Adoptions with an International Element

The standard of the best interests of the child is concretised in most instances by other standards that go hand in hand with it. In the specific provisions on intercountry adoption, other standards are named apart from the best interests of the child principle. The aim of this part is to observe whether the same or similar standards bind adoptions with an international element under the Law of the Child Act, 2009. These standards are as follows:

5.7.2.1 Subsidiarity Principle

Intercountry adoption, according to Article 21(b) of the UNCRC and Article 24(b) of the ACRWC, is required to be a measure of last resort. This means that intercountry adoption becomes an option only when all suitable local means of alternative care have been exhausted. Under section 74(1) (a), the Law of the Child Act permits resident non-Tanzanians to adopt only where a child cannot be suitably cared for within Tanzania. The Act does not apply the subsidiarity principle to adoptions by non-resident Tanzanians. This standard is incorporated to promote suitable local alternative care measures, which open up avenues for continuity in a child's upbringing, preserving a child's cultural identity and guaranteeing possible family reunification. However, the subsidiarity principle itself is subsidiary to the best interest of the child principle.[1049] Therefore, after reasonable consideration of available suitable domestic alternative care measures, a decision-maker may find intercountry adoption more in the child's best interest than the available local measures.

Although the 1993 Hague Convention recognises the subsidiarity principle, it does not require intercountry adoption to be the last option available to a child.[1050] Instead, the Convention prioritises intercountry adoption as a means to procure a permanent family environment for a child over temporary domestic foster or institutional care.[1051]

[1049] AD v DW (Department of Social Development intervening; centre for child law, Amicus Curiae) 2008 (3) SA 183 (CC) para 55 as read in African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 646, at p. 30.

[1050] The subsidiarity principle is implied in the Preamble and Article 4(b) of The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993.

[1051] Hague Conference on Private International Law, The implementation and operation of the 1993 Hague Intercountry Adoption Convention, above footnote 384, at p. 29. Good practice only demands that intercountry adoption be considered after due consideration has been given to national solutions and when it is in the best interests of the child.

5.7.2.2 Equivalent Standards for Adoption

Article 21(c) of the UNCRC and Article 24 (c) of the ACRWC require that a child adopted internationally should enjoy safeguards and standards equivalent to those of a child adopted nationally. Equivalency may extend to legal, procedural, and institutional safeguards. It applies to adoptability, subsidiarity, consent, and residence requirements, as well as monitoring conducted by mandated authorities for intercountry adoption. The 1993 Hague Convention expounds on this standard. Article 1(a) stipulates that the main objective of the Convention is to ensure that there are established safeguards to warrant intercountry adoptions are in the best interests of the child. Thus, the Hague Convention concentrates on the availability of central, competent, and accredited authorities to regulate the entire intercountry adoption process in the countries of origin and destination, as provided in Articles 6-11, 14-21 and 33. The essence of the equivalency standard is to uphold the child's best interests and prevent illicit activities in intercountry adoption.

Tanzania is not a party to the 1993 Hague Convention on intercountry adoption. Therefore, the equivalent standards stipulated under the Convention only apply if incorporated in the Law of the Child Act. The Act includes no comprehensive provisions on these standards for adoptions with an international element. However, the Adoption of Children Regulations, under regulations 25 and 27, emphasise that the legal and procedural safeguards applicable to adoptions by resident Tanzanians also apply to adoptions with an international element. Further, considering that a child in an adoption with an international element may reside abroad, the Regulations demand further assessment and monitoring, pre- and post-adoption, under regulations 16(5), 26, and 28.

5.7.2.3 Prohibition of Illicit Activities

Illicit activities in intercountry adoption may include, but are not limited to, the selling and buying of children, child abduction, trafficking in children and improper financial gain. The UNCRC under Article 21 (d) requires the State Parties to have safeguards to ensure that intercountry adoption does not result in improper financial gain. Article 24 (d) of the ACRWC goes further and requires that intercountry adoption must not result in improper financial gain or involve trafficking in children. The 1993 Hague Convention is geared towards preventing illegal activities in intercountry adoption, including the sale, abduction and trafficking of children as well as improper financial and other gains.[1052] This is a standard that requires

[1052] See the preamble, Article 1(b) and Articles 8 and 32 of the The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993, above footnote 933.

legislative and institutional structures to be in place in both sending and receiving countries to ensure that intercountry adoption is entirely in the best interests of the child and not for the illegal advantage of any person involved.

The Law of the Child Act, under section 72, prohibits payment or rewards in respect of an adoption. It does not explicitly prohibit the other illicit activities that can affect a child in adoptions with an international element. However, an investigation of the prospective adopter's criminal background is required under section 74(1) (d) of the Act and regulations 26(ii) and 28((d) of the Adoption of Children Regulations.

5.7.2.4 Post-adoption Monitoring

The most deplored aspect of intercountry adoption in countries of origin is the loss of post-adoption follow-up opportunities once the child leaves the country.[1053] The ACRWC under Article 24(f) requires the State Parties to establish a monitory machinery to follow up the well-being of the adopted child. The UNCRC does not have an echoing provision. Instead, it contains the standard requirement relating to the conclusion of bilateral and multilateral arrangements or agreements to ensure that a competent authority is responsible for a child's placement in the receiving state.[1054] These agreements may facilitate post-adoption monitoring by competent adoption authorities both in the country of origin and in the country of placement. The 1993 Hague Convention provides a cooperation platform for Convention Countries involved in intercountry adoption. According to Article 9 of the Convention, the institutional framework established under the Convention ensures post-adoption follow-up. Co-operation agreements, among others, may also assist in preventing illicit activities and promoting the child's best interests in intercountry adoption.

Post-adoption monitoring for adoptions with an international element in Tanzania is provided under regulation 16(5) of the Adoption of Children Regulations. The Regulations do not call for any cooperation agreements or frameworks to facilitate monitoring. Instead, they say that the Commissioner must consult with the International Social Service (ISS) to ensure the child is protected post-adoption.

[1053] African Child Policy Forum (ACPF), *Africa: The New Frontier for Intercountry Adoption*, above footnote 646, at p. 9.
[1054] Article 21(e) of the UNCRC and Article 24(e) of the ACRWC.

5.8 The Principle in Tanzania's Child Adoption Practice

This part looks at the interpretation, determination and application of the best interests principle in the practice of adoptions with an international element in Tanzania. The analysis is based on data gathered during the three phases of field research.

5.8.1 Practical Interpretation of the Best Interests Principle

The legislation does not define the concept of the child's best interests. Its interpretation is left open to the authorities applying the principle in practice. As seen above, the law mainly mandates social welfare officers and the court to implement the principle in child adoption practice. Therefore, the researcher investigated how these two authorities interpret the principle through interviews and analysis of social investigation reports and court rulings on child adoption.

To begin with, the language largely used in practice is Kiswahili, Tanzania's national language. The concept of the child's best interests in Kiswahili is translated as *'maslahi bora ya mtoto'.* Most social welfare officers explained their understanding of the concept in Kiswahili. However, judges and magistrates used English in their explanations, since they use English in their work. All responses were translated into English and are reported in English in this part.

For this study, 20 social welfare officers were interviewed. About half that number explained in detail what they took the principle to mean. A quarter of them described all their responsibilities towards children as constituting the principle. By contrast, another quarter limited the child's best interests to their physiological needs. Some of the officers did not give any clear statement in response to this question. The table below shows what they understand as the best interests of the child principle.

Table 5-1: Social Welfare Officers' Understanding of the Best Interests Principle

Meaning of best interests of the child principle[1055]	**Number of those who ascribed**[1056]
"It means that the child's development and future must be the main consideration in our decisions. So, we consider the child's rights and see how our decision will favour the child. Of course, the decision should also be more permanent than temporary and always timely."[1057]	2
"In anything that you do, you must look first at the impacts it will have on the child. For instance, while refusing marital separation, mothers usually say, we remain only for our children. Their children's best interests bind these mothers. That is what it means."[1058]	3
"Everything we social welfare officers do is for the child's best interest. Our decisions benefit children."[1059]	5
"It means the child's interests first! We check whether the placement will give the child all her or his material needs, whether the child will be happy and have some fun!"[1060]	1
"Ah, possibly we cannot tell what it exactly means. However, we follow the determination criteria under regulation 3 of the Adoption of Children Regulations and then put the child's interests first. To know a child's best interests, you must have good interviewing skills. They normally exhibit an 'I want-I do not want attitude'. Therefore, you should really focus on their facial expressions to get what they truly want. Best interests are not only needs. People's religious beliefs, customs and traditions and life circumstances make them much more than just needs."[1061]	1
"It means children should have all their basic needs. They need to eat, sleep, dress, play, go to school and get medical care. That is what we always look at first."[1062]	5
No clear statement	3

The author also interviewed four judges of the High Court, two magistrates of Resident Magistrate's Courts, and two of the Juvenile Court. Their understanding of the best interests of the child principle, like that of the social welfare officers, varied. Here, two statements are presented as examples. The first was made by a high-ranking judge of the High Court of Tanzania, and the other by a magistrate of the Juvenile Court at Kisutu, Dar es Salaam. The judge said,

> "The best interests of the child are very central that no court can grant an adoption order without ascertaining all the requirements have been adhered to. When the petition comes to court, the first thing is the appointment of a

[1055] This column quotes statements by individual social welfare officers who were interviewed during field reseach.
[1056] 'Those who ascribed' refers to the number of social welfare officers who gave a similar meaning of the best interest principle in interviews during field research.
[1057] Interview with social welfare officer at the adoption desk, MoHCDGEC headquarter offices in Dodoma, on 22. 03. 2018.
[1058] Interview with social welfare officer, Temeke District, Dar es Salaam, on 04.02.2019.
[1059] Interview with social welfare officer, Ilala Municipal Council, Dar es Salaam, on 07.02.2019.
[1060] Interview with social welfare officer, Bunju Ward, Kinondoni District, Dar es Salaam, on 16.01.2019.
[1061] Interview with social welfare officer 1, DSW, MoHCDGEC headquarter offices in Dodoma, on 05.03.2019.
[1062] Interview with social welfare officer 2-Arusha city, on 19.03.2019.

> guardian *ad litem*, who carries out a social enquiry to establish whether the adoption is in the child's best interest. The court nearly always accepts the enquiry's report and relies on it."[1063]

The magistrate said,

> "In civil proceedings, we always measure what is more suitable for the child and not the mother or father. Social welfare officers conduct a social investigation that paints the family's actual circumstances or the environment in which the child lives. We also listen to the child, but usually their thoughts may not influence an immediate decision. Well, every case has its own peculiarities, so the court relies on the social investigation report to understand them and decide in the best interest of the child."[1064]

These statements have two things in common. First, the judicial officers do not attempt to describe what constitutes the best interests of the child. Instead, they signify how important it is to adhere to the principle. The Magistrate goes a little further in explaining that the principle requires the court to determine what is suitable for the child in the presence of competing interests. Also, she provides the child's role in defining his or her interests through participating in decision-making. Second, both statements portray the court's reliance on social welfare officers in determining the child's best interests. Since the court cannot investigate, the social investigation report remains the only way to understand the child's circumstances. Thus, the understanding and will of social welfare officers largely influence the court's decision on the child's best interests. However, the Judge in his explanations, also said,

> "There are very few social welfare officers who are conversant with issues of child adoption. Maybe about only two."[1065]

In addition, during field research, the author interviewed a social welfare officer whom the Department of Social Welfare and the court had recommended as the most seasoned officer at the child adoption desk. With regard to understanding the best interests principle, she said,

> "Between social welfare officers, this principle is understood differently. Poverty is treated as a reason for child adoption, and it is perceived in the child's best interest to remove them from a poor family."[1066]

Here, the issue of context resurfaces. The officer's understanding of the child's interests may be influenced by socio-economic and political perceptions prevailing in the society, and may not necessarily lead to a correct assessment and determination of interests. Therefore, the

[1063] Interview with a high-ranking Judge, High Court of Tanzania, at Dar es Salaam, on 01.03.2019.
[1064] Interview with Resident Magistrate 2, Juvenile Court, at Kisutu, Dar es Salaam, on 21.02.2019.
[1065] Interview with a high-ranking Judge, High Court of Tanzania, at Dar es Salaam, on 01.03.2019.
[1066] Interview with social welfare officer 1-MoHCDGEC Dar es Salaam offices, on 06.04.2018.

court's reliance on social welfare officers in determining the child's best interests, though required by law, may compromise the child's interests.

The question of what the child's best interests are was put to all respondents. Only those who had a legal background or worked with children could provide varying degrees of articulate responses. However, a deputy regional health officer for Dar es Salaam who had neither of these qualifications made a very interesting statement of what constitutes the child's best interests. He said,

> "In Eden, Adam and Eve could get everything they wanted. Eden was like having parents, a mother and a father. In life, having parents is like Eden; you cry out and say what you want, and you get it. When a child gets the opportunity to tell someone 'I want', their best interests have been considered. Food, clothes, and shelter are automatic rights but getting a person who listens to the child's needs makes an actual consideration of his or her interests. Listening to a child is two-fold, verbal and non-verbal, by observation. When a child has the freedom to give their opinion, they are comforted. Of course, there should be a balance in listening, administering discipline and upholding the child's interests." [1067]

The health officer's statement emphasises the psychological needs of a child over physiological needs. He claimed that determining the child's best interests is nearly impossible without listening to the child's own views. In his opinion, even babies have views that can be taken into consideration, hence the need for non-verbal communication through observation. This statement makes the child's right to freedom of opinion and participation in decision-making central to understanding what the child's best interests are.

5.8.2 Assessing and Determining Interests

The Adoption of Children Regulations provide a list of criteria to consider when determining the child's best interests. Although the Regulations do not provide a specific procedure for best interests assessment and determination, the procedures for child protection, foster care placement and adoption are geared towards safeguarding the child's best interests. These procedures are, however, extensive, and not very specific. Hence, a child could benefit more from a separate procedure exclusively for best interests determination in child adoption.

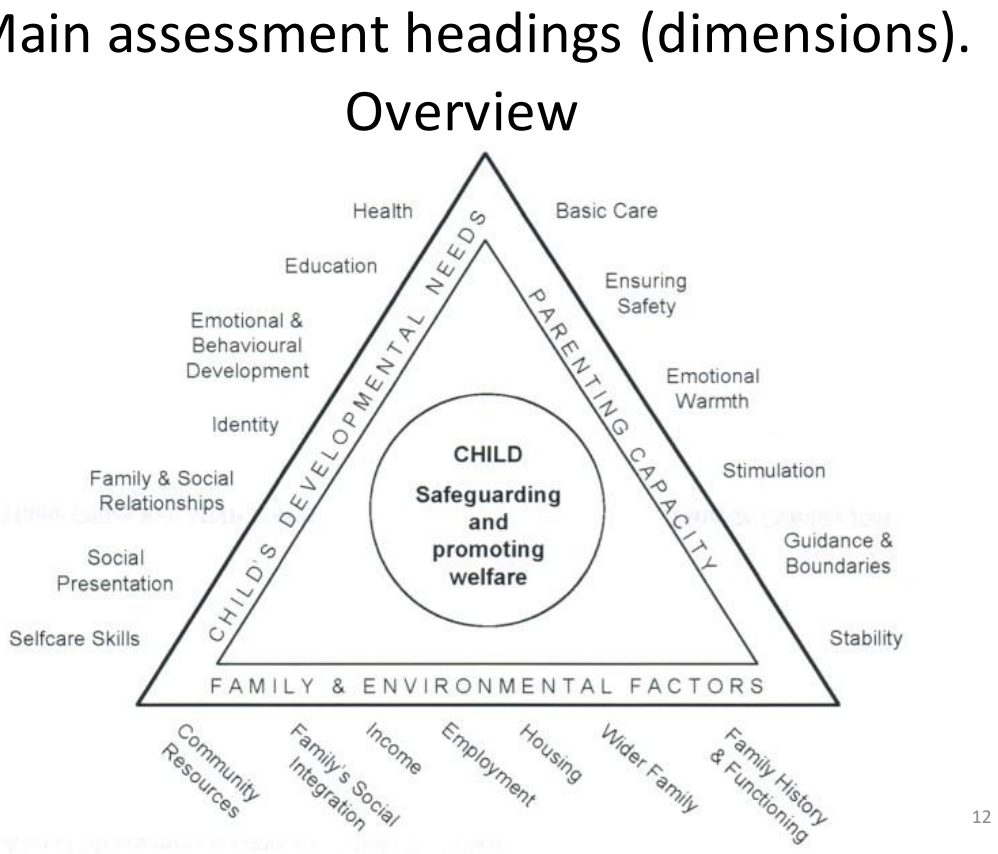
During field research, aided by an excerpt from the Tanzania Mainland Child Protection Training Manual in a PowerPoint document,[1068] a social welfare officer explained how they

[1067] Interview with a regional health officer, Regional Commissioner's Offices, Dar es Salaam, on 07.02.2019.

[1068] Tanzania Mainland Child Protection Training Manual: Module 8, Assessing Children's Needs. UNICEF Tanzania, through their child protection specialist the study interviewed, promised to provide the complete manual. The study did not receive it despite numerous reminders.

assess and determine the child's best interests.[1069] The training manual grounds the requirement for a needs assessment on section 94(7) of the Law of the Child Act which requires social investigation after receiving child protection referrals. In child adoption, regulation 11 of the Adoption of Children Regulations details what such an investigation entails. The manual sets the best interests determination criteria under regulation 3(a)-(e) as the golden rule for each needs assessment. It also categorises needs assessments into three. First, initial assessment (also initial investigation) is done immediately after receiving a child protection referral. Second, full or comprehensive assessment is done over an extended period to determine a proper care plan for the child. And third, risk assessment is a continuing process forming part of other investigations meant to determine dangers to which a child is or could be exposed. The manual aims to facilitate social welfare officers in the assessment and determination of the child's interests on a case-by-case basis. It provides an assessment triangle to guide the process. The triangle is reproduced below for ease of reference:

Figure 5-1: Child's Needs/Interests Assessment Triangle[1070]



[1069] Interview with social welfare officer at the adoption desk, MoHCDGEC headquarter offices in Dodoma, on 22.03.2018. The officer shared the document via email on 28.03.2018.

[1070] Reproduced from the Ministry of Health, Community Development, Gender, Elderly and Children, *Tanzania Mainland Child Protection Training Manual*, above footnote 1068.

Although the Adoption of Children Regulations provide a checklist for best interests determination in child adoption, only seven of the twenty interviewed respondents could mention at least three of the criteria during interviews. Among the seven, only four mentioned the legal source of the criteria. This gap suggests that most social welfare officers lack the legal knowledge necessary for carrying out their responsibilities, especially as far as child adoption is concerned. However, this position was challenged by the existence of the training manual, which, according to the interviewed UNICEF Tanzania child specialist, is sufficient to prepare social welfare officers to carry out all their child protection responsibilities effectively and efficiently.[1071] The responses of the social welfare officers concerning the extent of their training on child adoption law and procedure resolve this enigma. More than half of the interviewed officers complained of having received little or no training in child adoption. One of them said,

> "I have never been trained on child adoption. I have manned the foster care and child adoption desk since 2012. I personally worked hard to understand what adoption means and how to apply the law governing it. Well, I am trained in social work, but the curriculum did not include child adoption."[1072]

The statement above is typical of what the social welfare officers responsible for child adoption said when asked about their training in implementing child adoption law and policy. This means that best interests assessment and determination may be challenged by the lack of sufficient knowledge and skill in its execution. During field research, the author observed that social welfare officers relied primarily on experience rather than on training. However, experience may not always lead to correct assessments. An interview with a child protection specialist at UNICEF Tanzania revealed that the organisation is working with the MoHCDGEC to overhaul the social work curriculums of tertiary education institutions to provide training that will equip social welfare officers with adequate skills to handle their responsibilities.[1073] This initiative, if well implemented, will play a significant role in eliminating the lack of training issues at the Department of Social Welfare.

5.8.3 Application of the Principle

Social welfare officers and the courts apply the best interests principle in deciding whether child adoption is the most suitable option for the child. Therefore, before granting an adoption order, the court considers the child's best interests presented in a social investigation report

[1071] Interview with child protection specialist, UNICEF Tanzania, Dar es Salaam offices, on 21.02.2019.
[1072] Interview with social welfare officer, Ilala Municipal Council, Dar es Salaam, on 07.02.2019.
[1073] Interview with child protection specialist, UNICEF Tanzania, Dar es Salaam, on 21.02.2019.

submitted by the child's appointed guardian *ad litem*. Sections 59(1) (b), 59(3) and 74(2)-(4) of the Law of the Child Act require the court to make an adoption order after receiving a social investigation report if the court is satisfied that the adoption is in the best interests of the child. Specifically, section 59(1) (b), which binds the courts generally, provides,

> "The court shall make an adoption order if it is satisfied that-
>
> [(a) …]
>
> (b) it is in the best interest of the child and that the wishes of the child **have been considered** if the child is capable of forming an opinion;"[1074] [emphasis added]

Section 74(4), which applies specifically to adoptions by resident non-Tanzanians, provides that,

> "The court may, in respect of the application for adoption by a foreigner, make an additional order-
>
> (a) requiring a social welfare officer to represent the best interest of the child;
>
> (b) requiring a social welfare officer to prepare a social investigation report to assist the court to determine whether the adoption order is in the best interest of the child or not; and
>
> (c) for any other matter as the court may determine."

These two sets of provisions confirm what has already been argued above. While the court has the final responsibility to apply the best interests principle in deciding for or against the adoption, the law requires considerable reliance on a social investigation report. Thus, the duty to interpret, determine and apply the best interest principle lies squarely on the shoulders of social welfare officers. This is so because, although the social investigation report is meant to assist the court in making a decision, the court has no room to perform further investigations apart from observations made in chambers. Therefore, it can only depart from the report's conclusions if other contrary facts become manifest during the adoption proceedings. During a follow-up interview, a Judge of the High Court of Tanzania, when responding concerning these provisions, said,

> "The way the adoption law and procedure are structured, the court has no choice but to always rely on what a social investigation report provides. A judge cannot learn of the child's circumstances otherwise. Yes, the judge can interview the prospective adoptive child in camera, but these children are too young to form a reliable opinion in most cases. I find that the law provides an opportunity for the social welfare officers to collude with the

[1074] Section 59(1) (b) of the Law of the Child Act, 2009.

> applicants or their advocates to make sure the report supports the adoption."[1075]

The author closely scrutinised seven social investigation reports accessed during perusal of court files as part of the field research. She observed three things. First, only two out of the seven strictly followed the social investigation report template scheduled under the Adoption of Children Regulations. Second, three reports presented information reflecting serious investigation while the other four seemed only to respond to the formal requirements. Third, three of the reports came from the same social welfare officer and are all similar. They use the same format, provide the same arguments, and arrive at the same conclusion for three different cases. It shows that the officer was using one of her previous reports as a template for future ones. While the three reports in the second category above presented concrete information that appears quite helpful to the court, the other four seemed to fulfil a formality.

The information required in the social investigation report template emphasises the financial ability of the adopter to care for an adoptive child. This puts emphasis on the child's physiological needs, such as the physical environment of the adopter's home, rather than psychological. The seven reports reflected the same emphasis. However, they also considered the adoptive family's capacity to satisfy the child's psychological needs such as love, affection, and discipline. They reflected a varying degree of emphasis on these needs. The child's feelings and wishes were not featured in any of the seven reports. The reason behind this could be that the children lacked sufficient maturity to make an opinion. However, one of the reports covered the adoption of two teenage girls and did not include their opinion on the adoption.

Since the author was able to access some adoption rulings during field research, she analysed the courts' considerations of the child's best interests recorded in them. The analysis was based on 50 court rulings in adoptions with an international element between 2007 and 2018. It was found that the court relied on the social investigation report in 48 out of the 50 decisions. In one of the decisions that departed from the report's recommendations, the judge refused the adoption, arguing that the applicants did not fulfil the requirements for adoptions by foreigners under section 74(1) of the Act.[1076] In the other ruling, the judge considered the report but arrived at the decision to grant the adoption on the basis of considerations that were

[1075] Interview with a Judge of the High Court of Tanzania, at Dar es Salaam, through phone conversation on 27.06.2020.

[1076] High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, 2009 and In the Matter of A (Infant) and In the Matter of an Application for an Adoption Order by JVPB and EG of Dar es Salaam".

not entirely reflected in the report.[1077] These two decisions presented more extensive arguments than the others and considered other adoption precedents, binding and persuasive, in different matters, including the best interest of the child principle. One of the judges emphasised that this principle should not be applied to the exclusion of other provisions of the law. He said,

> "I am live in my mind of the important legal principle that in adoption petitions the main purpose is to safeguard and promote the welfare of the child at issue throughout his/her childhood (better than the existing arrangement); see the holding in the case of Re M (An Infant) [2004] TLR. 247 and In the Matter of Master Ayaz and two others [1978] LRT. N. 25. The supreme court of Uganda also subscribed to this stance of the law; see Re M (An Infant), [1995-1998] 2 EA 174. However, this valuable principle did not mean that courts should deliberately overlook important and express provisions of the law like S. 74 (1) (a) – (f) of the Act. It is for this ground that S. 74 (2) of the same Act provides that the court may grant an adoption order if it is in the best interest of the child, subject to S. 74 (1) of the Act."[1078]

The position of the judge supports the guidance of the UN CRC under Comment 14 that the principle considers other rights in the UNCRC and can be used for their analysis.[1079] Thus, applying the best interests principle means analysing the provisions of the law that safeguard the child's welfare and applying them.

The court's reliance on social investigation reports in determining and applying the child's best interests principle has led to minimal analysis of issues regarding the principle in the rulings. Most of the adoption rulings reiterate the contents of the reports and provide no further argument. The role of the court in interpreting the law is thus minimised in this instance. This practice has rendered the court a passive player in application of the child's best interests principle. The resercher concludes that the law and practice in respect of interpreting, determining, and applying the principle can detract from the protection guaranteed by the principle.

5.9 Conclusion

Prior to the human rights movement, children as objects of care were protected under the welfare principle. Although numerous child rights professionals and scholars use the welfare

[1077] High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, 2009 and In the Matter of Application for an Adoption Order by JNH and EMV and In the Matter of GC, the Adoptive Child" (10.11.2015).

[1078] High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, 2009 and In the Matter of A (Infant) and In the Matter of an Application for an Adoption Order by JVPB and EG of Dar es Salaam", at p. 11.

[1079] UN Committee on the Rights of the Child (CRC), "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)".

and best interests principles synonymously, they are different. The development and application of the welfare principle in the Commonwealth countries, including Tanzania, assists understanding of the differences.

Although the UNCRC was neither the first nor the last international instrument incorporating the best interests principle, it exalted its significance by making it a cardinal principle extensively applicable due to the Convention's near universal status. The principle's broad coverage in numerous conventions and statutes gives it an extensive variation of subject, scope, purpose, and status of application. In child adoption, the principle is allotted the high status of paramountcy, which means that it is the absolute determinant in the adoption decision.

However, child-centred conventions, such as the UNCRC and the ACRWC, and other general conventions enshrining the principle do not define it or provide criteria for its determination. The main purpose of leaving the principle indeterminate is to allow for flexibility considering the diverse circumstances and cultures in which the principle may be applied. Though deliberate, and for a good cause, the principle's indeterminacy can compromise compliance with it to the detriment of the child. This is due to the principle's own attribute of subjectivity which may lead to arbitrariness in practice.

The child's best interests, therefore, may not always be harmoniously determined across different cases, cultures, nations, or regions. This is a fact that must always be reckoned with. The significant point to note is that the individual will, agenda or manipulations of the determining authority should not taint the determination procedure. The final decision in every action concerning the child should and must be seen to be in the child's best interests.

Consideration of elements in the formulation of the best interests principle under a particular legal instrument should not ever defeat the requirement for any action to be in the child's best interests. Debates on elements such as primacy or paramountcy of the child's best interests should be subjected instead to the ultimate obligation to consider the child's best interests.

Other standards provided in the legal instruments embedding the principle concretise it. These standards form part and parcel of the best interests of the child's determinative criteria. For instance, under the UNCRC, these are the other three cardinal principles,[1080] the desirability for continuity of a child's upbringing, ethnic, religious, cultural and linguistic background,[1081]

[1080] Right to life, survival and development of the child under Article 6, right against discrimination under Article 2, and the right to respect the views of the child under Article 12 of the UNCRC.
[1081] Article 20(3) of the UNCRC.

the right of a child to preserve his or her identity[1082] and other provisions of the Convention. In adoptions with an international element, the other standard requirements, such as observing the subsidiarity principle, prohibition of illicit activities and conclusion of cooperation agreements between states, further concretise the best interests principle and add up to criteria for determination.

Also, there are efforts by the UN CRC, UNHCR, professionals, scholars and other institutions working with children to provide guidance in interpreting, determining, and applying the principle. However, although they are very helpful, they are non-conclusive. The introduction of determination criteria in national children's statutes provides more specific guidance in the light of the nation's own culture and prevailing circumstances. However, the responsibility to rely on the criteria and use them correctly to determine and apply the principle lies with the mandated authorities. Again, subjectivity dominates where the authorities could be influenced by their socio-cultural and economic situation which may cloud their perception of the child's best interests. For instance, considering that the principle originates from international law and is domesticated by the Law of the Child Act in Tanzania, the traditional understanding of the child's best interests may clash with the international perception, a case of legal pluralism. Also, the workplace environment of the mandated authorities, which is characterised by pressures emanating from the shortage of time, training, and resources, affects how these authorities consider the best interests principle in their decision-making, a case of street-level bureaucracy.

Tanzania's child adoption practice is strongly affected by legal pluralism and street-level bureaucracy. The Law of the Child Act places on the social welfare officers and the court the responsibility to apply the best interests principle in child adoption practice. The law and practice have created a reliance on the social welfare officers to interpret, determine and apply the principle. The officers, however, lack sufficient training to adequately discharge this responsibility. Also, they are significantly influenced by socio-cultural perceptions of what the child's best interests entail and workplace pressures, which can compromise their ability to apply the principle. In cases of child adoption, the court primarily relies on the social welfare officers' reports or representation of the child's best interests, which compromises their ability to safeguard the child's best interests. As a result, there is no guarantee that these interests will be protected.

[1082] Article 8 of the UNCRC.

Finally, it is impossible to ascertain beyond reasonable doubt what is in the best interests of the child, because an actor charged with best interests determination will be influenced by his or her own personal beliefs and inclinations. Also, due to social-cultural diversities, which are ever-changing, a definitive interpretation and determination of the child's best interests in the legal texts would be unreasonable. What is important is for every country to have proper interventions and qualified human resources to determine the child's best interests. In adoptions with an international element, this is critical as the subsidiarity principle requires a foolproof best interests determination.

Chapter 6: The Practice of Child Adoptions with an International Element in Tanzania

> "My settled view is that, even if it is taken as true that the petitioners complied with the conditions set under S. 74 (1) (b) and (c) of the Act, that alone would not warrant this court to overlook the rest of the conditions set under the same section for, as I observed before, the conditions have to be fulfilled cumulatively and not alternatively."[1083]

6.1 Introduction

This chapter presents, analyses, and discusses the findings of this study on child adoption practice in Tanzania. It concentrates mainly on data collected during the three phases of field research. While all the previous chapters collectively work towards providing answers to the research questions, this chapter addresses all the questions.

The chapter provides a statistical analysis of registered adoptions from 2007-2018, the period under study. Also, it complements the statistics gathered for this study with those from a previous study by Rwezaura and Wanitzek covering the period 1944-2006. Together, they reveal trends in child adoption from 1944-2018. The motives for child adoption are then analysed and discussed based on a selected number of adoption rulings. The trends and motives provide a background to understanding the practice of child adoptions with a foreign element in Tanzania.

Child adoption practice, in this chapter, is discussed in a way that exposes the strengths and weaknesses of the legal and institutional frameworks in regulating child adoptions with an international element. The discussion considers whether these frameworks can adequately manage the practice while ensuring that the adoptions are in the child's best interests. Also, it examines the impact of legal pluralism on the law and practice and looks at how a Tanzanian child is protected in adoptions with an international element. Lastly, the chapter considers the role of child adoption in addressing the problem of children in need of care and protection in Tanzania.

[1083] Utamwa, J. in High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, 2009 and In the Matter of A (Infant) and In the Matter of an Application for an Adoption Order by JVPB and EG of Dar es Salaam", at p. 10.

6.2 Child Adoption Trend

This part presents the general development of child adoption practice since its inception in Tanzania in the year 1944.[1084] It traces the history of child adoption in terms of the number and nature of adoptions, adopters and adopted children. The quantitative data collected during field research are presented and discussed, with explanatory qualitative information where required.

The study builds on the foundation of research on child adoption law and practice in Tanzania by Bart A. Rwezaura and Ulrike Wanitzek conducted in the 1980s and later extending up to 2006. The previous study provided statistical data that the present study uses to observe changes in child adoption practice.[1085] Part of the research findings of the previous study, especially from the years 1986-2006, are unpublished but were accessible to the researcher.[1086]

Research for the present study focused on child adoptions that took place within the twelve years from 2007 to 2018. The envisaged sources of quantitative data during preparation for field research were the Tanzania National Bureau of Statistics (NBS), the Department of Social Welfare (DSW), the High Court of Tanzania, the Resident Magistrate's and District Courts in Dar es Salaam and Arusha, and the Registration, Insolvency and Trusteeship Agency (RITA). Except for NBS, the others were envisioned sources for qualitative data as well.

The author had expected research at the NBS to be mainly online since it has an official website providing approved statistical data to the general public.[1087] However, no specific data relating to child adoption were found on the website. The author attributed the absence of data to the confidential nature of child adoption and therefore established contact with the Bureau's personnel to obtain the desired information through interviews. Regrettably, the Bureau reported the non-existence of any unpublished data on child adoption from which the study could benefit.

The DSW is the core player in child adoption practice in Tanzania. Thus, it was expected that this would be the leading source of information. However, during field research it was found that the Department had no centralised data recording system that could provide country-wide

[1084] The Adoption of Infants Ordinance, 1942 came into operation in 1944, as mentioned in Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 124.
[1085] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22.
[1086] Rwezaura, Barthazar A., Wanitzek, Ulrike, "The Adoption Practice in Tanzania Mainland 1986-2006, Statistical Evaluation recorded by Wanitzek, Ulrike" (University of Bayreuth, 13.01.2007, unpublished).
[1087] "National Bureau of Statistics - Home", https://www.nbs.go.tz/index.php/en/, 4/2/2020.

statistical data on child adoptions executed during the twelve-year period. The same problem was encountered at the social welfare offices visited at the local government level in selected districts of Dar es Salaam and Arusha. The offices could not present consolidated data on child adoptions even for complete one-year periods only. Hence, it was impossible to amass reliable quantitative data for the targeted twelve-year period from either the Department of Social Welfare or the social welfare offices at the local government level.

The situation was different in the Judiciary. All courts with the mandate to adjudicate on child adoption maintained registers of adoption petitions. However, at each court visited (High Court Registries and Resident Magistrate's Courts in Dar es Salaam and Arusha), child adoption petitions were registered in Miscellaneous Civil Causes Registers, which included various other civil causes. This type of recording presented several challenges. There was a need to access and go through multiple voluminous register books in busier courts. Some register books contained barely any information on child adoption. In some court registries, only parts of the registers from earlier years could be retrieved from storage, as in the case of the High Court Dar es Salaam Registry. In the High Court, Arusha Registry, the author was given to access a Miscellaneous Civil Causes Register with records only from 2014 to March 2019. These circumstances made it difficult for the author to collect from the court registers reliable and unified statistical data covering the entire twelve years.

The Adopted Children Register maintained by the Registrar-General, at the Registration, Insolvency and Trusteeship Agency (RITA), was the only other option.[1088] This Register records child adoptions based on a valid court order. Registration of the adoption, like registration of birth, forms the basis for an adoption certificate issued by RITA, which legally proves the existence of a parent-child relationship. The author was able to obtain consistent and reliable statistical data for the twelve years from this register. The data, however, is limited to only registered adoptions. Unregistered adoption orders remain unaccounted for.

Below is a presentation of numerical data on country-wide child adoptions from 2007 to 2018 originating from the Adopted Children Register maintained at RITA headquarter offices in Dar es Salaam.[1089] Two methods of presentation are used: the first is based on the year of entry in the Adopted Children's Register and the second is based on the year of the adoption order as recorded in the Register. The number of adoptions entered in the Register in a particular year is not necessarily the same as the number of adoption orders issued by the

[1088] Register maintained according to section 69(1) of the Law of the Child Act, 2009.

[1089] Perusal of the Adopted Children Register at the Office of the Registrar General, RITA HQ Dar es Salaam, visited on 15 and 25-27 March 2019.

court in that year. This is because in practice, adoptive parents rather than the registrar of the respective court initiate the registration of the adoption orders, which goes against the requirements of section 69(2) of the Law of the Child Act. The sub-section requires the registration to be done by the court's registrar within 30 days from when the adoption order is issued. But since the court registrars do not adhere to this provision in practice, it is left to the parents to register the order at their own convenience. Adoptive parents tend to register the order depending on the forces of urgency driving them. If there is no urgency, they may register the adoption even ten years after the date of the adoption order. For instance, in the Adopted Children Register, entry 496, the adoption order was issued in 2000 but registration was done in 2011; the same applies to entry 502, adoption order issued in 1998 but registration done in 2011; entry 648, adoption order issued in 2007 but registration done in 2015; and entry 707, adoption order issued in 2011 but registration done in 2015.

However, the data collected from the Adopted Children Register are considered in this study as being generally representative of the child adoption trend in Tanzania from 2007-2018. Both quantitative and qualitative data from the Register and the other sources named above are used to reveal the current pattern of child adoption practice in Tanzania. Statistical data from 1944 to 2006 collected and evaluated by Rwezaura and Wanitzek is also used to paint a clear picture of the developing trend of child adoption practice from its inception to 2018.

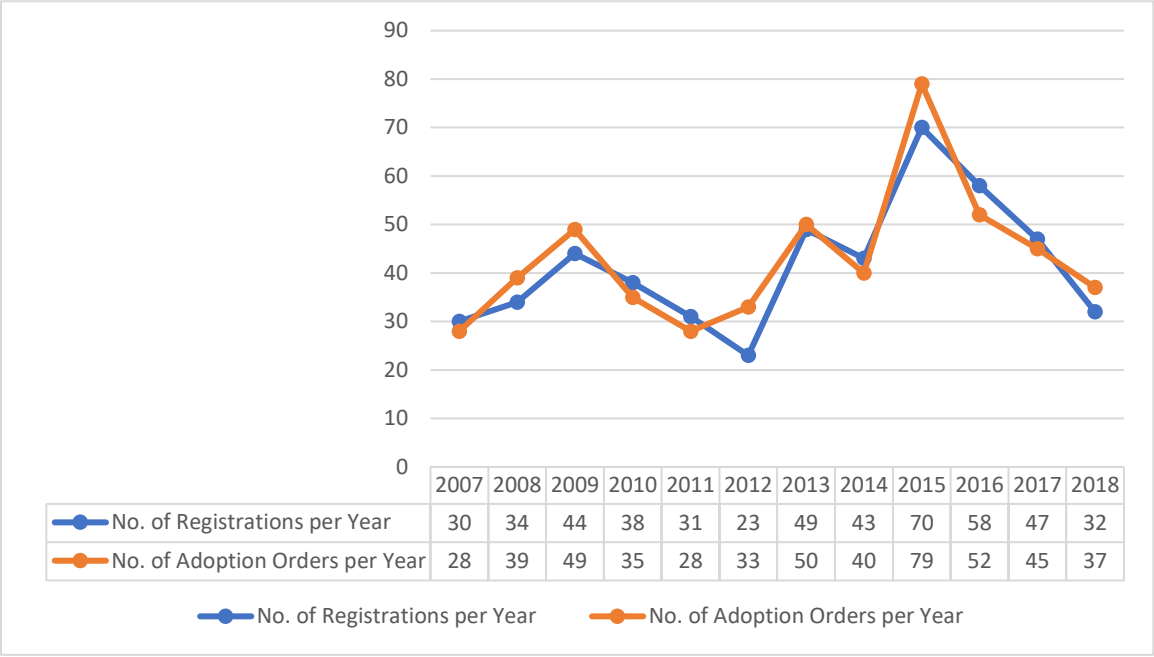
6.2.1 Number of Registered Adoptions

During field research, the author visited the RITA offices in March 2019. Access to the Adopted Children Register was possible up to the 27th of March 2019. The researcher examined child adoption entries from January 2007 to 25th March 2019 in the Register. During this time, there was a total of 514 registered child adoptions, starting from Register entry number 349 up to number 862. Among the 514 registered adoptions, six were of adoption orders granted in the 1990s or otherwise earlier than 2007 which were only registered in or after 2007. Also, by 25th March 2019, all adoptions registered in 2019 were of adoption orders issued in 2018. Therefore, excluding the six, there were 508 adoption orders issued from 2007 to 2018 entered in the Adopted Children Register by 25th March 2019. Again, it is essential to note that the aggregate number of registered child adoptions may not represent the actual number of adoption orders granted from 2007 to 2018 as some may remain yet to be registered. However, for discussion purposes in this study, it will be treated as a representative number of child adoptions concluded in the given period.

According to the year of entry in the Register, the number of adoptions registered in the twelve years from 2007 to 2018 is 499, recorded under entries 349 to 847. This is because the 15 entries from 848 to 862 were recorded between 1st January and 25th March 2019, and are thus excluded from the number of Register entries from 2007 to 2018.

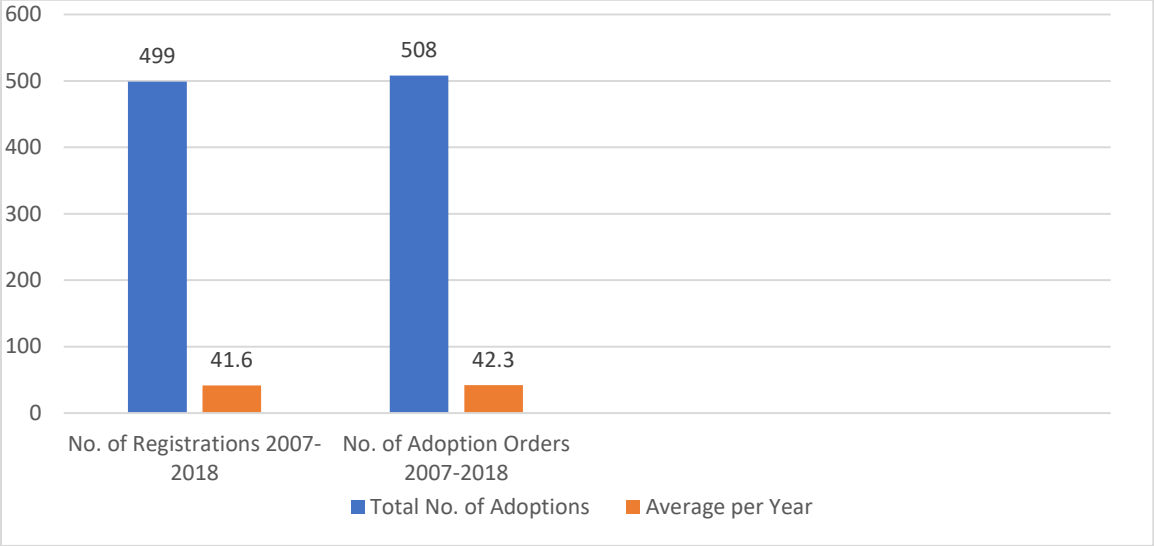
Therefore, based on the number of registered adoption orders issued in 2007-2018 recorded up to March 2019 which is 508, an average of 42 child adoption orders were issued per year (see Chart 6-1 below). The line graph (Graph 6-1) depicts the number of registered child adoptions in 2007-2018. It presents them using two lines: first, according to the year of entry in the Register from 2007 to 2018 and second, according to the year of adoption orders issued in 2007 to 2018 as registered up to 25th March 2019.

Graph 6-1: Number of Registered Child Adoptions 2007-2018



	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
No. of Registrations per Year	30	34	44	38	31	23	49	43	70	58	47	32
No. of Adoption Orders per Year	28	39	49	35	28	33	50	40	79	52	45	37

Chart 6-1: Average of Child Adoptions per Year



Under the Adoption of Infants Ordinance 1942, later repealed and re-enacted as the Adoption of Children Ordinance 1953, the operation of which began in 1944, 130 child adoptions were recorded up to 1961 when Tanganyika obtained its independence.[1090] In the eighteen years between 1944 and 1961, there was an average of 7 adoptions orders per year. From 1962 to 1985, 406 adoption orders were registered in the twenty-four-year period, recording an upsurge in the average number of adoptions per year to 17.[1091] Over the next twenty-one years (1986-2006), a total of 333 adoption orders were registered, averaging at 16 adoptions per year.[1092] This shows that the rate of adoptions during the colonial period was significantly lower than after independence, while there was no significant difference between the periods 1962-1985 and 1986-2006. However, registered adoption orders from 1962 to 2006 totalled 739, which over the 45 years signifies an average of 16 adoptions per year. This increase is more than double the average adoptions registered during the colonial period.

The statistics of the current study show a considerable increase in the average number of adoptions per year over the twelve-year period compared to 1944-2006. In the 63 years (1944-2006), a total of 869 adoptions were registered, giving an average of 14 adoptions per year. However, in the twelve years from 2007-2018, 499 adoptions were registered, giving an average of 42 adoptions per year. While the total number of adoptions over the twelve years was more than half of the adoptions registered in the earlier 63 years, the average number of

[1090] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 124.
[1091] *Ibid*., at p. 124-125.
[1092] Rwezaura, Wanitzek, "The Adoption Practice in Tanzania Mainland 1986-2006, Statistical Evaluation recorded by Wanitzek, Ulrike", above footnote 1086. The statistical data was collected and evaluated in a second phase of field research by Professors Rwezaura and Wanitzek after they had published their article "The Law and Practice Relating to the Adoption of Children in Tanzania" in 1988.

children adopted per year has tripled. Although the length of the periods compared to each other differs considerably, this is still a significant change that further discussion in this chapter shall attempt to explain.

The line graph above depicts an interesting trend in the number of adoptions registered and adoption orders issued each year. Both lines depict a similarity in the increase and decrease pattern in the number of adoptions in the twelve respective years. The mandated institutions did not provide official explanations of the resultant pattern during field research. Therefore, the researcher, on the basis of the field research findings, gives possible grounds for the statistical pattern.

First, it is significant that, for a country with over 50 million people and a considerable problem of children without parental care, the registered number of adoptions is generally on the low side. This fact can assist in understanding the analysis of adoption numbers over the years under study. In the years 2007 to 2009, when the Adoption of Children Act 1953 was still applicable, the graph shows a low but steady increase in the number of registered adoptions and adoption orders issued. Such an increase could be an extension of a pattern from earlier years or could be explained by other factors. However, looking at the years 2010-2012, there is a gradual decrease in the adoption numbers. This was after the Law of the Child Act, enacted and assented to in November 2009 and published in the government gazette on 25th December 2009, had come into force on 1st April 2010. Although the change in the statistics is slight, anticipation of a new law could be the reasoning behind it. In 2009, when the Act was enacted, the Register recorded the highest numbers by a difference of tens in the three years from 2007-2009. This could be because the judges and the parties concerned thought it best to conclude pending adoption petitions and register them before the new law became applicable.

The second half of the twelve years under study, from 2013-2018, evidences a general increase in the number of adoptions compared to 2007-2012. Although the increase is not ground-breaking, it is significant. A simple explanation for it could be the passing of several Law of the Child Act Regulations, including regulations for child adoption, foster care placement, and children's homes, in 2012. The guidance provided by the Regulations on child adoption requirements and procedures based on the new law could have improved child adoption practice, hence the increase.

2015 witnessed the highest number of child adoption registration and court orders compared to any other year under study. Such a spike in the numbers could have been caused by the adoption of the Child Protection Regulations in 2014, which provided more guidance on child

adoption practice. However, considering the implementation challenges of these Regulations in conjunction with those passed in 2012, their influence on the 2015 statistics is uncertain. Hence, it seems likely that there was a socio-political rather than a legal reason for the increase in adoption numbers in 2015. During election years in many African countries, including Tanzania, there is a risk of political unrest. Therefore, many people attempt to put their affairs in order in case of such an occurrence. 2015 was an election year in Tanzania.

The year 2016 had the next highest numbers in the twelve-year period, which could also be connected to a political regime change following an election year. A strong decrease in the registered adoptions follows in the years 2017 and 2018. However, by 25th March 2019, the Adopted Children Register had 15 more adoptions whose court orders were issued in 2018 but were registered in 2019. Such an addition brings the number of adoption orders issued in 2018 from 22 to 37, but the number remains low. Field research showed that a rise in socio-economic difficulties coupled with issues relating to governance could be responsible for this decrease. For instance, a respondent attributed the decrease in resident non-Tanzanian adopters to limitation of fundamental rights and freedoms in the economic arena during the fifth phase government regime.[1093] Chart 6-2 below on the background of adopters depicts the decrease between 2015 and 2018.

Nevertheless, it is significant to consider that many factors are at play in adoption practice; hence the socio-political explanation may not be conclusive. For instance, the year 2010 was also an election year, but no increase similar to that of 2015 is recorded during that time, probably due to the different factors at play then. The elections were for a second term for the incumbent president, and the effects of such elections are usually mild compared to when a change in political regime is expected.

Some respondents' comments suggest that there may be a socio-political explanation for the rising number of adoptions in 2015 and 2016, followed by a gradual decrease in 2017 and 2018. An advocate specialising in child adoption practice reported a decrease in resident non-Tanzanians who wanted to adopt children in Tanzania. She attributed the decrease to changes engineered by the new political regime. They included a review of policy and practice relating to residence and work permits for non-citizens based on the new Non-Citizens (Employment Regulation) Act of 2015 and other reforms (such as tax) affecting foreign investors. The respondent shared her adoption practice statistics for 2017 and 2018, which as in the

[1093] Interview with an advocate specialised in child adoption practice and a resident non-Tanzanian adopter, Dar es salaam, on 15.01.2019.

presented statistics, evidenced a considerable drop in the number of resident non-Tanzanians adopting. She said,

> "The foreign clientele has dropped by 70%. There are no more foreigners living in Tanzania! Procuring a work permit is a problem."[1094]

Due to the policy changes, foreign investors and expatriates working in Tanzania had to leave the country and those who remained felt that their positions were challenged.[1095]

6.2.2 Background of Adopters and Adopted Children

The Adopted Children Register contains information on adopters and adopted children, which may assist in determining their background. For this study, the cultural background of the adopters is interesting, the question being to which cultural group do they belong? However, the aim is not to identify a specific cultural group for each adopter, but to establish whether the adopter is a Tanzanian (and thus belongs to the plural cultural background that is Tanzanian) or is a non-Tanzanian (and thus belongs to a foreign cultural background). This means a division into people of any descent (such as African, Arab, Asian, and European, including mixed descent) who are Tanzanians, and people of any descent (such as African, Arab, Asian, European, and mixed descent) who are not Tanzanians. The place of residence of the adopters is also a significant factor which leads to their categorisation as resident Tanzanians, resident non-Tanzanians or non-resident Tanzanians.

The Adopted Children Register records the adopter's name, profession, address, place of residence and the court that issued the adoption order. This information is not sufficient to conclusively ascertain the cultural background of all adopters. Court records available in some cases provide more information that shows the adopters' cultural backgrounds beyond doubt and in more detail. However, as discussed above, court records could not be retrieved for all adoption petitions lodged during the period under study. Therefore, the background information presented here gives only the place of residence and nationality of the adopters, which is only sufficient to show whether they are Tanzanian or not. The findings of the previous study by Rwezaura and Wanitzek provide an example of statistical evaluation based

[1094] Interview with an advocate specialised in child adoption practice and a resident non-Tanzanian adopter, Dar es salaam, on 15.01.2019.

[1095] For further information see, for instance, Katherine Houreld, "Exclusive: Foreign firms hit by tax demands rethink Tanzanian expansion", https://www.reuters.com/article/us-tanzania-economy-idUSKBN13O0HO; and Tom Collins, "Five more years? Business prepares for Magufuli's second term: Have Tanzania's president's controversial business and coronavirus policies helped or hindered the economy?", https://african.business/2020/10/trade-investment/five-more-years-business-prepares-for-magufulis-second-term/.

on adopters' cultural groups.[1096] Their analysis can assist in producing and understanding a similar presentation and discussion in the current study.

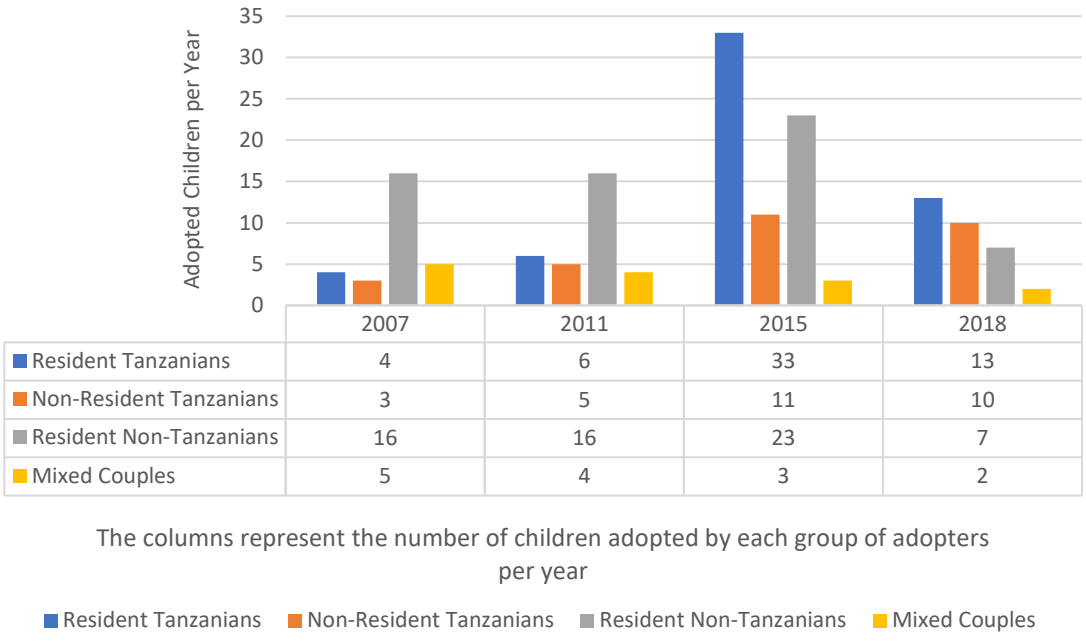
With regard to the adopted children, the Register records their date and place of birth and their gender. This information is relevant because it shows the age and gender preferences of the adopters, and ascertains the place of residence and nationality (albeit inconclusively) of the adopted child. Where possible, the information recorded in the Register was confirmed by looking at the child adoption court rulings and orders submitted during registration.

The charts below present an analysis of the backgrounds of the adopters and the adopted children. The first chart (Chart 6-2) shows the adopters' background in terms of residence and nationality against the number of children they adopted in the years 2007, 2011, 2015 and 2018. Nationality is shown only as Tanzanian or non-Tanzanian, and residence is limited only to resident or non-resident in Tanzania without naming the foreign countries of residence. The numbers represent the total number of children adopted; the same person or couple may have adopted more than one child. Chart 6-2 is followed by Graphic 6-1, which shows common occupations of resident Tanzanian, non-resident Tanzanian and resident non-Tanzanian adopters.

The second (Chart 6-3) and third (Chart 6-4) charts depict the background of adopted children with reference to their gender and age. Chart 6-3 presents distribution by gender of adopted children in the selected four years. And Chart 6-4 shows the age of the children at the time of the adoption order as recorded in the Adopted Children Register. In the four selected years, based on information about the place of birth, the Register records all adopted children as residents and nationals of Tanzania.

[1096] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at pp. 124 and 125. Some additional statistical categorization is made in the unpublished findings of their second phase field research covering years 1986-2006.

Chart 6-2: Background of Adopters Based on Residence/Nationality



For the colonial period, from 1944 to 1961, Rwezaura and Wanitzek report that Europeans formed two-thirds and Asians one-third of the total number of adopters.[1097] The number of African adopters was inconsequential. After independence, from 1962 to 1985, this situation was reversed, with the number of Asian adopters increasing to about two-thirds and Europeans dwindling to one-third. The number of Africans applying for adoption after independence increased but remained at less than 10%.

In their unpublished research findings, Rwezaura and Wanitzek report a considerable change in the number of adopters by cultural group between 1986 and 2006.[1098] They show that the total number of adopters was made up of 38.7% Africans, 27.7% Europeans, 21% Asians and 12.6% mixed couples[1099]. Thus, the number of African adopters increased considerably in the years 1986-2006. However, since the study categorised mixed couples as part of the European cultural group, this remained the dominant group at 40.3% of the total number of adopters.

Unlike this previous study, the current study, covering the period from 2007 to 2018, does not present the number of adopters in terms of cultural group. Instead, it focuses on categorisation according to residence and citizenship. This is because the study specifically focuses on

[1097] *Ibid*., at pp. 124 and 125; see fn. 5 at p. 124 for explanations on the categorisation of the cultural groups.
[1098] Rwezaura, Wanitzek, "The Adoption Practice in Tanzania Mainland 1986-2006, Statistical Evaluation recorded by Wanitzek, Ulrike", above footnote 1086.
[1099] See Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 124, fn. 5. As explained in that footnote, so it is in this study that the term 'mixed couple' refers to a bi-cultural couple mostly consisting of a person of European descent (including Americans) married to a person of African or Asian descent.

adoption by non-resident Tanzanians and resident non-Tanzanians. In the light of this categorisation, the statistics show that on average, 34.8% resident Tanzanians, 18% non-resident Tanzanians, 38.5% resident non-Tanzanians and 8.7% mixed couples adopted children in Tanzania from 2007-2018.

Thus, irrespective of residence in the country or not, Tanzanians account for 52.8% of the total number of adoptions in the studied period. The remaining 47.2% are adoptions by resident non-Tanzanians and mixed couples. The term mixed couples is used to refer to a European or an American married to a spouse of African descent, primarily Tanzanian. In such a union, child adoption is sought mainly by the European or American spouse. Thus, on the one hand, it could be counted as adoption by a resident non-Tanzanian. On the other hand, however, it may be different, especially where the adopted child was born out of wedlock to a male Tanzanian spouse who undertakes the adoption with the consent of his non-Tanzanian wife. In such a case, adoption is used to affiliate a child and make him or her as if biologically born to the mixed couple in lawful marriage. Following this procedure, the said adoption is sought by the Tanzanian rather than by the non-Tanzanian spouse. Nevertheless, there is an international element because the adoptive parents are a mixed couple. Considering both scenarios, adopters with an international element dominate in child adoption practice in Tanzania. They consist of non-resident Tanzanians, resident non-Tanzanians, and mixed couples, and together constitute 65.2% of all registered adoptions in the studied period.

Looking at the adopters' backgrounds helps to understand who in the Tanzanian population is ready to use, and uses, the formal adoption law. The population census of 1967, which was the last to inquire about and record people's ethnic origins, reported that Africans constituted 97.5% of the total population,[1100] while the latest population census of 2012 reported that Tanzanians form 98.5% of the population.[1101] Considering the adoption statistics given above, for instance, from 1944 to 1985, when barely 10% of adopters were Africans, it is clear that the largest percentage of the population was not ready to and did not use the formal law of adoption. From 1986 to 2006 and later from 2007-2018, considerable changes are seen where African adopters form 38.7% and 52.8% of the total number of adopters, respectively.[1102] Such an increase means that there are factors that made Africans, and in this study,

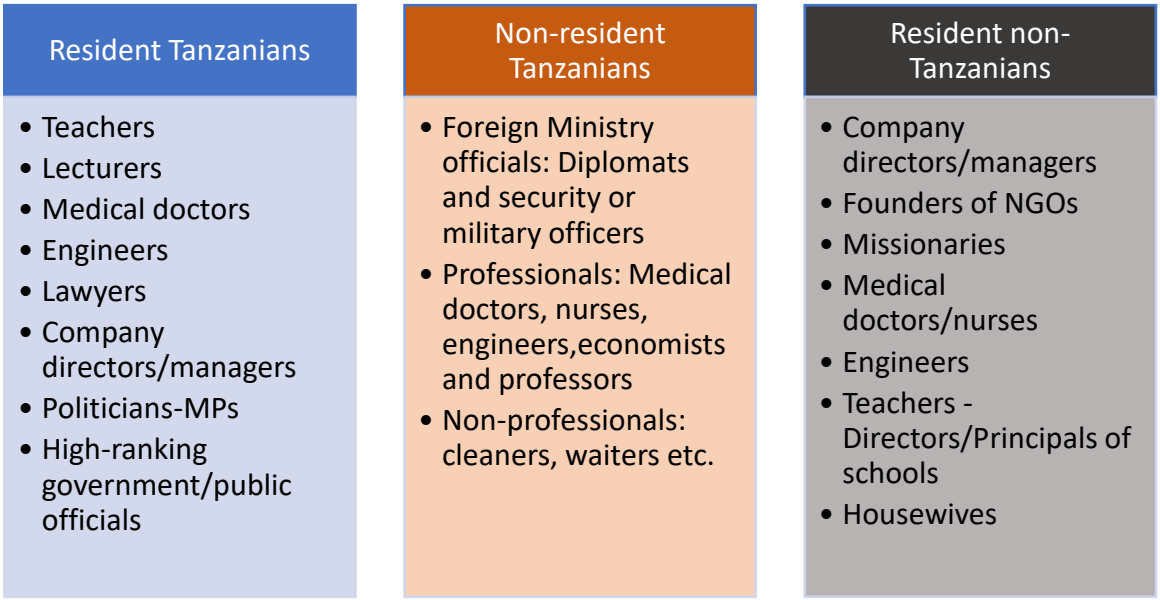
[1100] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 125, see fn. 6.

[1101] National Bureau of Statistics, *United Republic of Tanzania, Basic Demographic and Socio-Economic Profile*: *Key Findings 2012 Population and Housing Census* (Dar es Salaam, 2014) at p. 3 There was a total of 656,223 non-Tanzanians forming 1.5% of the population in Tanzania.

[1102] It is significant to note that 'African adopters' in the previous study may not have been limited to Tanzanian adopters while in the current study it is.

Tanzanians in particular, be ready to use the formal law of adoption. The reasons are elucidated below while discussing motives for adoption.

Graphic 6-1: Adopters' Occupation



The analysis of adopters' occupations generated qualitative rather than quantitative data. This is because it was necessary to understand the adopters' social, economic, and educational status. Therefore, above is a list of the most common occupations among three groups of adopters, namely resident Tanzanians, non-resident Tanzanians and resident non-Tanzanians. Except for housewives and non-professionals, the listed occupations require a certain level of education. Also, they come with an elevated socio-economic status in society. Thus, most adopters came from the elite portion of the population. Wives of resident non-Tanzanians who were described as housewives and who petitioned for adoption with the consent of their husbands are not necessarily women of low social, economic or educational status. They may have been staying at home just because they were yet to get a work permit or a job. Alternatively, they may have chosen to support their husbands' work in a foreign country by staying home to take care of the family.

Chart 6-3: Background of Adopted Children Based on Gender

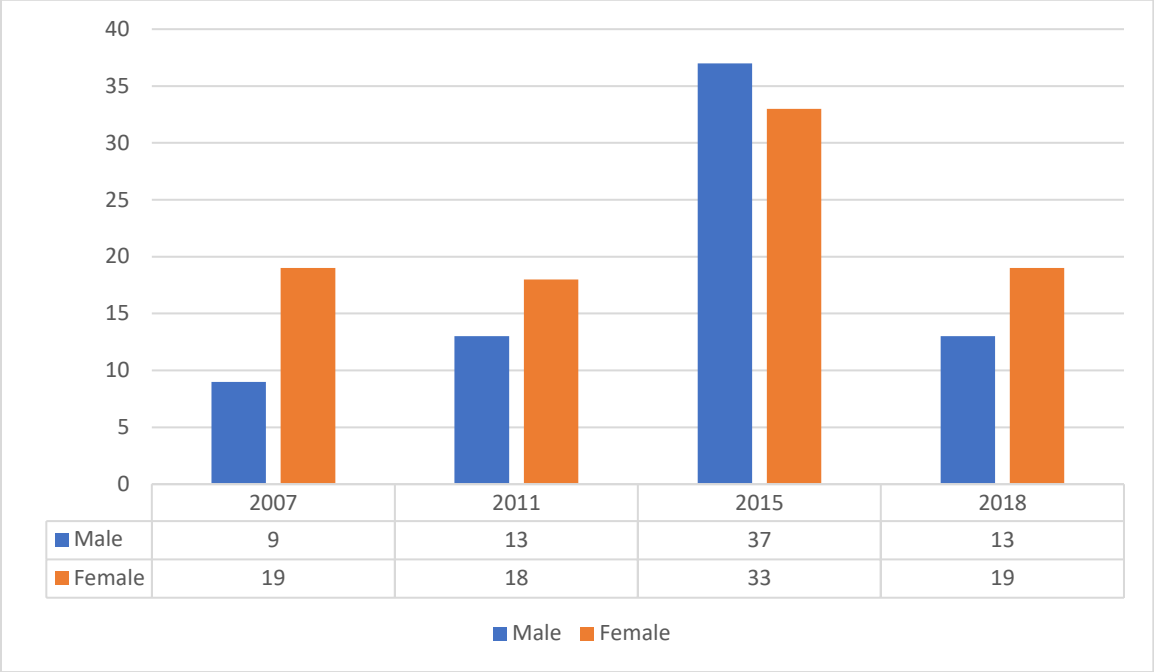


Chart 6-3 above shows that overall more girls than boys were adopted in the four selected years. There was an average of 55.3% adopted girls compared to 44.7% boys. The percentages are derived from the total number of adopted children in the four years presented in the chart, which is 72 boys and 89 girls respectively. Social welfare officers, children's homes managers and advocates specialising in child adoption affirmed in their responses that most resident Tanzanian adopters preferred girls to boys. However, they also pointed out that preferences could not always be met depending on available children suitable for adoption.

Responding to why girls may be preferable over boys, some social welfare officers claimed that it is easier to bring up girls than boys; and, furthermore, that girls tend to take care of their parents in old age while posing no inheritance challenges compared to boys. A family law expert put it in this form "…there is a preference of girls for adoption and a dislike for boys who demand land."[1103]

An advocate specialised in child adoption practice commented that resident non-Tanzanian applicants do not have such a gender preference, as compared to resident Tanzanians.[1104] If a child of the gender they prefer is unavailable, they adopt an available child of the other gender. Nonetheless, according to interviewed social welfare officers, more boys are ultimately left to grow up in children's homes than girls.

[1103] Interview with a professor of law and family law expert, Mbezi Chini, Dar es Salaam, on 15.02.2019.
[1104] Interview with an advocate specialised in child adoption practice and resident non-Tanzanian adoptive parent, Dar es Salaam on 28.02.2018.

Chart 6-4: Background of Adopted Children Based on Age

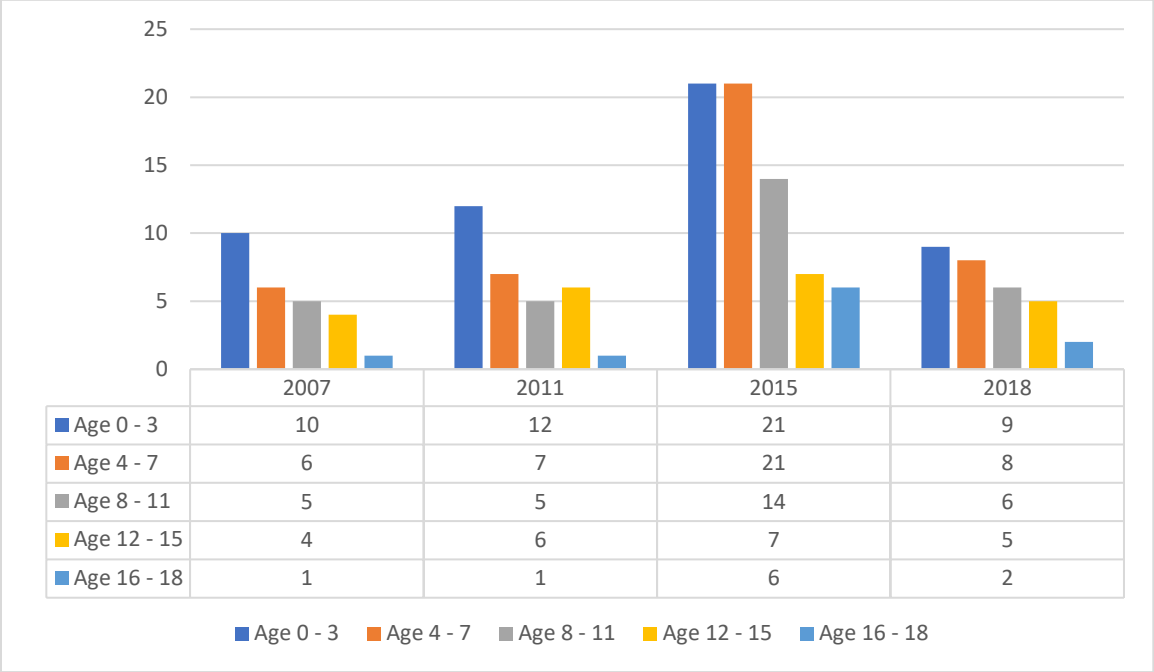


Chart 6-4 shows that children of a tender age, especially 0-3 years, are generally preferred for adoption.[1105] In Dar es Salaam, two children's homes, Msimbazi and Mburahati, which take care of children of this age group only, were more frequented by prospective adopters than other homes. One social welfare officer commented that if a child in this age group is unavailable at the two homes in Dar es Salaam, adoption applicants may be permitted to find a child in the age group from a home in other regions,[1106] for instance, from Forever Angels in Mwanza, where children of the same age group are cared for and may be available for adoption. The age group 4-7 years is the next from which most children are adopted. The two age groups make up about 60.2% of the total number of children adopted in the four selected years.

Respondents confirmed that younger children are preferred because it is easier to instil values in a child during the formative years, and because at that age, the feeling of belonging to an adoptive family can be developed with less difficulty. It becomes increasingly challenging to guide children who are beyond the formative years and make them feel part of the family. The social welfare officers who were interviewed reported that some resident Tanzanian adopters preferred newborn babies because they wanted to pass them off as biologically theirs and not

[1105] The chart presents a total of 156 instead of 161 children adopted in the four selected years because two adoptions were of persons beyond 18 years and three entries had errors in the age of the child.
[1106] Interview with social welfare officer 1-Kinondoni District, Dar es Salaam, on 23.01.2019.

adopted. Two officers relayed stories of adoptive parents who moved to other areas just so no one could find out that their children were adopted.[1107]

While going through some of the child adoption rulings and orders, it became apparent that most older children adopted were either relatives of the adopters or had been in the care of the adopters for many years before applying for adoption. For instance, there were two extreme cases in which persons aged (nearly) 19 and 29 were adopted by their relatives although they were not minors and therefore not adoptable under the Law of the Child Act. The first person was 18 years and 11 months old at the time of the adoption order and was adopted by a relative who was a non-resident Tanzanian. The second was 29 years old when the adoption petition was lodged and at the time of the order. She was adopted in 2018 by a relative who was a resident Tanzanian.[1108]

6.3 Motives for Adoption

The legal effects of an adoption order reflect the legislative rationale of Tanzanian adoption law. Mainly, it is to govern the transfer of parental rights and responsibilities from the birth to the adoptive parents. Although this may be the ultimate goal of adoptive parents, it does not explain their reasons for embarking on the adoption route in the first place. The Law of the Child Act and Regulations made under it pertaining to child adoption do not make it a legal requirement for prospective adopters to state their motivation to adopt. However, considering this study's focus on the categorisation of adopters in Tanzania, understanding the reasons pushing them to utilise the law of adoption becomes most pertinent.

Seventy child adoption court cases were selected as samples to analyse the motives of the adopters. The main criteria for the selection were based on the need to identify adoptions with an international element and the extent of available information on the adoption petitions and orders. The cases were selected from the child adoption orders from 2007 to 2018, collected from the Dar es Salaam and Arusha Registries of the High Court and RITA offices in Dar es Salaam. Fifty of the selected cases are child adoptions with an international element (non-resident Tanzanians, resident non-Tanzanians, and mixed couples), while the remaining 20 are by resident Tanzanians. Studying the motives of resident Tanzanian adopters will shed light on their current increasing readiness to use the law of adoption, and show how their grounds for adoption differ from those of adopters with an international element.

[1107] Interview with social welfare officer 1 and 2-Kinondoni District, Dar es Salaam, on 23.01.2019.

[1108] The District Court of Kinondoni, at Kinondoni, "In the Matter of the Law of the Child Act 2009 and In the Matter of RCM of Kinondoni-Dar es Salaam and In the Matter of Application for an Adoption Order by ECK of Mbezi Beach, Kinondoni-Dar es Salaam", (Misc. Civil Case No. 24 of 2018, Ordered on 25.05.2018).

Ascertaining motives for adoption in the 70 cases has been a challenging feat because of the lack of a binding requirement to state the motive in the adoption application. Even where an attempt to provide the reasons for adoption is made in the petition, there is no guarantee that there are not others that remain unstated. Also, the reasons for adoption are not always clear cut; they could arise from multiple considerations connected with the particular circumstances in the birth and the adoptive families. In the 70 cases considered, the researcher found clearly stated motives in some cases, but in most cases had to deduce them from facts stated in the adoption petitions and rulings.

Peter Selman, in a book chapter entitled "Adoption: A Cure for (Too) Many Ills?", discusses a wide range of reasons for child adoption.[1109] This study, however, focuses on three main categories of motives for adoption found in the 70 selected cases. Based on a structure developed by Rwezaura and Wanitzek, the motives are divided into three categories: child-centred, family-centred and strengthening of filial ties.[1110] The analysis of the cases showed an overlap in almost all cases (66 of 70) as far as child- and family-centred motives were concerned. Only in 4 cases, in which the motive for adoption was a distinct strengthening of filial ties, such an overlap was absent. It was clear that other pulls towards child adoption may go beyond the above three categories in some cases. One such pull is to legalise a parent-child relationship that already existed pre-adoption. This motive was strongly detected in 5 of the cases. Additionally, reasons that are not easily categorisable were apparent in some cases. Some of these reasons are discussed below in part 6.3.5, 'complex motives', with illustrations from relevant cases.

6.3.1 Child-centred Motives

Adoption is child-centred when its paramount consideration is to cater for the adopted child's needs and interests rather than those of the birth or adoptive parents or any other involved parties. In such adoption, the central goal is to provide a substitute stable, caring family for a child who has no family or is in a family that is unable or unwilling to provide proper care. This means that adoptions exclusively meant as a remedy for illegitimacy, childlessness, or lack of a male heir are not necessarily child-centred. However, there may be no clear demarcation between these reasons in most adoption cases. For instance, in the 70 selected adoption cases, about 41 adoptive parents without biological children of their own adopted children who were abandoned, orphaned, or came from dysfunctional families. This means

[1109] Selman Peter, "Adoption: a cure for (too) many ills?", in F. Bowie (ed.), *Cross-cultural approaches to adoption* (London: Routledge, 2004).

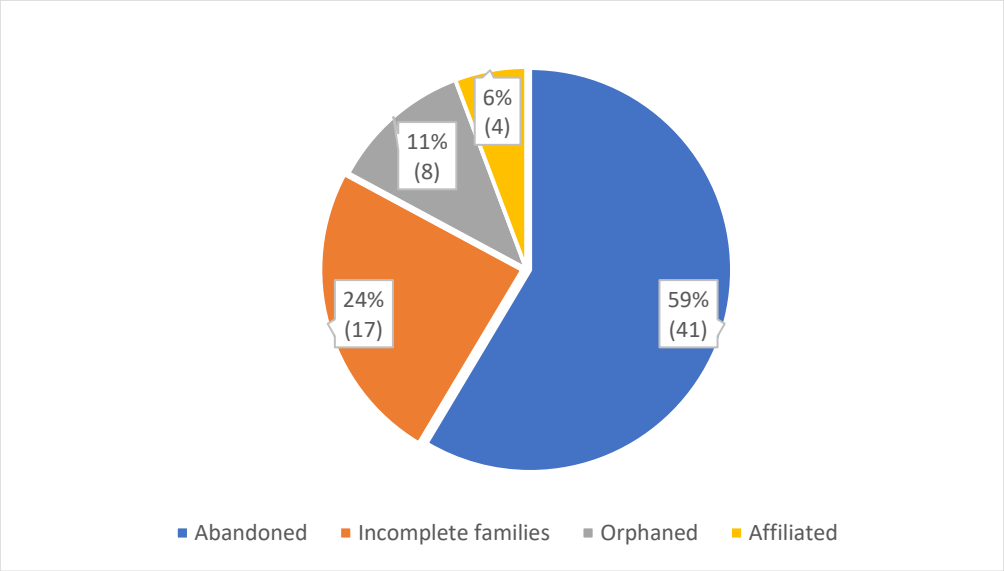
[1110] See Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 135.

that, although childlessness was the primary motive, a home was also given to a child without a stable, caring family.

As shown in Chart 6-5 below, in the 70 cases, 41 children were abandoned and had no known family, while 17 were from incomplete families with single, separated, or divorced parents, or unknown fathers, or had been left with relatives who could not care for them. Eight adopted children were orphaned by one or both parents and had no relatives who could care for them, while the remaining 4 were adopted to strengthen ties with step-parents in their biological parents' new marriages. It is evident from these numbers that the dominant motive underlying adoption in the select cases was to provide care in a family setting for children who lack such care. In the studied cases, there were only 3 children who came from a complete family, living with both of their parents. The main reason to grant such adoptions was the inability of the parents to provide sufficiently for their children. These children account for only 4.3% of the 70 adopted children. This means increased challenges to family and social life in Tanzania, leading particularly to children being abandoned, accounted for the largest percentage of children adopted.

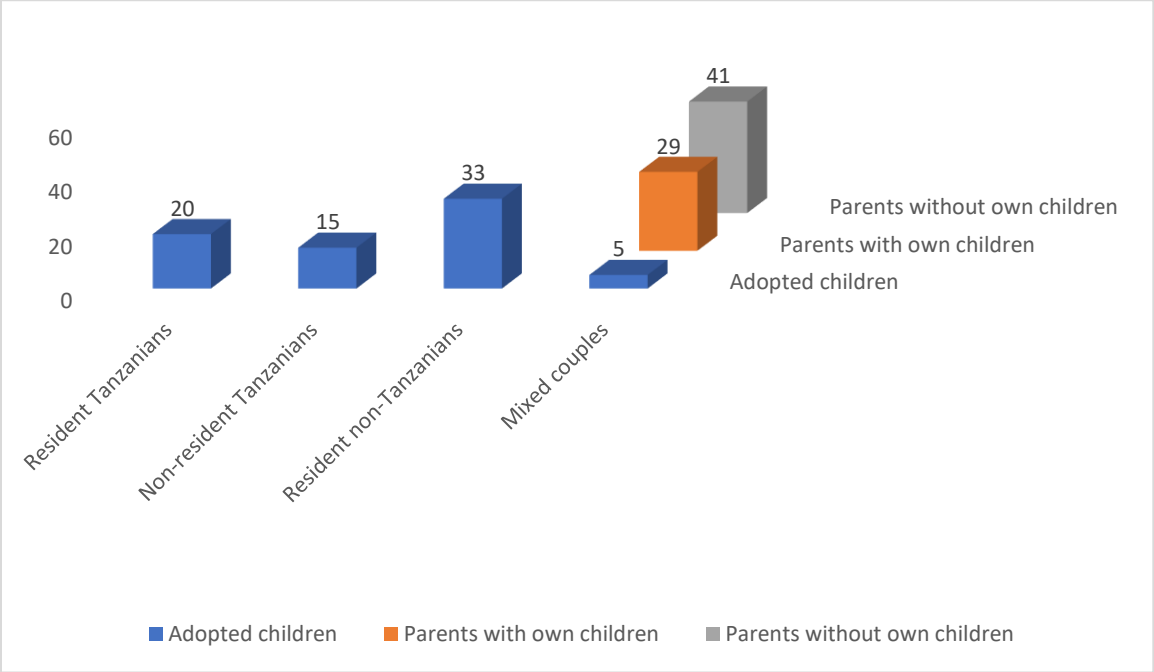
The study found that from the 70 adopted children, 66 were adopted for child-centred motives. Nevertheless, in the 66 cases, there are overlaps with other motives, some readily discernable and others too complex to decipher clearly. Overlapping family-centred motives were detected in 26 cases. In 5 cases, there was a compelling need to formalise an already existing social parent-child relationship in order to better cater to the child's needs and interests. This leaves 35 out of the 66 cases in which the child's interests may be the sole motive, although this cannot be confirmed beyond doubt since others hint at reasons that are not easily categorisable.

Chart 6-5: Categories of Adopted Children



As shown in Chart 6-6 below, in 29 out of the 70 cases, the adoptive parents had biological children of their own. Child-centred motives could be stronger in these 29 cases than in the remaining 41 cases in which the adoptive parents were childless. However, this cannot be conclusively said because usually there are other motives involved. For instance, considering the data in Chart 6-5 above, which shows that 59% of the children had been abandoned, the adoptive parents, regardless of whether with or without their own biological children, adopted them to provide a caring family, among other things. Of the 8 orphaned children constituting 11% of the 70 cases, 5 children were adopted by parents with biological children of their own while 3 were adopted by parents without children of their own. Also, in the 24% of children adopted from incomplete families (17 children), 5 were adopted by parents without biological children of their own, while the remaining 12 parents had their own children. This means that 17 out of the 29 parents with their own biological children adopted children who were orphaned or from incomplete families. This may or may not support the contention that their motives were strongly child-centred. The remaining 6% of adopted children are the 4 adopted jointly by a biological parent and a spouse to strengthen filial ties in a subsequent marriage. This accounts for 21 out of 29 parents with their own biological children, leaving 8 parents who adopted abandoned children. If it were clearly stated in the records that these 8 parents adopted the children not to sustain their own needs, such as finding a male heir, the study could confidently declare their adoptions to have been strongly child-centred. Unfortunately, this cannot be confirmed beyond any doubt.

Chart 6-6: Categories of Adoptive Parents



The motives of parents adopting children who were orphaned or from incomplete families were further analysed to evaluate the strength of their child-centredness. Among the 8 orphaned children, 3 were adopted by their relatives. Only one couple, who adopted 2 of the 3 children, had no biological children of their own. The couple, a non-resident Tanzanian husband who was the children's uncle and his non-Tanzanian wife, were named responsible for the children in a clan meeting according to local customary law.[1111] However, they adopted the children because they were resident in Ireland and spent more time there than in Tanzania. They had sought formal adoption in order to fulfil the immigration requirements of the foreign state and let the children benefit as would their own biological children in the event they move them to Ireland.

The researcher also considered the 17 children adopted from incomplete families and found that 14 out of the 17 were adopted by relatives. Among the 14 adopting relatives, 3 had no biological children of their own. Apart from providing better care for the children, these adoptive parents also wanted to have a child to care for as their own, hence a family-centred motive. In the other 11 cases, the relatives were already indirectly caring for the children before adopting them. They met the children's basic needs such as food, clothing, health, and education while the children stayed with a single parent, a grandparent or another relative.

[1111] High Court of the United Republic of Tanzania, In the District Registry of Arusha, At Arusha, "In the Matter of the Law of the Child Act, 2009 and In the Matter of MERM and CERM of Olasiti, Arusha and In the Matter of the Application for an Adoption Order by JRMS and DDD" (Misc. Civil Cause No. 19 of 2018, ordered on 14.03.2019).

They could already care for the children without resorting to formal adoption, so why did they do it? Eight out of the 11 adoptive parents were Tanzanians resident abroad or about to emigrate abroad. It was evident that, apart from desiring to provide better care and prospects for their relatives' children abroad, they were compelled to use the formal law of adoption in order to fulfil the immigration requirements of the host foreign countries. This was an additional reason that overlapped with child-centred motives.

In the remaining 3 cases, the adopters were relatives with their own children and resident in Tanzania. They also had other motives for resorting to adoption, which largely remained unexpressed. For instance, in one of the cases, a maternal grandmother applied to adopt her one-year-old granddaughter with the mother's consent, who also lived with the grandmother and her child.[1112] The mother was not married to the child's father, who was declared to have gone AWOL. The grandmother had been taking care of her granddaughter for the past one year; thus, the question arises of why she should seek to adopt the child. Since the grandfather consented to the adoption, providing two stable parents for the child could be the motive for adoption. However, another possible motive is to erase the daughter's shame of having a child out of wedlock and at her parents' home. Also, it cannot be ruled out that the grandmother needed to be a legal parent to enable the child's entitlement to some benefits such as health insurance.[1113]

To sum up, in Tanzania, child-centred motives for adoption are not restricted to the provision of an alternative family to a child who lacks one or whose parents or relatives are unable or unwilling to care for him or her. There are other underlying motives, such as compliance with the laws of other nations or organisations. The circumstances that compel people to use the formal law of adoption may, at times, compromise the intended legal effects of child adoption. The permanent change in familial relations may not be a practical reality in some cases. The scenario of the grandmother adopting her granddaughter while living with the mother of the child in the same household is a good example.

6.3.2 Family-centred Motives

The history of child adoption and its motives has passed through several phases. One motive, reflected in the adoption laws of the Western world, was adoption to serve the interests of the

[1112] High Court of the United Republic of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of GSG-the Infant and In the Matter of Petition for Adoption Order by DHN" (Misc. Civil Application No. 90 of 2011).

[1113] Interviews with social welfare officers provided accounts of adoption applicants whose motive for adoption was to become legal parents to relatives' children only to fulfil the requirements of health insurance organisations.

adoptive family.[1114] This is known as family-centred adoption: adoption whose primary goal is to cure an ill in the adoptive family.[1115] The problem could be childlessness or lack of a male heir. Due to changes in social awareness and attitudes towards children, propagated by, among other things, the recognition of children as subjects of rights rather than objects of care, child adoption has become increasingly child-centred rather than family-centred across the globe. However, it does not mean family-centred adoptions are not practised anymore. On the contrary, adoptions for the purpose of creating families for involuntarily childless couples still occur in most countries globally. The good thing is that the adopted child in family-centred adoptions benefits rather than suffers from the adoption. In cases where voluntarily childless couples seek to adopt children, this is usually with the intention of providing a family for children who are in need.

In 41 of the 70 selected cases, the adoptive parents had no biological children of their own. It is nevertheless only distinctly stated in 26 cases that adoption was sought to cure childlessness. About 4 adoptive parents out of the remaining 15 cases stated that they were voluntarily childless, and it was their life mission to adopt orphaned or abandoned children instead of having biological children of their own. Among these 4 adoptive parents, one adopted 5 children from Tanzania, accounting for 8 cases among the 15.[1116] In the remaining 7 cases, there was no clear statement of motives, and the researcher could not, without doubt, presume them to be family-centred adoptions. In these 7 cases, 4 adoptive parents were married while 3 were not. The duration of marriage of the married adoptive parents could unfortunately not be ascertained as such information was not available in the rulings. Duration of marriage where a couple remains childless helps determine their motive for adoption, especially in Tanzania, where couples seek to bear children within the first 5 years of marriage.[1117] Of the 3 single adoptive parents, one was a Tanzanian uncle resident abroad, and two were resident Tanzanian women, one of African and the other of Indian descent whose primary interest seemed to be to offer a better life to their relatives' children, since they were still within the productive age.

[1114] Keating provides a detailed account of historical and legal developments relating to child adoption in England in her book, Keating, *A child for keeps*, above footnote 306.

[1115] Interestingly, Selman refers to it as adoption for the best interests of the parents in Selman Peter, "Adoption: a cure for (too) many ills?", above footnote 1109, at p. 260.

[1116] Interview with a non-Tanzanian adopter and founder of a children's home in Mwanza, currently living in the UK, interview through email, submitted on 16.02.2019.

[1117] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, argue the same at p. 136.

Childlessness has gradually become a strong motive for adoption among Tanzanian couples.[1118] Out of the 41 cases of parents without biological children, 18 were Tanzanians, while 23 were non-Tanzanians and mixed couples. However, fewer Tanzanians, resident and non-resident, declared their childlessness as a motive for adopting compared to the two other groups. Tanzanian parents who adopted their relatives' children to satisfy their need of having children were only 3. Others adopted orphaned or abandoned children. The main reason against Tanzanians adopting their relatives' children as a cure for childlessness is the limited applicability of the permanent change of child-parent relations in their circumstances. The birth parents or extended family would probably still regard the adopted child as belonging to the birth parents. Most significantly, the child might still regard the adoptive parent as an aunt, uncle, sister, brother, or grandparent. Also, the need for secrecy is a factor where a couple without a child of their own would like the community to regard the adopted child as biological rather than adopted. A relative's child would not fit this bill.

In a nutshell, all family-centred adoptions among the 70 studied adoptions were also child-centred. This is because most of the adopted children were abandoned or orphaned; hence adoption provided them with a substitute family. Among the children with incomplete families who were adopted for family-centred motives, the adoptive parents wanted to provide them with better standards of life, and these cases were thus also child-centred. As indicated in the discussion on child-centred adoptions, other motives were also present in the family-centred adoptions.

6.3.3 Adopting to Strengthen Filial Ties

Filiation or filiality can be understood as the state of being a son or a daughter.[1119] In some instances, existing legal or social filial ties may require strengthening. Child adoption can be used as one of the means to strengthen filial ties. This may happen where an applicant or one of the applicants is the biological parent of the child. In this case, the child may be an issue of one spouse's previous marriage or an extra-marital affair. It is also possible for a single applicant to adopt his or her illegitimate child. If married, the applicant must get the consent of the step-parent. A couple may adopt their pre-marital child as well if they so wish. However, section 34 of the Law of the Child Act makes recourse to adoption unnecessary for

[1118] *Ibid*., at p. 137. This is a departure from the earlier trend where Africans did not generally view adoption as a solution to childlessness.

[1119] Bryan A. Garner (editor-in-chief), *Black's Law Dictionary*, Deluxe 9th ed. (St. Paul, MN: West Publishing Co., 2009), at p. 704.

a parent whose only motive is to legitimise the child. The parent may apply to the court to confirm the parentage of the child.[1120]

The common law principle making an illegitimate child *filius nullius* (child of nobody)[1121] is the basis for requiring the strengthening of filial ties. The principle's legal effect is to estrange an illegitimate child even from his/her biological parents and extended family. For instance, an illegitimate child could not inherit from the estate of a parent or relative who died intestate or did not specifically mention him or her in their will. Since Tanzanian law borrows from English common law, the effects of the principle also affected illegitimate children in the country. For a long time, despite the Affiliation Act, the legitimation of children was governed by rules of Islamic or customary law. This is because the Act focused on issues of custody and maintenance instead of legitimation.[1122] However, the Law of the Child Act covers this gap through provisions on parentage under Part V. In child-step-parent relations, however, child adoption remains the viable route to create a legal child-parent bond.

Among the 70 selected cases, 4 were dedicated to strengthening filial ties. All 4 cases involved a step-parent applying to adopt a child of their spouse. They involved two resident mixed couples, a non-resident Tanzanian and non-Tanzanian couple, and a resident Tanzanian couple. Among the four principal applicants, three were male, and one was female. In two cases, stepfathers petitioned for adoption jointly with their wives, who were the children's birth mothers. In one case, a stepfather applied alone with the consent of the child's mother (whom he was cohabiting with but not yet married). And in the last case, a resident non-Tanzanian wife jointly applied with her Tanzanian husband to adopt his extra-marital child born during the subsistence of their marriage. Apart from the latter, in the other three cases, the adopted children resulted from the mothers' prior relationships before their subsequent marriages.

There were no cases of unmarried parents seeking to adopt their illegitimate children. The only exception is in the case mentioned above, where adoption was granted to a resident non-Tanzanian male who is part of a mixed couple cohabiting without any proof of marriage.[1123] In all four cases, the adoptive parents cared for the children for some time before they decided to adopt them. In two cases, the children were adopted within the first five years of marriage.

[1120] Law of the Child Act, 2009, under section 160, repeals and replaces the Affiliation Act which harboured cumbersome procedures for legitimising a child that made adoption seem a more practical route to take.
[1121] Garner, *Black's Law Dictionary*, Deluxe 9th ed., above footnote 1119, at p. 705.
[1122] See The Affiliation Act, 1949 [Cap 278 R.E. 2002].
[1123] High Court of the United Republic of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, "In the Matter of Application for Adoption of TGB, a Male Child and In the Matter of Application for Adoption of TGB by RB" (Misc. Civil Cause No. 61 of 2011, Ordered on 04.10.2012).

In the remaining two cases, the duration of marriage was immaterial or inapplicable. The child resulting from an extra-marital alliance during the subsistence of marriage was adopted within two years of being born, while in the other case, adoption was sought after four years of cohabitation.

Although these adoptions are meant to strengthen family relations between the child and a step-parent and possibly siblings of the subsequent marriage, there usually are other underlying reasons compelling parents to resort to adoption. The need to expunge the child's illegitimate status, exclude the other natural parent from sharing parental rights and responsibilities, or seek to meet requirements imposed by states or organisations may be other common reasons. For instance, in the four studied cases, there was a need to adopt to meet immigration law requirements in the case of travel abroad for the mixed couples and the non-resident Tanzanian and non-Tanzanian couple. In the case where the child was a result of extra-marital relations, alienating the birth mother's parental rights to preserve the marriage may have been one of the driving motives for adoption. In the case of the resident Tanzanians, there may have been a need to entitle the child to the adopting stepfather's estate because he was already 70 years old at the time of the application.[1124] In short, there are usually other pushing factors to adoption than what meets the eye, and they are not always discernable.

6.3.4 Legalisation of *de facto* Parent-Child Relations

De facto is a Latin term that means existing in fact but not in a formal or legal sense.[1125] Some parent-child relations may exist socially but are not formally or legally recognised. Child adoption may be used to legalise such relationships. Multiple factors may necessitate such formalisation, based on circumstances within or outside the family. All in all, the formalisation of *de facto* parent-child relations is not on its own a category of motives for adoption, but it helps when trying to understand why some parents decide to use the formal law of adoption.

In the 70 selected cases, a considerable number of adoptions concerned children who had already been cared for by the adoptive parents for quite some time. However, not in all cases had the parent-child status developed. This was strong in 5 cases where one could say there was an existing informal (*de facto*) adoption. In these cases, the adoptive parents lived with and took care of the children for periods ranging from 5 to 15 years before applying for formal adoption. The common reason for adoption in these 5 cases was the need to meet the

[1124] Resident Magistrate Court in Dar es Salaam, at Kisutu, "In the Matter of Application for Adoption under the Law of the Child Act, 2009 and In the Matter of IGM of Dar es Salaam between GFM and AML", (Misc. Civil Application Case No. 124 of 2018, ordered on 21.03.2019).

[1125] Garner, *Black's Law Dictionary*, Deluxe 9th ed., above footnote 1119, at p. 479.

immigration requirements of foreign countries when travelling abroad. All five cases involved uncles and aunts adopting children of their relatives whom they took care of within Tanzania. Adoption was done due to the emergent need to travel abroad, for instance for a new job. In one of the cases, the adoptive parents, who were a mixed couple, had cared for the children after the death of their birth parents. The care arrangements fulfilled their obligations under customary law; however, they had to formalise the *de facto* adoption to enable them to travel abroad, among other things.[1126]

Many other reasons could push a *de facto* parent to adopt a child. These may relate to entitlement to benefits such as health insurance, inheriting the parent's estate, or adopting a child just before he or she attains the age of majority. In one case, which was clearly intended to legalise a *de facto* adoption, the court granted an adoption order for a 29-year-old woman who had been under the care of the adoptive parent for most of her life.[1127] This case is not counted among the 5 because, although the court used the Law of the Child Act as the enabling law, the adopted person was not a child. Other motives compelling the adoptive parent to adopt an adult and the court to sanction it were not stated in the ruling.[1128] Again, motives for adoption are not always clearly determinable.

6.3.5 Complex Motives

Some motives for adoption are not easily categorisable. There were some motives among the 70 studied cases that did not fall under any of the categories above. It could not be determined without a doubt whether the adoption served the interests of the adopted child, the interests of the adoptive parents, or the interests of the birth parents or family. It has already been shown that it is not always possible to understand reasons for adoption. In some cases, the motives are understandable, but their categorisation is complicated. These motives are referred to here as complex.

A sample of 10 cases was further studied to give an example of complex motives. While this part will not cover all 10 cases, some will be used to represent sets of similar motives that proved difficult to categorise. These motives include adopting a child because the birth

[1126] High Court of the United Republic of Tanzania, In the District Registry of Arusha, At Arusha, "In the Matter of the Law of the Child Act, 2009 and In the Matter of MERM and CERM of Olasiti, Arusha and In the Matter of the Application for an Adoption Order by JRMS and DDD", Misc. Civil Cause No. 19 of 2018, Ordered on 14.03.2019.

[1127] The District Court of Kinondoni, at Kinondoni, "In the Matter of the Law of the Child Act 2009 and In the Matter of RCM of Kinondoni-Dar es Salaam and In the Matter of Application for an Adoption Order by ECK of Mbezi Beach, Kinondoni-Dar es Salaam", Misc. Civil Case No. 24 of 2018, Ordered on 25.05.2018.

[1128] For an example of reasons for adult adoption, see High Court of the United Republic of Tanzania (Dar es Salaam District Registry), At Dar es Salaam, "Matayo K. Kihwelo vs. Gabriele Brandolini", Misc. Civil Cause No. 452 of 2020, Ordered on 01.12.2020.

mother has remarried, adopting a child from a complete family to assist financially while such support was already being given, and adopting for religious reasons.

Adoption because the birth mother has remarried: In one of the cases, a maternal uncle and his wife adopted their teenage niece because her mother had remarried. The new husband was not willing to take care of his stepdaughter. Since the death of the birth father six years before the remarriage, the mother had taken care of her daughter without any assistance from the paternal side. She said that after remarriage, living with her daughter caused misunderstandings in her marriage. Therefore, from the year she was remarried, she let her brother and sister-in-law take care of her daughter. After four years of living with her, the uncle and his wife applied for child adoption. They had no child of their own, and at the time of the application, the uncle was resident in the USA for studies. Thus, there are other motives at play here. Nonetheless, when granting the adoption, the judge said that it was to safeguard the welfare of the child, the birth mother, and her marriage.[1129] In this case, is the motive for adoption child-centred, family-centred or both? One can argue that both categories apply. However, it is the opinion of the researcher that the adoption order was granted out of consideration for the birth mother and her marriage rather than for the child's best interests. Issues such as continuity in the child's upbringing or effects of an adoption order on parental rights were not considered or discussed in the ruling. Although referring to a different scenario, Selman, in his chapter, introduces child adoption as a cure for birth mothers' ills.[1130] Probably the motive for adoption, in this case, could be categorised as birth mother centred.

Adoption for financial support: In a group of 'open adoption' cases, non-resident Tanzanians adopted their relatives' children to continue to support their upkeep. This means providing for food, clothes, shelter, medical care, and education. Three similar cases can serve as examples in this sub-category. The cases concern three girls, one 15 years old[1131], another 13 years old[1132] , and the last one 4 years old[1133]. The main reason stated for adoption in these cases is to provide care for the adopted children because their parents cannot afford to do so. The non-

[1129] High Court of Tanzania, At Dar es Salaam, "In the Matter of LKIM, a Child of Usa River, Arusha and In the Matter of Application for Adoption by RET and JEY of Usa River, Arusha" (Misc. Civil Application No. 103 of 2009, Ordered on 30.03.2010).

[1130] Selman Peter, "Adoption: a cure for (too) many ills?", above footnote 1109, at p. 261.

[1131] District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of the Law of the Child EMJS and In the Matter of Application for an Adoption Order by RMM and PVM" (Misc. Civil Case No. 134 of 2018, Ordered on 19.07.2018).

[1132] District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of the Child RJM of Mbezi Beach, Dar es Salaam and In the Matter of an Application for an Open Adoption by CFK and IMK of London, UK" (Misc. Civil Case No. 165 of 2008, Ordered on 24.08.2018).

[1133] District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of DWDM and In the Matter of an Application for an Adoption Order by GAK and HK of Jersey, USA" (Misc. Civil Case No. 143 of 2018, Ordered on 24.07.2018).

resident relatives say that they were already giving the parents financial assistance. Since the parents were alive and well and were already receiving assistance, this motive for adoption seems questionable.[1134] Evidently, the adopters chose to adopt in order to enable the children to travel to the country where they resided. Being able to travel abroad is important because what the adoptive parents are seeking to achieve is a better life for their relatives' children. In such cases, the motive is difficult to categorise because it is difficult to establish whether it is in the children's best interest to separate them from their birth parents for the chance of 'a better life' abroad. Since one cannot guarantee that they will have a 'better life', the adoption is not conclusively child-centred.

Adoption pursuant to religious beliefs: Some adoptive parents cited their religious beliefs as the motive for adoption in several cases. This was more common among adoption petitions from foreign missionaries working in different parts of Tanzania. In one adoption petition heard in Moshi, a Christian American missionary couple stated that according to their religious convictions, they had decided not to have biological children of their own but to adopt orphans.[1135] However, not only Christians claim religious beliefs as a motive for adoption. In one adoption case ordered in Dar es Salaam, a Muslim couple with four children of their own adopted a three-year-old abandoned girl stating their religious belief as the only reason for adoption.[1136] Although the Judge, in this case, did not raise any objection, the researcher knows that child adoption is not in compliance with the Islamic faith, where only *kafala* is recognised. Since the Law of the Child Act, 2009 does not provide for *kafala*, Muslims in Tanzania Mainland can adopt children, though the same cannot happen in Tanzania Zanzibar.[1137]

It was interesting to observe that not only adoptive parents were moved by their religious beliefs, but also judges/magistrates in their reasons for granting adoptions. In one case, a judge, while granting an adoption to a resident non-Tanzanian couple, said,

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[1134] In a case decided in Moshi: Resident Magistrate Court of Moshi, At Moshi, "AAM, Petitioner vs. JAM and IAM, Infants" (Adoption Case No. 02 of 2017, Ordered on 02.03.2017), a similar conclusion can be reached as a resident Tanzanian woman adopted two of her younger siblings, a brother of 16 years and a sister of 15 years, despite having both parents alive and well, and despite the fact that they were already receiving financial support from their sister. Terming the adoption child-centred, as the Magistrate did, may not fit the true meaning of the category.

[1135] High Court of Tanzania, At Moshi, "In the Matter of the Adoption of Children Act, Cap 335 and In the Matter of BSM, Infant and In the Matter of an application for an Adoption Order by DLH and MWH, Petitioner" (Misc. Civil Application No. 10 of 2010).

[1136] High Court of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of Application for Adoption of AM, infant and In the Matter of an Application for an Adoption Order by MOM and AM of Kinondoni, Dar es Salaam" (Misc. Civil Application No. 583 of 2018, Ordered on 08.11.2018).

[1137] Zanzibar's Children's Act, 2011, under section 76.

> "I wish to take this opportunity to express my thanks to the petitioners who have offered to adopt this infant. May the Almighty God pour a lot of blessings on them for being good hearted. First of all, this infant is an orphan…he was just abandoned in the church premises by one of his relatives who was not in a position to take care for him. Thereafter, he was taken to the orphanage where the petitioners who are good Samaritans volunteered to care for him. That is great of them." [1138]

Religion, therefore, is a motivation for adoption. However, it does not fit the other categories of motives discussed above, and is hence included under complex motives.

During field research in Tanzania, several social welfare officers explained other motives for child adoption that were difficult to categorise. These motives were primarily beneficial to the adoptive parents rather than the children. Here, the study mentions only two dominant motives among those advanced. A motive common to both resident non-Tanzanian and non-resident Tanzanian adopters was adopting in order to receive child benefits in the country of origin or the country of residence. In some Western countries, the state provides child benefits for residents. For instance, in Germany, the state provides *'kindergeld'* monthly to every lawfully resident parent. The more the children, the higher the amount. The social welfare officers named a second motive that applies mainly to non-resident Tanzanians: adopting a relative's child in order to have household help abroad. The officers said that in their life abroad these adopters miss the support which they are used to finding within the extended family at home, and try to replace it by adopting their relatives' children. "There are no housegirls in Europe; these non-resident Tanzanian adopters sometimes seek to adopt their relatives' children to obtain house help", said one social welfare officer.[1139] The study could not confirm these motives in the court records because they are very personal, and no adopter would ever state them. Also, they are neither child- nor family-centred and do not fit the profiles of the other motives discussed above, hence they are referred to here as complex.

6.4 Adherence to and Sufficiency of Child Adoption Requirements and Procedures

The legal requirements and procedures for child adoption in Tanzania, and their strengths and weaknesses, have been discussed in the earlier chapters. This part looks at how the authorities mandated to oversee child adoption interpret and apply them in practice, and how street-level bureaucrats navigate areas with unclear legal regulation. In addition, the sufficiency of the legal requirements and procedures to accomplish the envisaged effective child adoption practice is discussed. The headings under which practice is examined have been chosen to

[1138] High Court of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, "In the Matter of the Adoption of Children Act, Cap 335 and In the Matter of CPO, Infant and In the Matter of an Application for an Adoption Order by KLT and SECT" (Misc. Civil Cause No. 131 of 2009, Ordered on 02.02.2010).

[1139] Interview with social welfare officer, Bunju Ward, Kinondoni District, Dar es Salaam, on 16.01.2019.

expose the most crucial matters in the discussion. Issues of legal pluralism and their effects are addressed where applicable under the sub-parts. Child protection issues in adoption are also described and discussed under each heading.

6.4.1 Identifying a Child for Adoption

> "…they are simply 'chosen' by the family (who come to the Baby Home and actually select the child they like best!)."[1140]

Admittedly, the process of identifying a child for adoption raised several issues among persons responding to questions posed by the researcher. The legal position of a child suitable for foster care pending adoption may contribute to the issues. Because, in all types of adoptions, the Law of the Child Act requires a prospective adoptee to be in the continuous care of the adopter for a period of not less than three or six months before petitioning for adoption, the process of identifying a child to be fostered prior to adoption is regulated by the Foster Care Placement Regulations, 2012. The children, for the most part, are to be found in residential children's homes or institutions.[1141] The Adoption of Children Regulations, 2012, therefore, have no provisions on child identification. However, since there is no distinction under the Foster Care Placement Regulations between children to be fostered pending adoption and children to remain in foster care, a problem arises. This is because not all children suitable for foster care are necessarily suitable for adoption as well.

The Child Protection Regulations, 2014 attempt to remedy this situation. They provide that children suitable for adoption are those whom the Juvenile Court has declared free for adoption during care order proceedings where the care plan is for adoption.[1142] However, since the Child Protection Regulations came two years after the Foster Care Placement Regulations, what they provide is not always reflected in practice. The established practice is to select children to foster for purposes of adoption from children's homes or institutions irrespective of whether they have been declared free for adoption or not. Two Magistrates of the Juvenile Court at Kisutu, Dar es Salaam, who were interviewed during field research, asserted that not all children placed in homes or institutions are subjects of supervision or care

[1140] Interview with a non-Tanzanian adoptive parent and founder of a children's home in Tanzania, currently living in the UK; interview response submitted online on 16.02.2019. The adoptive parent of five Tanzanian children and an active non-state actor in the field of child adoption in Tanzania, said the quoted words while responding to a question relating to determination of the best interests of the child.

[1141] Regulation 8(1) of the Foster Care Placement Regulations, 2012 read together with sections 32(1) and 53 (1) and (7) of the Law of the Child Act, 2009.

[1142] Sections 49 and 50 of the Child Protection Regulations,2014 read together with section 99 of the Law of the Child (Juvenile Court Procedure) Rules.

orders.[1143] Social welfare officers place a considerable number of children in homes or institutions as an emergency response pending further action, but they generally remain there for longer than the anticipated period. Ultimately, the children may be declared abandoned without known parents or relatives and so they remain in the homes or institutions without any court process. Also, any person may place a child in a home or institution. In such an occurrence, the law requires the home or institution to notify the social welfare office responsible. Unfortunately, in all district social welfare offices visited during field research, the officers said that usually, the managers or patrons of the homes or institutions neglect this duty. As a result, children identified for fostering pending adoption from the homes or institutions may not always be suitable for adoption in the sense of the Child Protection Regulations, 2014.

The freedom of prospective adopters to select children for adoption from children's homes or institutions is another issue. This is because, once the Commissioner for Social Welfare approves an application to foster a child pending child adoption, he or she also allows the applicant(s) to visit a children's home or institution to identify a child. Ordinarily, the Commissioner's approval letter specifies a home or institution on the basis of the characteristics of the prospective adoptee specified by the applicant.[1144] Unfortunately, the law and the letter of approval set no guiding rules for the identification process.[1145] Thus, prospective adopters are free to assess all the children in the home or institution available for adoption and choose the one they are most pleased with. And if none of the children seems to satisfy the needs of the prospective adopters, they are, subject to permission from the social welfare office responsible for their application, free to search for a child in another home or institution. A social welfare officer at Kinondoni District, while describing the process, said,

> "When the Commissioner approves the application, he writes to the council director allowing the applicant to go identify a child in a children's home. He also copies the letter to the manager of the home, the social welfare officer in charge and the applicant. When the applicant cannot identify a child from the home designated by the Commissioner, the officer in charge requests the Commissioner to allow the applicant to identify a child from

[1143] Interview with Resident Magistrates 1 and 2, Juvenile Court at Kisutu, Dar es Salaam, on 19.02.2018 and 21.02.2019, respectively.

[1144] During field research the researcher found that children's homes are specified according to the category of children they receive. This categorisation may be in terms of age, gender, religion and status of the child with regard to having surviving parents, relatives or guardians. Thus, a prospective adopter in search of a child aged between 0 and 3 years would be directed to a home caring for such young children.

[1145] The researcher analysed the contents of the approval letters found during the perusal of child adoption files at the High Court of Tanzania in Dar es Salaam and Arusha.

> other children's homes. Since most applicants want small babies, they could even be allowed to go to other regions."[1146]

Some respondents described the process with the words 'as if selecting common commodities in the market'.[1147] This freedom is against the tenets of child-centred adoption.

Apart from the above challenges, the identification process presents other problems. One such problem is the lack of a rigorous child-parent matching process based on a needs assessment of an adoptable child and the prospective adopter's ability to meet these needs. The social investigation procedure provides for the assessment of prospective adopters with regard to a child already specified or identified. However, in practice, if a child in a home has no known parents or relatives, he or she is available for adoption. Once the prospective adopter chooses such a child, it is settled; there is no matching process of any kind. The arguments of the guardian *ad litem* as reported in adoption rulings, focus mainly on the adopter's financial ability, home safety and criminal status. The researcher has not come across any court case that considered or questioned an adopter's psycho-social, medical, or emotional condition. As a result, adoptive parents may select children to adopt while mentally or emotionally unable or unprepared to parent them. One of the non-Tanzanian adopters who responded to this study had to re-adopt a previously adopted child because the original adoptive parents were unable to handle the child and returned the child to the children's home.[1148] It would be important to consider how the best interest of the child can be safeguarded in such practice.

Another problem of this freedom is the resulting inherent discrimination of children living with a disability, HIV/AIDs or other similar conditions. Very few prospective adopters willingly select such children for adoption. However, there are persons who, for child-centred reasons, would adopt these children if assessement shows that they are well matched. Thus, with a proper needs assessment and matching process, children with such conditions would not remain in the homes for a longer time than is necessary, a situation that is currently inevitable.[1149]

The primary rationale behind the freedom to choose a child, apart from the lack of a strict law to the contrary, is the presence of a large number of children available for adoption against a

[1146] Interview with social welfare officer 1-Kinondoni District, Dar es Salaam, on 23.01.2019.

[1147] Interview with two non-Tanzanian adopters living in Dar es Salaam and the UK, on 15.01.2019 and 16.02.2019, respectively.

[1148] Interview with a non-Tanzanian adoptive parent and founder of a children's home in Tanzania, living in the UK, interview response submitted online on 16.02.2019.

[1149] The study observed two mentally disabled young adults who have remained at the Kurasini Children's home beyond the age of 18. The observation was made during field research in Dar es Salaam in January and March 2019.

limited number of adoption applicants. If adopters were lining up waiting for children to adopt, this freedom would be non-existent. One respondent said that,

> "…. there are so many more children needing families than there are families wanting to adopt. So, there is no 'competition' where Tanzanians would get priority over a foreigner. Like I said – we have only ever done adoptions with children who have been abandoned and have no known relatives – and we often had 30-40 children at any time who would be available for adoption. Once a couple was approved – they would come to us with a letter from Social Welfare and choose their baby. They pretty much always got the baby they chose as there was no one else in the process."[1150]

The need of prospective adopters to pass off adopted children as their own biological children is another reason for allowing freedom to choose. This practice is common among resident and non-resident Tanzanians. Respondent social welfare officers reported cases where prospective adopters chose children from homes in other regions so that they could keep the adoption secret and later claim the children were their biological children.

In a few cases, adopters do not go through the child identification process. They already have specific children they want to adopt before lodging the adoption application. This does not, however, mean that the problems stated above are avoided in these cases. Since the child is specified, an assigned social welfare officer conducts a social investigation to ascertain the suitability and eligibility of the child and the prospective adopters. The investigation does not go beyond the requirements of the social investigation form. Hence, again, no psycho-social or emotional assessment is made. When it is a relative's child, the assessment is even laxer. This is because, in most cases, the child has been in the prospective adopter's care for some time before the adoption application. So, adoption is seen as only an extension of that care within new legal bounds. In such cases, there is no meticulous determination of whether adoption is in the specified child's best interest.

In a nutshell, improving the law is the first solution for issues relating to the identification of children for adoption. Establishing a clear, integrated approach, from the Law of the Child Act to the Regulations on child adoption made under it, would go a long way to solving the problem. Also, social welfare officers should be trained in how to implement current laws or regulations, especially where there are changes. In addition, the enactment of stricter rules on child identification is imperative. For instance, there is no such free rein in choosing children

[1150] Interview with a non-Tanzanian adoptive parent and founder of a children's home in Tanzania, living in the UK, interview response submitted online on 16.02.2019.

in the UK, from where Tanzania's adoption law originated.[1151] Instead, social workers match the prospective adopters with the available children. Such a practice would require training of social welfare officers in Tanzania in respect of the rigorous needs assessment and matching procedures. Next, there must be a campaign to raise awareness in the Tanzanian community on the meaning and significance of child adoption as an alternative care measure for children in need of family care. Such a campaign might increase the number of adopters who want to help the available adoptable children and not only adopt for motives beneficial to themselves.

6.4.2 Consent: Understanding Formal Child Adoption

One of the most fundamental requirements and procedures in child adoption practice is procuring consent from the persons charged with the child's care and from the child concerned. Consent should be free and informed.[1152] For it to be so, those giving consent must fully understand the meaning and effects of formal child adoption. In practice, this goal has proved not always attainable. While all the respondent social welfare officers and commissioners for oaths interviewed during field research insisted that they explain the meaning and effects of child adoption to their clients, they agreed that not all understand it as they should. The main challenge is understanding the permanent and complete transfer of rights and responsibilities from the birth family to the adoptive family. Child care in traditional African systems does not usually entail such an effect. Even where child adoption is practised in such systems, its requirements and effects differ from those of formal child adoption under state laws derived from the West.[1153]

In the 70 selected adoption cases, three scenarios were observed in which consent to adoption does not necessarily mean that the people consenting understand or assent to the permanent change in familial relations. The first scenario is when relatives adopt. As discussed above, in these adoptions, the primary motive may be to provide a better standard of living for a relative's child rather than an alternative family. The legal effect of permanently and completely depriving the relative of his or her child may be undesired and hence not representative of the social reality after the adoption. For instance, in the case where a

[1151] The process of assessment and approval of adopters before they are given a child is explained in Alper, Joanne and Howe, David (eds.), *Assessing adoptive parents, foster carers and kinship carers*: *Improving analysis and understanding of parenting capacity* (London, Philadelphia: Jessica Kingsley Publishers, 2017).

[1152] Parental informed consent is required under section 59(1) of the Law of the Child Act, 2009 and regulation 5(5) of the Adoption of Children Regulations, 2014. For children, it is required under regulation 11(7) of the Adoption of Children Regulations, 2014.

[1153] Rwezaura, Wanitzek, in "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22 at pp. 153-155, explain child adoption under traditional laws of different African societies. The authors argue that such societies practise child adoption for reasons different from those envisaged in formal child adoption, and that the nature and effects of such traditional African law adoptions differ considerably from those of formal child adoption.

grandmother adopted her daughter's child, it is doubtful whether anyone in the family would really consider the grandparents as the child's parents.[1154] Also, in the case decided in Moshi where the court granted a sister an adoption order for her two teenage siblings, it is implausible that they would regard her as their parent rather than their natural parents who were still alive.[1155] Similarly, in cases where non-resident Tanzanians adopt their relatives' children to facilitate travel abroad with them, the relatives' consent to the adoption does not necessarily mean that the change in familial relations is strictly socially applicable.

The second scenario is cases where consent to adoption is given purely in order to alleviate financial difficulties in respect of raising the child and not otherwise. In these cases, the permanent change in familial relations may be not only undesired but also inconceivable. Undeniably, in many of the studied cases, the financial status of the birth families plays a vital role in their agreeing to consent to the adoption. Not in all such cases, but in a considerable number, the birth parents or relatives may harbour a belief that their financially astute children will come back to assist them in the future. Several social welfare officers, advocates and a founder of a children's home reported that some clients consent to child adoption because they consider it a form of social security, trusting that their adopted children will return and care for them, especially in their old age.[1156] They reported that the practice was common in Arusha, where numerous non-Tanzanians come as tourists or to work in the region. Some of them take pity on children living in hazardous environments and decide to adopt them. In such adoptions, the natural parents or relatives are mostly convinced that their children will receive a better education overseas and will eventually return to care for them.

Cases in which people seek to adopt children only to fulfil eligibility criteria for benefits from certain organisations also fit into the scenario above. There is no permanent change in familial relations intended in such adoptions. For instance, there is a current tendency where applicants have adopted or attempted to adopt children, their relatives' or not, in order to be able to fill them in their National Health Insurance Fund (NHIF) slots.[1157] This is because

[1154] High Court of the United Republic of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of GSG-the Infant and In the Matter of Petition for Adoption Order by DHN".

[1155] Resident Magistrate Court of Moshi, At Moshi, "AAM, Petitioner vs. JAM and IAM, Infants".

[1156] Interview with social welfare officers 1 and 2-Kinondoni Municipal, Dar es Salaam 23.01.2019; social welfare officers 1 and 2-Arusha Regional and Municipal offices 19.03.2019; an advocate and resident non-Tanzanian adoptive parent, Dar es Salaam, 15.01.2019; and a non-Tanzanian adoptive parent and founder of a children's home in Tanzania, living in the UK, online response submitted on 16.02.2019.

[1157] Interview with social welfare officers in Dar es Salaam and Arusha indicated a growing trend of resident Tanzanians applying to adopt children so they can benefit from their health insurance schemes. They admitted that some may have successfully adopted for this reason although they did not state it as their motive for adoption during the application.

every public servant in Tanzania must be a member of NHIF, where 3% of the salary is deducted as a membership contribution. Apart from a spouse, the health fund gives four slots for legal dependants who can be parents or children of the insured. The children must be born to the insured or adopted. In cases where the insured has to pay for health care of a relative's child, and has some empty slots, they may apply for adoption only so that the child can benefit from their NHIF account.

The third scenario comprises situations where consent to adoption is mistaken. There were a few cases in which birth parents or relatives gave their consent for guardianship, but the procedure in court changed to child adoption. This means that they never really consented to the effects of child adoption, including permanent changes in familial relations. In two such cases used as examples here, the court rulings mention application for full custody or guardianship as the original intent of the applicants. Then, in due course of arguing, the application was changed to child adoption, which the court eventually granted. In one of the two cases, the researcher was able to access an affidavit by the child's natural father consenting to an application for full custody, yet the court granted child adoption.[1158] It is an odd case because the applicants are resident non-Tanzanians who are not related to the child and the court awarding the adoption order is a district court. In the other case, a non-resident Tanzanian maternal uncle, according to the court ruling, applied for full and sole legal custody for his nephew at the same district court but was instead granted an adoption order at the end.[1159] It was not possible to access any affidavit or letter of consent from the natural mother whom the ruling mentions as having consented to the adoption. These two cases, among others, show the court's lack of sufficient understanding of child adoption legal requirements and procedure.

Since consent is a core legal requirement in adoption, applicants usually submit to the court a duly signed consent letter from the natural parents or relatives, together with the petition. Unfortunately, it is impossible to determine whether the signatory fully comprehended the effects of child adoption before signing the document. In the case of applications to adopt children without known parents, relatives or guardians, the Commissioner for Social Welfare provides consent for adoption. Such consent is not discussed here because it can be assumed that it is sufficiently free and informed.

[1158] District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, 2009 and In the Matter of an Application for Custody of MJM by JW and AW" (Misc. Civil Cause No. 358 of 2016, Ordered on 23.06.2017).

[1159] District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, 2009 and In the Matter of an Application for Adoption Order of FAHA by AHA of Jersey City" (Misc. Civil Case No. 163 of 2018, Ordered on 29.10.2018).

6.4.3 Pre-Adoption Care Supervision

The Law of the Child Act, under sections 56(3) (b), 59(5) and 74(1) (c), requires children who are subjects of adoption applications to remain in the continuous care of the applicants for periods not below six months for resident and non-resident Tanzanians, and three months for resident non-Tanzanians, before petitions for their adoption can be lodged in court. The continuous period of care is known as pre-adoption care or foster care. This time is meant for the prospective adopter(s) to bond with the child and for the authorities to ascertain whether the care arrangement is suitable for both parties. The Foster Care Placement Regulations, under regulation 16, designate home visits as the method to assess the welfare and progress of the child while under the care of the prospective adopter(s). Thus, these pre-adoption supervision visits form part and parcel of the child protection process.

Commencement of home visits depends on the age of the child. Where the child is less than two years old, then the first visit should be within the first two weeks after placement, and for children above two years old, within the first month after placement. Subsequent visits should follow every two months for the duration of the foster care placement before the court grants child adoption. Other visits may be immediate or urgently scheduled depending on incoming information, for instance reports of child abuse. According to regulation 16(7) of the Foster Care Placement Regulations, the Commissioner should develop rules and forms to guide the supervision visits and facilitate reporting. However, the researcher was not able to access such rules or forms during field research. Therefore, the only guidance on home visits considered here is that provided under regulation 16.

The field research findings show that although the law is clear and seemed well understood by the social welfare officers, home visits were not conducted according to the set requirements. Interviews with two non-Tanzanian adopters, one American and the other British, brought up the fact that after the initial home visit following placement, the assigned social welfare officer did not visit again.[1160] These two women with their husbands had adopted a total of nine children from Tanzania; hence they had sufficient experience of the adoption procedure. They reported that to get the social welfare officers to come for subsequent visits, a prospective adopter must seek them out and facilitate their visit. They observed that since the social welfare department provides no transport infrastructure or financial support to enable

[1160] Interview with a non-Tanzanian adoptive parent and founder of a children's home in Tanzania currently living in the UK, response submitted online on 16.02.2019 and interview with a non-Tanzanian adoptive parent, currently living in Tanzania, interview held on 01.02.2019 in Dar es Salaam.

the visits, it is difficult for the officers to make visits as officially required. Another resident American adopter said,

> "No, they do not do visits. They do the first visit but then disappear, and you have to beg for them to come for the final visit at the end of the six months. It creates avenues for corruption."[1161]

When questioned about this matter, the social welfare officers cited a shortage of time, finances, human resources, and travel infrastructure as curtailing their efforts to discharge this particular duty. For instance, one officer with a locomotor disability, while explaining similar challenges, described how such shortages create pressures on their work.[1162] Giving his own example and considering his situation, he let the researcher consider how these deficiencies further complicate his work. In accordance with the street-level bureaucracy theory, the social welfare officers attempt to manage their working conditions by creating practicable patterns. Thus, they find other ways to assess a child's placement, such as meeting outside the home.[1163] However, some of these coping mechanisms may defeat the purpose of the law in ordering home visits. Most of the interviewed social welfare officers said that in their efforts to discharge this responsibility, they tend to go for a first visit to satisfy themselves that the child is well and adequately cared for. Also, they figure out that an adopter cannot lodge an adoption petition without a final supervision visit; hence, they must reach out to them and arrange the meeting when the time comes. They cannot achieve more than these crucial visits in most cases. The researcher is of the opinion that this practice is not in the child's best interests, especially where there is abuse or other parent-child matching complications.

Another problem discovered is the social welfare officers' lack of training on what to be done during the supervision visits. A British adopter, who has much experience with Tanzanian adoption practice as she established a children's home in Tanzania, shared some information on this problem.[1164] She reported that different social welfare officers would have different ways of conducting supervision visits. Some would want to see and speak to the child, while others would only talk to the parents. Regarding the depth of the supervision, she said, "the social workers themselves have no idea about adoption or attachment or positive parenting – so how can they evaluate someone else?" Training on child adoption that is uniform, consistent, up-to-date and frequent is a scarce commodity among social welfare officers at

[1161] Interview with an advocate and resident non-Tanzanian adopter, Dar es Salaam, on 15.01.2019.
[1162] Interview with social welfare officer, Bunju Ward, Kinondoni Dar es Salaam, on 16.01.2019.
[1163] Interview with social welfare officer, Temeke Dar es Salaam, on 04.02.2019. She said that at times it is difficult to visit prospective adopters' homes, hence a supervision meeting may be arranged out of the home at an agreed place.
[1164] Interview with a non-Tanzanian adoptive parent and founder of a children's home in Tanzania, currently living in the UK, response submitted online on 16.02.2019.

national and local levels.[1165] As a result, the quality of social welfare officers' work is compromised, which challenges conformity to the dictates of the best interests of the child principle.

A respondent social welfare officer who has worked at the adoption desk, national departmental level, in Dar es Salaam for about ten years reported that home visits and social investigation are also done in the home of an applicant non-resident Tanzanian abroad.[1166] She said that the Tanzanian social welfare officers liaise with social welfare officers in the applicant's country of residence to obtain a report on their suitability to adopt based on their home environment abroad. The law does not reflect the practice of direct liaising with foreign social welfare offices, not only for non-resident Tanzanians but also for resident non-Tanzanians. For non-resident Tanzanian applicants, the law stipulates that home visits and social investigation will be done in their Tanzanian homes while they foster prospective adoptive children for six months.[1167] However, there seemed to be discrepancies in practice, with social welfare officers reporting that some non-resident Tanzanians failed to fulfil the foster requirement and could still adopt. During one of the interviews, a social welfare officer shared some real examples of adoption applications by non-resident Tanzanians, citing two diplomats who could adopt children without fulfilling the six-month foster requirement.[1168] Other respondent social welfare officers agreed that the requirement is not ordinarily strictly adhered to, especially where a relative's child is being adopted. A respondent advocate said that the foster care requirement is an obstacle to adoption by non-resident Tanzanians because many have employment abroad and cannot spend six months fostering a child in Tanzania before adopting.[1169] She recommended that the law should consider a pre-adoption care period abroad. Although regulation 60(5) of the Child Protection Regulations stipulates that the court can give a care order for a child to live outside the United Republic, it is not common in practice. Both at the social welfare offices and the Juvenile Court, the respondents were not aware of this type of care order. However, the provision means a non-resident Tanzanian adopter can foster such a child abroad pending adoption.

[1165] Lack of sufficient training amongst social welfare officers was a consistent finding during field research, complained of by adoptive parents, lawyers and judges, and also confirmed by the Commissioner of Social Welfare and the social welfare officers interviewed from the DSW HQ offices in Dodoma and those in districts of Dar es Salaam and Arusha.

[1166] Interview with a social welfare officer in charge of the adoption desk in Dar es Salaam 2008-2018, DSW Dar es Salaam Offices, on 06.04.2018.

[1167] Regulation 4(7) of the Adoption of Children Regulations, above footnote 568.

[1168] Interview with social welfare officer, Bunju Ward, Kinondoni Dar es Salaam, on 04,01.2019 and 16.01.2019.

[1169] Interview with an advocate and resident non-Tanzanian adoptive parent, Dar es Salaam, on 15.01.2019.

Interviews with other social welfare officers at the local government level showed that they were only aware of the work of the International Social Service (ISS) in obtaining information about suitability to adopt from the country of origin of a non-Tanzanian applicant. They claimed that liaising with ISS is not within their mandate but that of the Commissioner or assigned social welfare officer at the national level. The Adoption of Children Regulations do not specify the practice of involving the international agency for pre-adoption supervision but only for post-adoption monitoring. During field research, reports of the ISS were declared top secret and could not be accessed. Such reports are also not submitted during the adoption petition and hearing, and hence are not part of court filed records. Evidence that the Department of Social Welfare uses ISS as an agency to provide the required information was presented by a respondent advocate during field research in Dar es Salaam.[1170] However, the study cannot confirm that pre-adoption home visits or social investigation in the non-resident Tanzanians and resident non-Tanzanians' countries of residence or origin are conducted in all cases.

The challenges of supervision in pre-adoption care reflect challenges concerning child protection in adoption. Lack of a consistent, uniform practice according to the dictates of the law may compromise a child's best interests.

6.4.4 The Adoption Order and its Effects

The Law of the Child Act and other laws such as the Law of Marriage Act 1971 specify the legal effects of an adoption order. Section 64 of the Law of the Child Act empowers an adoption order to transfer all rights and responsibilities for the child of any nature, including under customary law, from the child's natural parents or any other person connected to the child to the adoptive parent. The adoptive parent takes on such rights and responsibilities as if the child was born naturally to him or her in lawful wedlock and had never been a child of any other person. This part considers the legal and social impacts of section 64 on other provisions of the law relating to child adoption and on the social realities of natural and adoptive families.

6.4.4.1 Effects of an Adoption Order in 'Open Adoption'

In 'open adoption', defined and practised as adoption by relatives according to the Law of the Child Act, the legal effects of adoption articulated under section 64 are a challenge in

[1170] Interview with an advocate and resident non-Tanzanian adoptive parent, Dar es Salaam, on 15.01.2019.

implementation. Regulation 22 of the Adoption of Children Regulations names two exceptions to section 64 of the Act. These exceptions allow for maintaining contact between the natural family and the adoptive family and prohibiting changes to a child's family name unless agreed upon between the child, the natural family and the adoptive family. Regulation 24 further provides for access and communication between the adopted child and his or her natural family. One may ask whether this does away with the idea that adoption makes the child belong to the adoptive parent as if the child was born to him or her in lawful wedlock and has never been a child of any other person. The research would answer no to this question. Because legally, the child no longer belongs to the natural family even if he still bears the same name and has contact. The adopted child does not hold a birth certificate anymore but an adoption certificate. Thus the law recognises that the adoptive parents have all rights and responsibilities concerning the child and not the natural parents. In cases of adoption by relatives, however, such a complete clean-cut change of familial relations is not viable in practice.

Complications associated with the social effects of the adoption order in an open adoption are observable at different levels. Two of these will be considered here. First, the child's natural parents and relatives continue to be his or her relatives after adoption by virtue of being relatives of the adoptive parent. Second, the natural and adoptive parents, the whole extended family, and in some cases, the child, know for a fact that the child was born to the natural parents. A child with sufficient maturity to understand and who knows about the adoption pursuant to regulation 24 of the Adoption of Children Regulations will still regard the natural parents as his or her 'real parents'. The natural parents will maintain their social name and status as father and mother, and the adoptive parent will continue to be grandmother, grandfather, aunt, uncle, sister or brother as before the adoption. Thus, the change in familial relations is a legal reality but has no force in everyday social life. To drive this point home, the social realities may be considered in the cases cited above where a grandmother adopted her daughter's one-year-old child while residing with them both; a sister adopted two of her teenage siblings while their parents were still alive; and an uncle together with his wife adopted his niece because the natural mother re-married. In these adoptions, it is improbable that the participants would live the legal effects of the adoption order in their social reality.

While discussing these effects with a family law expert who participated in the drafting process of the Law of the Child Act, he had the following to say,

> "We had proposed inclusion of adoption by relatives and open adoption as completely different provisions in the Bill. The African wide view of the

> family makes adoption not a necessity. There is no expectation of an uncle or aunt to adopt the child of his or her sister or brother to be able to take care of the child. We insisted on adoption by relatives because traditional care is quickly breaking down. As resources are becoming scarce, the care system is challenged—we begin to find who owns what? The relative child would remain with nothing. The idea of adoption by relatives was intended to protect children cared for by relatives by ensuring that they have equal rights and care as biological children."[1171]
>
> "Understanding the law of adoption has not been used by Tanzanians; we wanted to bring it down to the people. To allow this, we wanted it to be less expensive and most accessible at the magistrate's court. Thus, open adoption was intended to make adoption much more usable to Tanzanians considering African views on the family. The adoptive parent gets the legal responsibility for the child because there must be somebody liable when enforcing the responsibility. In the permanent change in familial relations, the test is the best interests of the child." [1172]

The fact that the Law of the Child Act combines adoption by relatives and open adoption into one makes an analysis of the effects of such an adoption much more complicated.

6.4.4.2 Effects of an Adoption Order on Prohibited Relationships

Section 14(4) of the Law of Marriage Act specifies a legal effect of an adoption order that the Law of the Child Act leaves undetermined. It declares that the adoptive parent and the child are within the prohibited degrees of consanguinity, which means that they cannot marry or have sexual relations. Section 14 of the Law of Marriage Act lists prohibited relationships based on consanguinity and affinity. Sections 158, 160, and 161 of the Penal Code, 1945 criminalise such relationships by pronouncing them incestuous and forbidden. Section 64 of the Law of the Child Act raises some questions in this regard. First, if the adopted child belongs to the adoptive parent as if a natural child born within lawful wedlock, do all adoptive relatives become as if blood-related to the adopted child by force of law? If yes, by the same implication, do natural relatives, related by blood to the child, cease to be blood relatives? The Law of Marriage Act and the Law of the Child Act are silent on these questions.

Section 65(1) of the Law of the Child Act, on the effects of an adoption order, states that upon intestacy, an adopted child will inherit from the estate of a deceased adoptive parent as if a natural child of the deceased. Section 66(1)(d) declares that in the testamentary disposition of the deceased's property, "any reference to a person related to the adoptive parent shall, unless the contrary intention appears, be construed as a reference to the person as if he were the relative of the child who is adopted." It is, therefore, without a doubt that an adoption order

[1171] Interview with professor of law and family law expert, Mbezi Chini, Dar es Salaam, on 15.02.2019.

[1172] *Ibid.*

creates relatedness between relatives of the adoptive parent and the adopted child. However, the phrase 'as if', repeated in sections 64(1) (b) and (2), 65(1), and 66(1) (d) of the Act, hints at an artificial relationship created by court order, similar but not the same as that of the natural family. Therefore, the adopted child has a biological-like legal relationship with the adoptive relatives rather than a real biological relationship. Prohibited relationships between the adopted child and adoptive relatives can thus not be founded on consanguinity. Since laws on prohibited relationships derive their significance from blood relationships, adoptive relationships do not fall squarely in their realm.[1173] This means that forbidden relationships between adoptive relatives are based on religious or social considerations. One author argues that civil and criminal laws on prohibited relationships are meant to preserve family peace by eliminating clashes while vying for sexual relations in the home.[1174] Thus, by social rather than legal standards, adoptive siblings or relatives in other degrees are not allowed to have sexual relations or marry. However, a clear position in the law would be in the best interest of the adopted child.

Wadlington argued that enactment could not execute biological separation; hence an adopted child remains in the purview of prohibited relationships with his natural family due to consanguinity.[1175] He contended that prohibited relationships apply even to illegitimate and half-blood relatives; thus, it should still apply to the adopted child—a position supported by Tanzania's Law of Marriage Act.[1176] The researcher was not able to trace any judicial interpretation on this question from Tanzanian courts. However, while considering reports on cases with persuasive status, it became apparent that courts have not always thought like the author above. In a 1986 case, the court in Indiana, USA, stated that adoption completely severed biological relations and acquitted a biological father who had had incestuous relations with his daughter, who had been adopted at age four. Nevertheless, soon after, in 1989, the Indiana Supreme Court, in another case, overturned the previous court's stand by ruling that adoption law, which establishes legal parenthood, cannot abolish the link of consanguinity.[1177] Although Tanzania's law is not as clear, in practice, it seems that an adoption order

[1173] The Adoption and Children Act (2002) of UK expressly states under section 74 that the status conveyed by an adoption order as provided in section 67 of the Act shall not apply to prohibited degrees of kindred and affinity under the Law of Marriage of 1949 and Civil Partnership Act of 2004.

[1174] Walter J. Wadlington, "The Adopted Child and Intra-Family Marriage Prohibitions", Virginia Law Review 49(3) (1963): p. 478 at p. 483.

[1175] *Ibid*., at p. 484.

[1176] The Law of Marriage Act, 1971, under section 14(5), extends the prohibitions to half-blood and illegitimate children.

[1177] In State v. Bohall, 546 N.E. 2d 1214, 1215 (Ind. 1989) cited by Naomi Cahn, "Law, Adoption, and Family Secrets: Disclosure and Incest", in *The New Kinship* (NYU Press, 2013) at p. 118.

supplanting natural with legal familial relations lacks the power to obliterate blood relations. Hence, an adopted child is within the prohibited relationships with his or her natural family, whether he or she knows them or not.[1178]

6.4.4.3 Effects of an Adoption Order when a Natural Parent Adopts

In adoptions motived by the desire to strengthen filial ties lies another question that the law does not clarify. In these adoptions, a natural parent, alone or with a spouse, adopts his or her natural child with the intention of legitimating their relationship or incorporating the child into a new family. The effects of an adoption order granted to such a parent do not differ from those named in section 64 of the Act. In this instance, however, the order erases the natural familial relationship and replaces it with a legal adoptive relationship with the same natural parent. In a way, it creates an absurdity. The law declares a natural child to be 'as if a natural child'. Although declaring an illegitimate child to be 'as if a natural child born in lawful wedlock' may secure for the child some legal benefits such as property rights, it does not reflect the social reality. What has changed in the eyes of the law has not changed in the eyes of society. This is because a person's natural child, whether legitimate or not, remains as such in social relations despite an adoption order. The law should have a more subjective provision for this type of adoption in the child's best interests. Two points are discussed below which further support this argument.

Section 70 of the Law of the Child Act requires registration of an adoption order for it to be complete and effective. In practice, although not specified in the law, upon registration, the adoptive parent must surrender the adopted child's birth certificate to the Registrar-General and in place receive an adoption certificate. This is the practice even where a natural parent has adopted his or her own natural child. Adoptive parents, social welfare officers and officers at the registration agency (RITA) have expressed significant concerns regarding this practice. Their most common concerns were connected with the confidential nature of adoption and what happens in educational facilities. For school registration, a birth certificate is one of the required documents. For adopted children, because they have no birth certificates, adoption certificates are submitted. This practice discloses the adoptive status to the school administration, and to teachers who have access to the child's file. The information finally reaches fellow students if the matter is not handled with the required confidentiality. Fellow students may start pestering the adopted child with questions, jests and discriminatory

[1178] Interviews with respondents on this issue showed they were averse to the notion of an adopted Tanzanian child entering into prohibited relations with his or her natural relatives.

behaviour. A social welfare officer who has worked at the adoption desk in Dar es Salaam for a long time reported this situation to be worse for Tanzanian children adopted by Europeans because of the racial differences.[1179] The children end up being laughed at for believing that they have 'white' or '*mzungu*' parents.

Section 61 of the Law of the Child Act specifies that adoptive parents should tell their adopted children that they are adopted only if it is in the child's best interest and the child has attained fourteen years of age. So, in some cases, the children may not have been aware of their adoptive status. When they hear it from their fellow students and in an unkind manner, this is likely to occasion psycho-social problems for them. Although section 61 (2) and (3) prohibits and makes it an offence for any person other than an adoptive parent to disclose the adoption to an adopted child, no record of any such offence was found during field research. An interview with a high-ranking officer at RITA raised an interesting question.[1180] She said that if the child becomes 'as if a natural child' of the adoptive parent, should he or she not be entitled to a birth certificate to avoid the problems presented by having only an adoption certificate? She declared that her office would propose legal reforms in this area. On another note, section 61 is contrary to all the provisions on obtaining a child's consent to an adoption and the child's right to participation in decision-making. Thus, it already stands on shaky ground.

6.4.4.4 Effects of an Adoption Order and Legal Pluralism

The effects of the adoption order in conjunction with section 68 of the Law of the Child Act may also cause complications in practice. The effects of an adoption order under section 64 are based on the Western law of adoption inherited from the British. However, section 68 of the Act applies customary law to an adopted child, provided the adoptive parents are subject to customary law. Thus, the application of the effects of an adoption order in this situation requires particular understanding. Adoption is understood differently under statutory law and under local customary law. It has been indicated above that the effects of formal adoption may not be plausible in the social reality of Tanzanians, whether resident or non-resident, due to the influence of their traditions and customs.

For instance, there is the case where a non-resident Tanzanian paternal uncle, together with his non-resident non-Tanzanian spouse, adopted two teenage girls who were under their care

[1179] Interview with social welfare officer in charge of the adoption desk in Dar es Salaam 2008-2018, on 06.04.2018.

[1180] Interview with a high-ranking officer at RITA, on 21.01.2019.

subject to a clan decision passed after the death of the girls' parents.[1181] The first care arrangement the orphaned girls were subject to was traditional according to their local customary law; placement under the care of relatives. It means that the uncle was subject to customary law upon accepting its application. Later, the uncle together with his spouse decided to formalise the adoption to comply with foreign immigration laws when travelling to their usual place of abode, Ireland. Taking section 68 into account, the girls continue to be subject to customary law after the adoption, because their adoptive parent is subject to it. Hence, the cessation of rights and responsibilities under customary law as provided for in section 64 of the Act is reversed by section 68. With regard to property rights on succession, sections 65 and 66 of the Act would still apply, as well as the local customary law. Here a conflict of laws may arise. For instance, section 65(2), which declares that an adopted child shall not be entitled to inherit from the estate of the biological parent upon intestacy, may not hold for the two girls if the customary rules of inheritance are applied. The court, in this case, did not address the issue of multiple applicable laws.

Respondent family law experts, judges, magistrates, and social welfare officers could not explain the rationale of section 68 during field research.[1182] There is a need to find clarity for the law to safeguard the child's best interests in adoption. In the case above, if the family moved to Ireland, Irish family laws would also play a role in determining various adoption or family life issues. This would add to and possibly further complicate the interaction of different legal orders governing the same family relations.

A social welfare officer shared an actual case scenario that raises pertinent questions on the contextualisation of section 68.[1183] She told a story of an adoptive couple, a Tanzanian man married to a non-Tanzanian woman. They had adopted two children because they could not beget children naturally. Unfortunately, the husband died intestate a few years after the adoption. After the funeral, the husband's relatives instructed the wife to return the adopted children to the social welfare office since they were not of their bloodline. They said, according to their customary laws, the two children could not inherit from the deceased's estate because he was not their father. Section 65(1) of the Act could not protect these children since section 68 subjected them to customary law which bound their adoptive father.

[1181] High Court of the United Republic of Tanzania, In the District Registry of Arusha, At Arusha, "In the Matter of the Law of the Child Act, 2009 and In the Matter of MERM and CERM of Olasiti, Arusha and In the Matter of the Application for an Adoption Order by JRMS and DDD".

[1182] A professor of law and family law expert at Kinondoni, Dar es Salaam, in an interview conducted on 15.02.2019, affirmed that it is challenging to ascertain the intention of the drafters of the Law of the Child Act for section 68.

[1183] Interview with social welfare officer 1-Kinondoni District, Dar es Salaam, on 23.01.2019.

Here, there was a clash between statutory and customary laws that was against the best interests of the adopted children.

In adoptions by Muslim parents there are further complications. One author showed that Muslims bound by Islamic laws live by those laws wherever they are, irrespective of the host state's laws.[1184] The Law of the Child Act permits Muslims to adopt in Tanzania Mainland contrary to Islamic laws, which do not recognise formal child adoption. Islamic law governs the affairs of Muslims who live according to the tenets of their faith. When Muslim adopters declare religious beliefs as their motive for adoption, this implies that they are religious. [1185] Thus, the very law that does not recognise child adoption may be used to govern rights and responsibilities between the adopted child and the adoptive family post-adoption. The question arises of what the effects of child adoption under section 64 will signify in the adoptive family's social life. For instance, will the extended family regard the child 'as if naturally born to the adopters in lawful wedlock'? Analogously, if the adoptive family continues to be subject to customary law under section 68, a Muslim family will continue to be subject to Islamic law after the adoption. Therefore, issues that may be governed by Islamic law in Tanzania, such as marriage, guardianship, and inheritance, will fall within the ambit of that law.[1186] Similar to the case of customary law above, the inheritance rights of an adopted child who is subject to Islamic law will be complicated in the intestate devolution of property. This is because Islamic law does not recognise formal child adoption; hence the adopted child may not be considered eligible to inherit under the estate of the adoptive parents subject to Islamic law.

The constellation of different legal orders that govern relations pre- and post-adoption may result in conflicts affecting the adopted child's best interests. To ensure that an adopted child has adequate protection post-adoption, the Law of the Child Act and Regulations should limit other laws that govern rights, responsibilities, and relations in adoption. It is true that since the adopted child becomes 'as if naturally born' to the adopters, such regulation may be perceived as invading family privacy. However, strict regulation is warranted in view of the different perceptions of child adoption in different legal orders.

[1184] Judith Stacey, "Uncoupling Marriage and Parenting", in L. C. McClain, D. Cere (eds.), *What is parenthood?: Contemporary debates about the family* (New York: New York University Press, 2013), at p. 78. When discussing the practice of Muslim polygamous marriage, the author explains that Muslims living in states such as Canada where such marriages are illegal still practice them following their religious laws.

[1185] High Court of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of Application for Adoption of AM, infant and In the Matter of an Application for an Adoption Order by MOM and AM of Kinondoni, Dar es Salaam".

[1186] See section 11(1) (ii) of Judicature and Application of Laws Act.

In a nutshell, non-Tanzanian adopters, by virtue of growing up in a legal culture or society that has practised and understood child adoption with effects akin to section 64 of the Act, do not encounter problems similar to those experienced by their Tanzanian counterparts. However, the dekinning of a child in adoption is not a matter easily perceptible or acceptable to any parent, Tanzanian or otherwise. The case of *I.S. v. Germany*, providing a detailed argument on whether a birth parent loses kinship with an adopted child once the adoption is final, shows that dekinning is also challenging to Europeans.[1187] Kinning of children after the adoption is equally challenging. A respondent social welfare officer gave an example of a married resident Tanzanian woman who adopted a child because she could not have children biologically.[1188] Shortly after the adoption was complete, she became pregnant and safely delivered her own natural child. Thereafter, the woman sought to return the adopted child to the social welfare office. This signals a complete misunderstanding of the effects of an adoption order. The Law of the Child Act has no provisions for returning adopted children, although it does specify that an adoption order can be appealed.[1189] Because an adopted child becomes 'as if naturally born' to the adopter, returning him or her would be regarded as child abandonment or relinquishment. To better protect a Tanzanian child's interests in adoption, the law should take more account of adopters' social realities. Even more important, the ministry responsible should organise legal and social public awareness campaigns on child adoption and its effects.

6.4.5 Child Adoption Record Keeping and Management

The Law of the Child Act and the Regulations made under it insist on record-keeping for applications and actions concerning the adoptive child. On the side of the social welfare office, these include, but are not limited to, registers of most vulnerable children, people unsuitable to work with children, and foster carers; records of child protection referrals; and records of applications, investigation reports, administrative decisions and court orders affecting children. Regulation 13 of the Child Protection Regulations, 2014 lists opening a file as the initial procedure upon receiving a child protection referral. Regulation 13(3) specifies that the file should be in hard copy and opened in the child's name. In addition, regulation 13(4) provides for a filing system in electronic form using an established case management system. Giving this regulation due emphasis means that every child who has been referred to the social welfare office for whatever reason should be in their files. The status of the file,

[1187] European Court of Human Rights, "I.S. v. Germany" (13.10.2014).
[1188] Interview with social welfare officer 2-Kinondoni Municipal, on 23.01.2019.
[1189] Section 71(3) of the Law of the Child Act, 2009.

whether open or closed, depends on the status of the child. All children in care should therefore have files in the social welfare offices of their respective areas.

During field research, it became apparent that most adopted children were obtained from children's homes except for cases involving relatives' children. This means that their data from the time of referral to placement into care should be available at the social welfare offices of their respective areas. However, this was not the case. It was a challenge to obtain any of the records required by law in the social welfare offices both at local and national levels. During a visit to the social welfare office at Kinondoni District, Dar es Salaam, the researcher observed that there was one big file where an assortment of matters concerning children were filed. The matters ranged from applications for maintenance and custody to applications for foster care and adoption. There was no data management system to speak of, either in physical or electronic form. When asked about a database, the Commissioner answered that it is something his management is working on. He said that because of decentralisation by devolution, data is received directly by the district or municipal councils, where directors have to analyse it and send it to the national level. However, due to a heavy workload and the fact that data is recorded manually, the directors rarely send the required information to the Commissioner's office. He agreed that this is why, for instance, there is no centralised register of foster carers as required by regulation 7 of the Foster Care Placement Regulations.

Social welfare officers and other respondents who work with the Department, such as advocates and adoptive parents, agreed that data management is a big challenge. A respondent non-Tanzanian adoptive parent and founder of a children's home in Tanzania, while replying to a question concerning data management at social welfare offices, said,

> "Nothing is computerized – the offices deal with bits of paper and files and it is an unorganized mess to be honest. I don't think in 12 years, I ever managed to re-find a piece of paper/report in Social Welfare ever! They get lost within the filing and this is a child protection issue in itself."[1190]

An acting director and youth care worker at SOS Village in Dar es Salaam, while sharing their working experience with the social welfare authorities at national and local levels, also said,

> "Record keeping is not a strong suit with the Department. Formalities are not well followed, for instance, in documenting the children they bring to us. There are usually incomplete documents."[1191]

[1190] Interview with a non-Tanzanian adoptive parent and founder of a children's home in Tanzania, currently living in the UK, response submitted by email on 16.02.2019.

[1191] Interview with an acting director and a youth care worker, SOS Village Tanzania, Ubungo, Dar es Salaam, on 29.01.2019.

The researcher had an opportunity to interview a child protection specialist working with UNICEF Tanzania in alternative child care and capacity building for social welfare officers.[1192] He revealed that the organisation had been working together with the Social Welfare Department to develop an electronic system that would facilitate the creation of a database. At the time, an online system for registration and monitoring institutions was already in the preparatory stage. He reported that UNICEF Tanzania had assisted the Department in establishing a District Case Management System that was already functional in about fifty (50) or more district councils. The system analyses information from case management forms that social welfare officers must fill in and then feed into the system. The specialist spoke about the challenges associated with this requirement. Social welfare officers are used to recording information in 'counter books', and find it difficult to fill in about twelve forms for each case and enter the information in the electronic system. Although it is already progress to have and use case management forms, while many officers could not even draft a care plan, to succeed, there must be a proper case management process, he said. A proper process would need consistency, which is yet to be achieved. In line with the theory of street-level bureaucracy, pressures resulting from heavy workloads coupled with shortage of time, human resources, training and facilitative infrastructure hinder effective use of the system.

The study did not encounter the problem of record-keeping and management only at social welfare offices. Although courts and RITA had data management systems of some sort in place, they were not in satisfactory order. Data was stored mainly in hard copy, which meant it was not always possible to access court records from earlier years because, due to the bulkiness of documents, the court is forced to put them in external storage where they often get misplaced. During field research at the High Court of Tanzania, Dar es Salaam Registry, the researcher observed efforts to digitalise record-keeping through uploading judgements on an electronic data storage system. However, at the stage reached, the system could not be of any assistance to this study. At RITA offices, the adopted children register is only available in hard copy, which is not the best method of data management. There were better data management conditions in the children's residential homes and institutions that were visited. However, the conditions varied depending on available infrastructure, human resources, and technological know-how. For instance, data management in organisations or homes such as

[1192] Interview with child protection specialist, UNICEF Tanzania, Dar es Salaam, on 21.02.2019.

SOS Village and Save the Children Tanzania is not comparable with homes such as Kurasini and Umra, where information is mainly stored in hard copy files.

The lack of a uniform and functioning data recording and management system in social welfare offices at the national and local levels compromises the effectiveness and efficiency of the services. For instance, the Commissioner and several respondent social welfare officers spoke of adoption applicants who had been given children to foster pending adoption but had not returned to complete the procedure for years. The Department desires to urge the applicants to finish the process but cannot do so as it lacks reliable information concerning their whereabouts. This also means that consistent monitoring and evaluation of placement is a challenge due to the lack of a database. This shortcoming compromises compliance with the best interests of the child principle.

6.4.6 Corrupt Practice in Child Adoption

Section 72 of the Law of the Child Act prohibits any form of personal financial gain in respect of child adoption. Any payment or reward must be authorised by the court. Sub-section 3 of the section makes giving or receiving any unauthorised payments or rewards in the adoption process an offence punishable by fine or imprisonment not exceeding two million shillings or two years, or both. Such a prohibition is a condition to be observed before giving an adoption order stipulated under section 59(1) (d) of the Act. Despite these explicit provisions, the researcher found that there have been instances of corrupt or fraudulent behaviour in child adoption practice. Below is a brief account of respondents' experience with this issue.

During field research, a high-ranking officer of the Department of Social Welfare, who had been in office for about 15 months, spoke of his struggle to eliminate corrupt practice in the Department. Specific to child adoption, he said he had received reports that Arusha was a hub for "bought adoptions".[1193] A regional social welfare officer in Arusha confirmed the allegations, saying that he was transferred to the office in 2018 to combat the practice.[1194] The social welfare officer working the adoption desk at the municipality,[1195] a non-Tanzanian adopter and founder of a children's home[1196] and an advocate specialising in adoption practice[1197] also confirmed the existence of corruption in Arusha and shared their experiences

[1193] Interview with a high-ranking officer of the DSW, in Dar es Salaam, on 20.02.2019.
[1194] Interview with social welfare officer 1-Arusha, Regional Social Welfare Offices, Arusha, on 19.03.2019.
[1195] Interview with social welfare officer 2-Arusha Municipal, on 19.03.2019.
[1196] Interview with non-Tanzanian adoptive parent and founder of a children's home in Tanzania, currently living in the UK, response submitted online on 16.02.2019.
[1197] Interview with an advocate specialised in child adoption practice and resident non-Tanzanian adoptive parent, Dar es Salaam, on 15.01.2019 The advocate cited names of social welfare officers who demanded illegal payment before processing adoption applications for her clients.

of it. These sources reported different perpetrators of corrupt acts in child adoption, including social welfare officers, advocates, and judges. The average amount extorted is around $5,000, they said. The Commissioner, who was mortified, said corrupt social welfare officers tell clients that about $3,000 of the amount must be paid to his office.

"Usually, the advocate and the judge collude in the corruption and later pull the social welfare officer into the game as guardian *ad litem*", said a respondent social welfare officer.[1198] She describes the collusion as follows: A prospective adopter, desirous of adopting a specific child they have met but ignorant of the child adoption legal process, approaches an advocate for legal counsel. The advocate misdirects the client by drawing up documents for the adoption petition and submitting it to the court instead of applying for adoption at the social welfare office in the area. Of course, the client is billed an enormous sum of money for the service. Once the petition has been assigned to a judge or magistrate, the advocate brings them up to speed about the whole issue. When the judge or magistrate is on board, the first step of the hearing process is to appoint a guardian *ad litem*. This is a social welfare officer who is required to tender a social investigation report to vet the adoption 'in the best interest of the child'. It does not matter whether the investigation is actually carried out or not. A good amount is paid for the report. An adoption order is then issued without following the due process of law. This corrupt practice presents an opportunity to adopt a child without all the challenging legal requirements. It is, however, akin to sale of the child.

A respondent social welfare officer shared a personal story where he was wrongfully implicated in a corruption saga. He reports,

> "… you know, in the Monduli District there are no children's homes, this is because of the Maasai traditional child care arrangements or their way of life. As a social welfare officer in the District, I once had to find a home for two boys of mentally challenged parents. I found it in the Cradle of Love, a home in Arusha Town. A couple from Trinidad and Tobago adopted the children from the home without following the requisite legal procedures. I got blamed for it. But you should know, a social welfare officer from Meru did the social investigation in Monduli without my knowledge and played in the deal to give away the children. I am telling you this because you may find the case in court records."[1199]

The respondent at the municipal social welfare office in Arusha Town lamented that many judges and magistrates do not yet understand the law of adoption. This makes them open to manipulation by advocates who persuade them to participate in corrupt practices. She spoke

[1198] Interview with social welfare officer 2-Arusha Municipal, on 19.03.2019.

[1199] Interview with social welfare officer 1-Arusha, Regional Social Welfare Offices, on 19.03.2019. The author searched for but was unable to access the case in the records of the High Court of Tanzania, at Arusha.

of the tension between advocates and social welfare officers where an advocate has already instituted an adoption petition in court and has received payment for it, so that he or she wants it to succeed by all means. Because the court is not involved in the initial adoption application process, judges or magistrates usually do not concern themselves with that process. They look at the petition at hand. As a result, a social welfare officer appointed as guardian *ad litem* is put in a difficult situation. The researcher noted a problem in these proceedings: lack of involvement of the Commissioner for Social Welfare as required by law. The court proceeds without submission of the Commissioner's approval of the adoption and can obtain a guardian *ad litem* without this person being appointed by the Commissioner. The officer explained in respect of the first issue that the court proceeds without the Commissioner's approval being attached to the petition due to insufficient knowledge of the adoption procedure or at the instance of a corrupt advocate. With regard to the second issue, she said that social welfare officers who go to court for adoption cases are already established in their offices and are known by the court; hence they may receive a court summons to act as guardian *ad litem*.[1200]
Corrupt practices in child adoption and the giving or receiving of illicit payments for personal gain are not restricted to Arusha. The Commissioner shared his knowledge of widespread corrupt and fraudulent malpractice in social welfare offices at local levels. He said that a current campaign propagated by the Regional Commissioner for Dar es Salaam had unveiled the 'rottenness of the system'.[1201] Also, during field research, corrupt allegations facing a seasoned social welfare officer at the national adoption desk were explained to the researcher by the officer herself and a colleague.[1202] The alleged corrupt practice was not limited to receiving money for personal gain but included unnecessary delays in the adoption process, loss of documents, breach of privacy and poor customer care in general.[1203] At the time of the interview, the Department was investigating these allegations to find a proper recourse.

[1200] Regulation 4(5) of the Adoption of Children Regulations requires the Commissioner to appoint a guardian *ad litem* and inform the court of the appointment. However, the researcher found that in practice there are social welfare officers at the national or local levels who are generally asked to appear as guardian *ad litem* in adoption cases. As a result, the court usually sends an order for their appointment to the social welfare office concerned, and the Commissioner does not have to make such an appointment in every child adoption case.
[1201] Muhidin Issa Michuzi, "Mamia ya Wanawake Waliotelekezwa na Waume Zao Wafurika kwa Makonda", https://issamichuzi.blogspot.com/2018/04/mamia-ya-wanawake-waliotelekezwa-na.html. Also observable in a video showing multitudes of women claiming to have been abandoned by their male partners who failed to receive assistance from the social welfare authorities; *Mamia ya Wanawake Waliotelekezewa Watoto Wafurika kwa Makonda* (Youtube, 09.04.2018).
[1202] Interview with two social welfare officers who worked at the adoption desk, MoHCDGEC offices in Dodoma and Dar es Salaam, on 21.03.2018 and 06.04.2018, respectively.
[1203] "Dada Shirima wa ustawi wa jamii makao makuu DSM unawakosesha watoto familia", https://www.jamiiforums.com/threads/dada-shirima-wa-ustawi-wa-jamii-makao-makuu-dsm-unawakosesha-watoto-familia.1363749/page-3.

The theory of street-level bureaucracy could provide explanations for some of these malpractices. Extorting payments from clients could be due to the financial and infrastructural constraints experienced by social welfare officers in their daily work. These include low income, lack of office equipment such as photocopiers or printers, lack of vehicles for travel, and insufficient financial allowances to facilitate their work, for example for communication with clients. Delays, loss of documents and lack of privacy may be due to having a massive workload with time pressures, lack of proper data management systems in the office, and lack of office space for private consultations. The theory only explains the practice but does not condone it. A respondent with experience in the Mwanza region, responding to a question relating to corruption complaints, said,

> "In Mwanza, I have never known any. In 101 adoptions, we have never been asked for money. We have been asked to buy phone credit or photocopy adoption forms etc., as the office had no money to do so – but this was helping out their poor systems, and no money was being used for personal gain. In other places, definitely Arusha, lawyers and Social Workers have received thousands of dollars to complete adoptions."[1204]

Section 72(3) of the Law of the Child Act imposes punishment on any person who gives or receives any payment or reward not approved by the court to procure an adoption order. While investigating the repercussions of social welfare officers and officers of the court engaging in corrupt practices in the adoption process, the researcher did not find any evidence of convictions under this subsection. However, the Department of Social Welfare has reacted by either dismissing, suspending, or changing the work posts or responsibilities of officers who have been shown to be corrupt. A follow-up on officers named as being corrupt by respondents during field research showed that one or more of the above-mentioned actions were implemented in their cases.

6.5 Post-Adoption Protective Measures

To ensure the protection of adopted children beyond the adoption, the Adoption of Children Regulations, 2012, under regulation 16, require post-adoption monitoring. The Regulations require monitoring to be done by way of home visits after the first three months following the adoption order. For children adopted by parents residing in Tanzania, the monitoring duty falls upon social welfare officers. In the case of adopted children whose parents reside abroad, the Commissioner of Social Welfare, in consultation with the International Social Service, is

[1204] Interview with a non-Tanzanian adoptive parent and founder of a children's home in Tanzania, currently living in the UK, response submitted by email on 16.02.2019.

the designated authority to make the follow-up. If monitoring unveils any protection issues, the law requires that they are dealt with according to the Law of the Child Act.

6.5.1 Post-Adoption Monitoring Practice

Post-adoption monitoring is not standard in Tanzanian child adoption practice. None of the social welfare officers and adoptive parents interviewed had ever done or experienced any post-adoption monitoring. A resident non-Tanzanian adoptive parent who also practises child adoption law in Tanzania reported that she had not witnessed any monitoring since she adopted her child in Tanzania 13 years ago.[1205] She added that she has been legal counsel for numerous adoption petitions but has never heard about post-adoption monitoring in respect of any of her clients. Commenting further on post-adoption monitoring, she asked whether every parent in Tanzania is monitored on how they raise their natural children. Her argument was, once a child is adopted, he or she belongs to the adoptive parents as if naturally born to them in a lawful marriage; so if she is not monitored in respect of her natural children, she does not see why she should be monitored for her adopted ones. Some of the social welfare officers interviewed shared the same viewpoint.[1206] However, when asked about post-adoption monitoring, others said that an adopted child is one less in their extensive workload of children whose fate is still undetermined. They argue that once the court has ruled that adoption is in the child's best interest and granted an adoption order, it can be assumed that the child is safe in a stable family, and resources can be concentrated on others who are still in need of care. This argument reflects what street-level bureaucracy theory says about the effect work pressures have on social workers – rationing services as a coping mechanism.[1207]

The rationale for post-adoption monitoring or services is that the adoptive family must understand and respond to the adopted child's history, specific needs and behaviour, which may be due to earlier bad experiences or the child's current adoptive status. The child may be struggling with feelings of loss, confusion over origins and the need to form a dual identity.[1208] An adoptive parent may require professional assistance if the adopted child is

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[1205] Interview with an advocate specialised in child adoption practice and resident non-Tanzanian adoptive parent, Dar es Salaam, on 15.01.2019.

[1206] Interview with social welfare officer, Ilala Dar es Salaam, on 07.02.2019.

[1207] Smith, Donovan, "Child Welfare Practice in Organizational and Institutional Context", above footnote 117, at pp. 543-544. As a coping mechanism in the face of resource limitations, time pressures and conflicting goals at the work place, social workers may end up rationing services that they are responsible for providing to their clients.

[1208] Kay Challand, "Calling for Post-Adoption Monitoring and Support: A Personal Statement", Adoption & Fostering 24(4) (2000): pp. 29–31. The author provides a personal account of the struggles she went through as an adoptive child in two different adoptive families and makes a plea for strengthening post-adoption monitoring. Michael Tarren-Sweeney, *Mental health screening and monitoring for children in care*: *A short guide for children's agencies and post-adoption services* (New York: Routledge, 2019), at pp. 179-183. The

experiencing any of these challenges. Also, there are child protection issues involved in adoption that warrant post-adoption monitoring. These include the possibility of child abuse, abduction, sale and trafficking. This is the reason behind the insistence on safeguards and post-adoption services under the 1993 Hague Convention on Intercountry Adoption.[1209]

6.5.2 Tanzania's Position on the 1993 Hague Convention on Intercountry Adoption

Tanzania is not a party to the 1993 Hague Convention on Intercountry Adoption. Therefore, the safeguards, including central and competent institutions formulated under the Convention that could conduct post-adoption monitoring, are not available to an adopted Tanzanian child living abroad. Protection of children adopted by non-resident Tanzanians, and by resident non-Tanzanians with the possibility of residence outside Tanzania, is in the hands of the Commissioner with the help of ISS. However, the researcher could not find any evidence that this type of monitoring is performed.

In its report to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in 2015, Tanzania indicated that it was consulting with stakeholders to form a consensus regarding ratifying the Convention.[1210] In paragraph 102 of the report, Tanzania indicates that it practises international adoption where non-citizen adopters must be residents in the country during the adoption. The study followed up both statements during field research. A high-ranking officer of the Department of Social Welfare indicated that there was not sufficient progress at the consultation stage to merit ratifying the Convention. He said,

> "We have no good systems to do an assessment before an international adoption and also monitoring after the adoption. While speaking about international adoption in the Parliament, the Members of Parliament asked me, are you aware of how many of our children live abroad? Do you know what traditions Madonna is teaching them?" [1211]

In response to the second statement above, the Department of Social Welfare maintained that Tanzania only practises domestic adoption. Social welfare officers exhibited meagre knowledge of what international adoption means. Among the 20 interviewed officers, only four were aware of the 1993 Hague Convention on Intercountry Adoption. Of these four officers, two were holders of a bachelor's degree in sociology and social work who had

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author discusses the mental health and psycho-social effects that a child in care, including adopted children, may experience because of his or her status. This can be addressed only where post-adoption monitoring is conducted and support is offered.

[1209] Under Articles 1 and 9(c) of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Concluded 29 May 1993), reflecting the spirit of Artcle 21 (c) of the; United Nations, Convention on the Rights of the Child.

[1210] See Paras 104 and 233 of the United Republic of Tanzania, *Consolidated 2nd, 3rd and 4th Reports on the Implementation of the African Charter on the Rights and Welfare of the Child by the Government of the United Republic of Tanzania*, above footnote 395, at pp. 30 and 64.

[1211] Interview with a high-ranking officer at the DSW, in Dar es Salaam, on 20.02.2019.

worked at the adoption desk at the national level for an extended period; one had a master's degree in development studies and was working on general social welfare issues at the district level; and one had a bachelor's degree in sociology and was working at the ward level. One of the social welfare officers who demonstrated an understanding of what the Convention entails said,

> "The Convention makes the adoption process easier and provides an avenue for children to get a better life abroad. However, it is not fully equipped to guard against the trafficking and selling of children. Our legal framework is still not well structured to carry the safeguards established under the Convention. Selling and trafficking in children would be easier."[1212]

The officer was further questioned on whether a Tanzanian child in adoptions with an international element would not be better protected under the framework of the Convention than without it. He was asked to take into account that even if these adoptions are considered domestic in Tanzania, they have an international aspect, and that, by not being a party to the Convention, Tanzania may be compromising the level of protection they could be guaranteed. He responded,

> "There are some effects of Tanzania not being a party to the Convention, but instead of experiencing the dangers of being a party now, it is better to improve our adoption laws, perceptions and institutions first so that we can profit from it." [1213]

In the light of these responses, the researcher cannot conclusively say whether, or when, Tanzania will ratify the 1993 Hague Convention on Intercountry Adoption. During field research in 2018 and 2019, there were no indications that the consultations were still ongoing, or whether the undertaking has been abandoned.

In conclusion, Tanzania's law and practice on post-adoption monitoring are not comprehensive enough to guarantee the protection of the adopted child in accordance with the best interest of the child principle. A regional social welfare officer in Arusha shared a story regarding a non-Tanzanian adopter whose intentions regarding the adoption were doubted by the assigned social welfare officer.[1214] In the social investigation report, the officer expressed his doubts. In court, the officer agreed with the decision to grant the adoption but wanted to ensure that there would be post-adoption monitoring while the child was abroad. Because he was bothered by the case, the assigned social welfare officer established contact with the social welfare office in the host country and received quarterly reports on the adopted child's

[1212] Interview with social welfare officer at the adoption desk, MoHCDGEC headquarter offices in Dodoma, on 22.03.2018.
[1213] *Ibid.*
[1214] Interview with social welfare officer 1-Arusha, Regional Social Welfare Offices, Arusha, on 19.03.2019.

development. This story shows that post-adoption monitoring is possible and can be done across borders with the cooperation of the social welfare offices in the receiving country. Such cooperation could be secured by way of bi- or multilateral agreements between Tanzania and common receiving countries. The law and the administration of the Department of Social Welfare need to effect reforms to ensure better protection of adopted children to safeguard their best interests.

6.6 The Role of Child Adoption in Helping to Alleviate the Problem of Children Without Parental Care in Tanzania

This part considers the role of child adoption as a whole, not only by resident non-Tanzanians and non-resident Tanzanians. It pays particular attention to the position of Tanzanians generally in child adoption practice. The statistics and trends of child adoption in Tanzania from 1944 to 2018 show that it is still practised at a very low level. The NBS estimated the country's population at 55.9 million in 2019.[1215] The researcher found that up to March 2019, there were 1,377 registered adoptions. These include 869 adoptions in the period 1944-2006 as reported in the previous study by Rwezaura and Wanitzek, and 508 adoptions in the period 2007-2018 as reported in this study. Considering the size of the country's population and the number of years over which adoption law has been implemented in Tanzania, the adoption rate is negligible. These numbers are inexplicable, especially when considering the high numbers of children in need of care and protection in Tanzania, as discussed in part 3.3.

Several respondents attempted to explain why child adoption practice is minimal in Tanzania. The leading reason was the cultural legitimacy of formal child adoption in Tanzanian society. A social welfare officer said,

> "The biggest drawback is culture. It is not in our culture as Tanzanians and Africans to take children that are not related to us and make them ours. It is in the Europeans' culture to assist unrelated children; hence they understand alternative care or adoption better than Africans."[1216]

Rwezaura and Wanitzek, in the 1980s, also gave "cultural background" as an explanation for people of African descent showing low engagement in formal child adoption.[1217] They found that there was a preference for traditional alternative care arrangements such as kinship foster care and adoption practices.[1218] However, they also found a gradual increase in adoptions by

[1215] United Republic of Tanzania, National Bureau of Statistics (NBS), "Tanzania in Figures 2019", above footnote 530, at p. 18.
[1216] Interview with social welfare officer, Bunju Ward, Kinondoni District, Dar es salaam, on 16.01.2019.
[1217] Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at p. 125.
[1218] *Ibid.*, at pp. 153-159.

Tanzanians of African descent. A significant number of these were, of course, among professional groups and non-residents. This study, like the previous one, confirms that non-resident Tanzanian adopters use the formal law of adoption, partly because they understand adoption better due to their exposure to European culture, and partly because they are forced to adopt by foreign immigration laws. In the research for this study, a developing trend of increased adoptions by resident Tanzanians has been observed. However, such adoptions are still low compared to the numbers of children in need.

Rwezaura and Wanitzek predicted that features of a modern state, such as bureaucratic requirements and social restraints compelling a precise definition of social relations between a person and his or her dependents, might influence the use of formal adoption. The motives for adoption discussed above do indeed show that Tanzanians adopt because the legal requirements of a modern state, whether Tanzania or a foreign state, force them to define their relationships with their dependents. This obligation arises in issues of emigration, inheritance and succession, national registration, services such as health insurance, and the like that require definitive parentage.

The mandatory requirements of a modern state apply, and the Law of the Child Act contains comprehensive provisions for child adoption which creates clear parent-child relations; so why do Tanzanians still not use the formal adoption law? The study confirms that traditional care arrangements in Tanzania have undergone substantial weakening, leaving many children in need of care and protection; so why do Tanzanians still not use formal child adoption to cater for these children? The respondents provided several reasons based on the socio-legal and economic situation in Tanzania. Two major reasons stand out: lack of legal awareness, and financial inability to care for additional children. These issues have been extensively discussed in part 3.3. However, while explaining the reasons, two respondents gave distinctive opinions. One social welfare officer said,

> "Many Tanzanians are not aware of child adoption. Those who are aware do not know what it really means. They want child adoption mostly to access services such as health insurance, education, better standard of living or travelling abroad and not to provide care for those in need."[1219]

A health officer also said,

[1219] Interview with social welfare officer, Ilala Municipal Council, Dar es Salaam, on 07.02.2019.

> "Economy is the biggest hindrance to caring for relatives' children. Electricity or water bill expenses will marginally increase. But what about food and health care? People avoid taking on this burden."[1220]

Apart from these reasons, respondents attempting to explain Tanzanians' reluctance to adopt also mentioned the legal and institutional challenges. The researcher made some observations during field research regarding these challenges. They include the mandated authorities' lack of sufficient knowledge, training and experience in handling child adoption practice, the courts' financial and procedural inaccessibility, and lack of institutional commitment in facilitating child adoption practice.

Social welfare officers, magistrates and judges exhibited an insufficient understanding of the law and procedure of child adoption as provided under the Law of the Child Act. During field research in 2018 and 2019, about ten years after the Act was enacted, they still referred to it as "the new law". Social welfare officers were honest about this shortcoming and attributed it to the lack of training, as already explained above. On the side of the court, several respondent judicial officers declared a lack of experience in child adoption matters. An adoptive parent and seasoned child adoption legal practitioner said, "…judges and magistrates do not actually know the law and procedure on child adoption…".[1221] In analysing adoption cases, the researcher came across substantive and procedural irregularities that proved this contention. There were irregularities in matters of court jurisdiction, adherence to child adoption requirements, and child adoption procedures. For instance, open adoption requirements and procedures were a stumbling block for several magistrates and judges. Some magistrates ruled on closed adoption petitions as if they were open,[1222] and some judges deliberated on open adoption petitions as if closed.[1223] The researcher also came across an adoption order granted in the Juvenile Court at Kisutu, which has no jurisdiction for adoption matters.[1224] Adherence

[1220] Interview with a deputy regional health officer, Regional Commissioner's Offices, Dar es Salaam, on 07.02.2019.

[1221] Interview with an advocate specialised in child adoption practice and resident non-Tanzanian adoptive parent, Dar es Salaam, on 28.02.2018.

[1222] For instance, in the Resident Magistrate's Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, 2009, In the Matter of A (Infant) and In the Matter of Application for Adoption by CXM and LSL of Dar es Salaam" (04.08.2017); and District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, 2009 and In the Matter of an Application for Custody of MJM by JW and AW".

[1223] For instance, an adoption by the child's grandmother concluded in the High Court, see High Court of the United Republic of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of GSG-the Infant and In the Matter of Petition for Adoption Order by DHN".

[1224] Juvenile Court of Dar es Salaam, at Kisutu, "In the Matter of the Law of the Child Act, No. 21 of 2009, In the Matter of an Application for an Open Adoption Order by HAB alias HAH and In the Matter of Open Adoption of AMAB" (17.07.2017).

to requirements pertaining to age,[1225] residence,[1226] marital status,[1227] pre-adoption foster care,[1228] and best interests determination and application was also not always strictly observed. If the institutions implementing child adoption law do not understand it, it is even more challenging for the general public to understand and apply it.

Regarding the court's inaccessibility in child adoption matters, social welfare officers attributed this to the length of adoption proceedings, financial costs of adoption and complicated procedures that challenge a common Tanzanian's understanding. One social welfare officer, while speaking about these difficulties, said,

> "Many applicants become stuck at the fostering stage because advocates are very expensive; they cost 1.5 to 3 million Tanzanian shillings for an adoption, they say. They become reluctant to file adoption petitions. And the high court is not easily accessible to ordinary people without legal representation. Also, adoption proceedings take too long; and they are postponed for years as if they are similar to criminal! This is because judges are always reshuffled. I have an adoption proceeding at the High Court that has gone on for two years now with a change of four judges already. Last time the case was postponed for six months just because the applicant had gone out for five minutes to find a snack for the child while the case got called." [1229]

Although open adoption, as conceived during the Act's drafting, would have assisted in reducing the procedural inaccessibility of the court, it now applies only to adoptions by relatives. District and resident magistrate's courts are generally more approachable than the High Court of Tanzania. For instance, for a long time Kiswahili was used as the language of proceedings in the lower courts, while at the High Court, English was used. Since only a small number of Tanzanians are conversant with the English language, this acted as a barrier. However, there has been a recent change under Act 1 of 2021 which amends the Interpretation of Laws Act by adding section 84A which makes Kiswahili the official language of all courts.[1230] This change may improve court accessibility, particularly in

[1225] A child adoption order was granted for a 29-year-old woman in The District Court of Kinondoni, at Kinondoni, "In the Matter of the Law of the Child Act 2009 and In the Matter of RCM of Kinondoni-Dar es Salaam and In the Matter of Application for an Adoption Order by ECK of Mbezi Beach, Kinondoni-Dar es Salaam".

[1226] The adopted child and adoptive parents were already resident in the USA at the time of the adoption order in the case of High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, 2009, In the Matter of Adoption of M (the Child) by PLK and PMK (Petitioners) of Texas, USA" (2014).

[1227] The applicant stepfather was not yet married to the adopted child's mother in High Court of the United Republic of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, "In the Matter of Application for Adoption of TGB, a Male Child and In the Matter of Application for Adoption of TGB by RB".

[1228] In an open adoption by a relative there was no compliance with the pre-adoption foster care requirement in District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, 2009 and In the Matter of an Application for an Open Adoption of PJK by MPM" (16.06.2017).

[1229] Interview with social welfare officer, Ilala Municipal Council, Dar es Salaam, on 07.02.2019.

[1230] See section 5 of the Written Laws (Miscellaneous Amendments) Act, 2021.

adoption matters. Other issues, such as postponement of proceedings, are administrative issues that the court administration can resolve.

The court's role in interpreting the law is not sufficiently reflected in child adoption practice. Rather, the court suffers from misconceptions in the law, as in the case of the misconceptualisation of open adoption. The court could have established the correct interpretation and application of the concept which would have cured several problems connected with open adoption, as explained in this thesis. Also, the court has refrained from clearing up contradictory provisions, such as section 61 of the Act, which derogates from the child's right to an opinion and participation in decision-making. This section also counteracts the provisions in the Act and the Regulations requiring a child's consent to an adoption provided the child is of sufficient maturity and understanding to give such consent. The researcher observed that advocates and officers of the court with the responsibility to assist it to arrive at just and correct decisions show a lack of aptitude and commitment to do so in the practice of child adoption.[1231] Instead, they mislead the court by colluding[1232] with clients and bending the law to suit their clients' demands.[1233]

There is very little institutional commitment to facilitating child adoption. This is common to both public and private institutions involved in the child adoption process. The Department of Social Welfare has not emphasised the practice which can ensure a permanent family-based solution for children in need of parental care; instead, it still relies on institutional care. Social welfare officers, during interviews, declared that child adoption, especially with an international element, is procedurally difficult; hence they tend to avoid it.[1234] Children's rights stakeholders such as UNICEF Tanzania support formal child adoption but have not included it in their priority areas. During field research, a UNICEF officer in charge of alternative child care said that the organisation's primary focus was on deinstitutionalising child care.[1235] The researcher is of the opinion that coupling the deinstitutionalisation agenda with raising awareness on child adoption could go hand in hand in ensuring that children leaving or not placed in institutional care find permanent homes.

[1231] See discussion on a similar finding in Rwezaura, Wanitzek, "The Law and Practice Relating to the Adoption of Children in Tanzania", above footnote 22, at pp. 147-151.

[1232] See the discussion on corrupt practices in child adoption in part 6.4.6.

[1233] For instance, the advocate in High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, In the Matter of RKSM (Infant) and In the Matter of an Application for Adoption by LBM of London, UK" (07.08.2014) instituted an open adoption petition at the High Court. The adoption proceedings reached the hearing stage before the advocate realised he was misleading the court and applied to withdraw the petition. An advocate who knows the law should not make such an obvious mistake.

[1234] Interview with social welfare officer 2-Kinondoni District, Dar es Salaam, 23.01.2019.

[1235] Interview with child protection specialist, UNICEF Tanzania, Dar es Salaam offices, on 21.02.2019.

The practice of child adoption in Tanzania plays a minimal role in reducing the problem of children without parental care. However, the adoption of even one child is significant as long as it serves the child's best interests. For child adoption to significantly reduce the problem, a host of challenges must be eliminated first. This is because the socio-legal challenges explained in this part and throughout the thesis limit the practice of child adoption. The following chapter provides recommendations to address the challenges and provide a way forward.

6.7 Conclusion

The child adoption trend in Tanzania shows that the dominance of certain cultural groups in child adoption has gradually shifted since 1944. Currently, there is an increase in adoptions by African Tanzanians, both resident and non-resident. However, despite the increase, adoptions with an international element still dominate the practice. This means adoptions by non-resident Tanzanians, resident non-Tanzanians, and mixed couples.

The number of registered adoptions shows that child adoption practice in Tanzania is still very low. The general Tanzanian resident population consists of almost 60 million people. However, the leading adopters are those with a foreign element, whose number is limited. According to the information from registered adoptions, most adopters come from professional groups. This means that ordinary Tanzanians generally do not use the formal law of adoption. Cultural background and lack of understanding of formal child adoption are the main reasons for their non-engagement in child adoption.

The registered adoptions show that adopters prefer girls to boys. They also show that the child's age matters, with a preference for younger children over older ones. Children in the age groups 0-3 and 4-7 made up over half of the total number of adopted children in the years under study. In addition, over half of the total number of adopted children in these years had been abandoned. This finding indicates that child abandonment significantly contributes to the problem of children without parental care, and further, that adoption plays a role in solving this problem by providing a permanent family for those children. Moreover, it confirms that abandonment is one of the main factors leading to an increase in the number of children in need of care and protection, as discussed in part 3.3.

The motives for adoption analysed in this chapter reveal the type of children adopted in Tanzania. Most of the studied cases involved an overlap between child- and family-centred motives. Although there were other motives which the researcher found difficult to categorise, most adoptions were intended to serve the best interests of the adopted children and hence

were child-centred. This means that a considerable percentage of the adoptions helped to solve the problem of children in need of care and protection.

The child adoption legal framework provides requirements and procedures geared towards safeguarding the child's best interests. However, due to several shortcomings and gaps in the framework, this goal may not always be realisable. For instance, there is an urgent need to harmonise the provisions and practice of the Law of the Child Act and the Regulations made under it on child adoption issues. The problems associated with identifying a child for adoption could, for example, be addressed by the 'freeing for adoption procedure' under the Child Protection Regulations, 2014. However, since the Child Protection Regulations came later than the other Regulations, child adoption practice does not always adhere to its provisions.

The institutions responsible for administering adoption law suffer from structural, administrative, resource and professional challenges that can compromise the child's best interests. The institutional shortcomings affect the ability of the mandated authorities to interpret and apply adoption law. For instance, this study has shown how lack of sufficient knowledge, skill, and experience affects the way child adoption practice is managed by social welfare officers and judicial personnel. Also, it has shown how the shortage of time, human, financial and infrastructural resources create workplace pressures leading the responsible officers to resort to coping mechanisms that can detract from compliance with the child's best interests principle.

Tanzania is a country in which child adoption practices are impacted by legal pluralism. The presence and operation of other legal orders alongside state law have a two-fold effect on child adoption practices. First, the influence of customary and religious laws on child care traditions affects Tanzanians' understanding of child adoption. They fail to comprehend the effects of an adoption order, especially regarding the permanent change of familial relations and its associated consequences. Second, it makes those Tanzanians who engage in formal child adoption do so for other compelling reasons that make child-centred motives secondary. For instance, the researcher found that in the case of non-resident Tanzanian adopters, children are adopted mainly in order to comply with the immigration laws of their host states. It was also found that in some adoptions the interplay of different legal constellations may compromise the child's best interests. For example, the application of customary or religious laws post-adoption may affect adopted children's inheritance rights in intestate devolution of property.

The legal and institutional shortcomings discussed in this chapter and throughout the thesis are evidence of an inadequate child protection framework, especially in adoptions with an international element. For instance, the law does not sufficiently provide for post-adoption monitoring and support initiatives. In addition, there was no evidence of compliance with the minimum measures that the law provides for adopted children living abroad. Furthermore, Tanzania maintains that all adoptions with an international element are domestic adoptions, and that the country does not practise international adoption. Tanzania is not a party to the 1993 Hague Convention on Intercountry Adoption, and the researcher could not find a clear policy on the country's position regarding joining the Convention.

Lastly, while it is true that child adoption still plays a minimal role in addressing the problem of children in need of parental care in Tanzania, it has the potential to do more and the number of adoptions by resident Tanzanians is in fact increasing. Considering that traditional arrangements for child care are weakening, and that there is a move towards deinstitutionalisation, formal child adoption could be a good solution in future for children in need of permanent family-based care. Bearing in mind the low use of other alternative care measures such as foster care and placement with fit persons, the area of formal alternative child care in Tanzania needs keener attention. Thus, the following chapter provides recommendations for improving child adoption practice in Tanzania.

Chapter 7: A Response to 'in the Best Interest of the Child?' – A Summary of Findings, Conclusions and Recommendations

7.1 Recapitulation of Research Questions and Findings

Journalistic, scholarly, and social reports on the increasing number of children living in endangered environments ('most vulnerable children') in Tanzania roused the researcher's interest in child welfare law and practice. Her attempts to understand the root causes of child vulnerability unveiled an intricate social problem that could be examined from numerous angles. Being trained in legal studies, the researcher elected to pursue legal research on the care and protection of children who lack parental care. This led to the study of alternative child care, and in particular child adoption.

A preliminary investigation into Tanzania's law and practice on child adoption gave rise to questions about how the relatively newly enacted Law of the Child Act, 2009 of Mainland Tanzania addressed adoptions, especially those with an international element.[1236] These are adoptions by Tanzanians living abroad (non-resident Tanzanians) and non-Tanzanians living in Tanzania (resident non-Tanzanians). These questions shaped the current study into a socio-legal inquiry on Tanzania's law and practice on child adoptions with a special focus on adoptions with an international element. At the centre of the study is an interrogation of:

1. whether the existing legal, policy, and institutional frameworks have the capacity to adequately manage child adoptions with an international element;
2. whether the legal process for child adoptions by non-resident Tanzanians and resident non-Tanzanians is in the best interest of the child;
3. whether the law and practice on child adoption guarantee sufficient protection to the child in the adoption process; and
4. the extent to which child adoption, especially by non-resident Tanzanians and resident non-Tanzanians, could help to alleviate the problem of children deprived of parental care in Tanzania.

The main objective of asking these questions was four-fold: to analyse, to inform, to suggest solutions, and to motivate reforms. The researcher aimed at providing a critical analysis of the law, policy and institutional frameworks relating to child adoption in general, and to adoptions with an international element in particular. The analysis was meant to show

[1236] Detailed justifications for research on child adoptions with an international element are given in part 1.2 of this thesis.

whether the frameworks can sufficiently manage child adoption practice in a way that guarantees the child's best interests. In the case of shortcomings, it was intended to recommend solutions that would motivate reforms and bring about a legal and practical transformation in the field of child adoption in Tanzania.

The researcher used field and desk research methods to generate data that could address the research questions and meet the research objectives. The thesis presents, analyses, and discusses these data which were collected using interviews, documentary analysis and a quantitative survey, in combination with other methods. The empirical data were collected from selected districts and municipalities in Tanzania. They cover a period of twelve years from 2007 to 2018 and are in some aspects complemented by other authors' previous studies.

7.2 Research Findings

This part provides a summary of the main research findings. They are arranged under headings that reflect the research questions.

7.2.1 The Capacity of the Legal, Policy, and Institutional Frameworks to Manage Child Adoption

7.2.1.1 Legal Framework

The framework that regulates child adoption in Tanzania is mainly provided in the Law of the Child Act together with the Regulations made under it. In principle, the framework provides for how child adoptions should take place in Tanzania with the intention of protecting children's best interests. The study's overall findings indicate that the framework provides minimum guidance for adoptions generally, and specifically for those with an international element. A critical examination of the entire framework revealed a number of inadequacies, as summarised in this part.

It was discovered that child adoption in Tanzania is regulated by multiple legal orders that create a relatively broad and complex legal framework. These legal orders interplay in practice and may be invoked alternatively depending on the nature of a specific case. For instance, customary or religious laws may apply in pre- or post-adoption decision-making where the involved parties are subject to such laws. The reality of this plurality of laws is that it creates challenges for the new familial relations and rights and duties created by adoption under state law. It also affects law enforcers, such as non-lawyer social welfare officers, who are required to take into account the constellation of legal orders involved in child adoption. This is difficult to achieve, especially in adoptions with an international element.

The present analysis of the law on child adoption reveals a lack of harmony between the Act and the Regulations that creates difficulties in implementation. This legal disharmony results from haphazard drafting and enactment of the Regulations without proper sequence and sufficient consideration and consultation of the already existing provisions. For instance, the Child Protection Regulations, 2014, which should have been drafted first, came later than the Regulations on children's homes, foster care, and adoption. The requirements and procedures under the Child Protection Regulations cover all alternative care measures and are certainly beneficial for children deprived of parental care. However, they are not always complied with in the child adoption process because the earlier provisions set out in the specific Regulations for each measure have already taken root.

On procedural aspects, the researcher found a lack of clarity and uniformity in the child adoption requirements and procedures laid down in the Regulations. This is because the requirements and procedures for different formal care measures affect child adoption. During the child adoption process, it is necessary to consider the rules and procedures set out in the Regulations for child protection, children's homes, foster care placement and adoption of children. Where an international element is involved, as in adoptions by non-resident Tanzanians and resident non-Tanzanians, matters are further complicated. For instance, the Child Protection Regulations, 2014 provide a procedure to free children for adoption, which is not reflected in the other Regulations and hence is not always adhered to. This has caused the enforcers to apply the law selectively and sometimes erroneously, based on long-term established practices and procedures that do not necessarily reflect the spirit and intent of the current legal framework.

In the course of analysing the legal framework, it became apparent that the relevant legal texts on child adoption, especially the Law of the Child Act, 2009 and the Regulations made under it, contain multiple misconceptions, contradictions, ambiguities and omissions, as well as errors in language, typing, numbering, and cross-referencing. Despite the recent law review in 2019 that edited some parts of the Law of the Child Act, many errors still subsist. These shortcomings affect the substance of the law and impact attempts to interpret and apply the relevant provisions correctly. In some instances, these shortfalls make it difficult to reconcile provisions of the Act and different Regulations that address a similar issue. As a result, the shortcomings affect the law's implementation, especially when those responsible for implementation are not trained in law.

In connection with the above finding, it was observed that some Regulations have been translated from English into Kiswahili. The Act itself is yet to be translated. According to

information available to the researcher, the weaknesses in the Regulations were not raised as a problem during the process of translation. However, in the case of the Adoption of Children Regulations, GN. No. 197 of 2012, some considerable changes are included in the translated version, GN. No. 164 of 2016. Nonetheless, while section 4 of Act No. 1 of 2021 amending section 84 of the Interpretation of Laws Act requires all laws to be translated into Kiswahili, it maintains that the language of the enacting version takes precedence in case of any conflict with the translated version. Therefore, the translations of the Adoption of Children Regulations and the other Regulations do not address the shortcomings in the original documents. That is not the task of a translation anyway, since it must follow the original version exactly. Thus, the Kiswahili translation of the Regulations might facilitate enforcers' understanding of the law but it does not help to clear up the confusion created by the observed shortcomings. The researcher found that without first amending and harmonising all relevant legal documents, such translation risks creating parallel versions that further complicate the problem.

In addition to these findings, the relevant laws fail to properly define critical terms related to adoption, or they provide definitions that are either misconceived or inconsistent with accepted international standards and practice. For example, open adoption is defined by the Act as adoption by relatives, different from the common understanding of this notion, according to which open adoption allows for varying degrees of communication, contact, and access between the birth and adoptive families. The effect of this misconception is an uncertain framework with novel legal rules that apply only in Tanzania. This presents a challenge from an interpretation perspective, especially when viewed in the context of international laws on child adoption. From an implementation perspective, this misconception limits the scope of open adoption and misconstrues adoption by relatives. Furthermore, the Act and the Regulations do not provide comprehensive legal requirements and procedures that apply exclusively to this type of child adoption. In practice, this results in contradictions such as regarding whether a relative prospective adopter needs to foster a child for six months or not. Social welfare officers expressed contradictory views regarding this question.

Adoptions by non-resident Tanzanians face similar challenges because there are no sufficient provisions on the precise requirements and procedures for this type of child adoption. It was observed that the question of pre-adoption care for non-resident Tanzanian adopters attracted the most conflicting responses. There was no agreement on the terms of the requirement and its duration, especially where the adopters were relatives of the child. Social welfare officers exhibited a lack of understanding about adoptions of this type.

In conformity with the alternative care principle of suitability, the Law of the Child Act provides a range of formal alternative care measures. However, there is a gap between what is provided in the laws and what is found in practice. For example, it was discovered that even though the Law of the Child Act introduced placement with 'fit persons' as a measure of alternative care in 2009, it is not yet practised throughout the country. Also, regulations concerning the requirements and procedures for fit person placements are yet to be published. Another example is foster care, which in practice is hardly used as an independent alternative care measure as conceived under the law, but mainly as a precondition for child adoption. These shortfalls, which result from the inconsistencies of the legal framework and weak institutional structures (as will be seen in the next section), force children to unnecessarily remain in institutional care against their best interests.

The researcher found that the law does not adequately address kinship care as an alternative care measure. Despite its recognition in the Law of the Child Act, its regulation remains a challenge. For instance, even though the law provides for monitoring and support in formal placements with relatives, practice shows that social welfare officers hardly do so. The situation was found to be even more unsatisfactory in informal kinship care, where the Act merely recognises it without setting any further standards and safeguards to monitor it. The impact of this omission is enormous as it means the law does not adequately address the form of care that is most commonly practised by Tanzanian families and communities under their different customary and religious laws. This means that a significant number of children placed in informal kinship care do not enjoy the full protection of the law. While state intervention in traditional child care remains debatable, issues regarding children's exposure to significant harm in kinship care cannot be disregarded. A balance must be struck to guarantee the child's best interests.

Despite the challenges discussed in this thesis, some components of the legal framework are very good. For instance, the Child Protection Regulations, 2014 establish a robust, comprehensive child protection procedure, which, if reviewed to correct the errors and if well implemented, can guarantee adherence to the child's best interests. However, effective implementation of the Regulations goes hand in hand with enhancing the understanding and work conditions of the enforcers (mostly the social welfare officers). For example, the researcher discovered that implementation of the Regulations is compromised by workplace pressures arising from the shortage of resources such as time, qualified human resources, infrastructure and finance.

7.2.1.2 Policy Framework

The researcher found that there is a multiplicity of policies that influence child adoption law and practice in Tanzania. Such policies include the Child Development Policy of 2008 and many others relating to children's education, health, labour, and other relevant social aspects. Overall, it was found that these policies aim at protecting the child. However, their analysis also revealed some weaknesses that undermine effective implementation of the policies and laws on child adoption.

Since different public offices developed these policies at different times and for different purposes, they remain unharmonised and potentially confusing in practice. It was observed that over time, their implementation has become inconsistent and counterproductive. It must be noted that in practice, 'street-level bureaucrats' adhere to the contents of policies more than to the relevant laws and regulations. This means that a confusing policy framework directly impacts implementation of the law.

Also informing policy and adding to its framework are national plans of action, strategies, and guidelines covering or impacting child welfare in Tanzania. Similar to policies, these texts are also multiple and unharmonised. There is also no smooth succession from one national plan of action or strategy to the next. In practice, when the time for implementation of a plan has lapsed, it is succeeded by another without any further follow-up. The new plans rarely build on the work of the previous plans due to the lack of a rigorous review process that identifies their successes and failures in order to better address the needs in the field. Thus, the multiple policies and policy-like documents on child welfare are disconnected in a way that affects their implementation and defeats their purpose.

Multiple policy documents provide a wealth of plans and strategies for effective child care and protection in Tanzania. However, since they are not well coordinated and implemented in practice, they fail to achieve their objective.

7.2.1.3 Institutional Framework

The relevant laws have established the Department of Social Welfare with officers at the national and local government levels as an institution responsible for overseeing children's affairs, including adoption matters. The Department has an extensive mandate on children such that no institutions involved in the child adoption process can function without its cooperation. This centralisation in the institutional arrangement is potentially good as it ensures uniformity in addressing children's issues across the country. However, the following shortcomings were observed.

The Department suffers from challenges in respect of coordination of its operations and officers between central and local government levels. This is because the decentralisation by devolution reform has made the position and work of social welfare officers at the local government level unclear. Their responsibilities and accountability fall under the Ministry of Health, Community Development, Gender, Elderly and Children (MoHCDGEC) and the President's Office – Regional Administration and Local Government (PO-RALG), which are two different Ministries. This breaks the smooth chain of command that is implied in the Act, a situation which complicates child adoption management.

Institutional administration of child adoption law is impeded by structural, administrative, resource, and professional challenges that compromise adherence to the best interests of the child principle. Apart from the lack of good institutional coordination as mentioned above, these challenges are evident in the lack of sufficient human, financial, and infrastructural resources, which mostly affect social welfare and judicial officers, the key administrators of child adoption law. Among other things, the effects are seen in their lack of adequate knowledge, skill, and experience required for the proper implementation of adoption law. These shortcomings create workplace pressures that push the officers to create coping mechanisms with the potential to undermine compliance with the child's best interests principle.

The researcher found that the institutions responsible for child adoption, specifically courts of law and social welfare offices, do not have reliable modern systems for data storage and management. To a considerable extent, the institutions still use paper-based systems that are disorganised and make tracking information extremely tedious. For example, although the courts have made considerable strides in developing electronic data systems, they are still lagging behind with case registers and court decisions. In the course of the study, it was challenging and time-consuming to retrieve data on registered adoption petitions and adoption orders. This situation forced the researcher to work personally and manually in the court registry for several weeks to obtain the records of the cases used in this study. Similar instances of poor data management were observed in social welfare offices where records of their transactions were almost non-existent.

The research findings reveal that the judiciary has not been adequately executing its role in adoption proceedings. For example, significant delays in adoption cases were recorded, affecting the whole adoption process, which is already a sensitive matter. Further, it was noted that some judicial officers are not well versed in child adoption law. Instead, they rely on the guidance of social welfare officers, who are also not sufficiently conversant with the

provisions of the law. Thus, there can be no independent verification by the judicial officers who may approve adoptions that do not uphold the child's best interests.

It was further noted that shortcomings in the legal and policy framework contribute to weaknesses in the institutional management of child adoption. For instance, the Law of the Child Act and the Regulations overemphasise the duty of social welfare officers to interpret, determine and apply the best interests principle. This means that the court is forced to rely almost entirely on the decisions of the officers regarding the best interests of a child in adoption proceedings. This practice obliterates the court's chances to consider the best interests of the prospective adoptive child objectively. Since the court is supposed to be the independent umpire in the proceedings, relying on social welfare officers who may be influenced by the adopters jeopardises best interests determination by the court.

7.2.2 Adherence to the Best Interests of the Child Principle

Chapter five of this thesis contains an extensive discussion of the best interests of the child principle. This principle is one of the UNCRC's four cardinal principles, and is widely applicable in children's matters. The Convention's near-universal status has given the principle broad coverage. This has led to the principle being included in multiple conventions and statutes with varying scope, purpose, and status of application. However, in most such instruments, the principle remains deliberately devoid of a definition or criteria for determination. The primary purpose for leaving the principle indeterminate is to allow for flexibility considering the diverse circumstances and cultures in which the principle may be applied.

Thus, what constitutes the child's best interests, cannot be harmoniously determined across different cases, cultures, nations, or regions. Nonetheless, the authority determining and applying the best interests principle must ensure that the decision made or action taken is in the child's best interests. This study of the relevant laws and practice in Tanzania reveals mixed findings regarding adherence to the best interests of the child principle.

The relevant Law of the Child Act does not define or provide criteria for determining the child's best interests. However, the Adoption of Children Regulations provide a brief list of criteria applicable to child adoption. Compared to the criteria under Zanzibar's Children's Act, this list is very limited.

Although the requirement that all administrative and judicial actions must adhere to the best interests of the child principle is uniform across the Act and the Regulations, other principles that concretise the best interests principle are not consistently incorporated in them. For

instance, the Act does not include a list of alternative care principles that concretise the best interests principle. These are found under the Regulations. The Foster Care Placement Regulations contain the least provisions for these principles, while the Children's Homes Regulations include the most comprehensive list. Thus, adherence to these principles in child protection practice is inconsistent, which lays the basis for discriminatory practice that may impinge on the best interests of some children.

The Law of the Child Act requires social welfare officers and the court to apply the best interests principle in child adoption. In practice, however, there is an over-reliance on social welfare officers to interpret, determine, and apply the principle. However, the officers lack sufficient training to understand the legal aspects of best interests determination and application of this principle in child adoption. Also, the officers' socio-cultural and economic environment significantly influence their perceptions of what constitutes the child's best interests. It was found that the workplace pressures emanating from a shortage of time, training, and resources force the officers to devise coping mechanisms that affect their ability to apply the principle. Since in cases of child adoption the court primarily relies on the reports and representation of the child's best interests submitted by a social welfare officer as guardian *ad litem*, it cannot be guaranteed that the child's best interests are always safeguarded in adoption.

7.2.3 Adherence to the Law and to Child Protection Requirements in Child Adoption

The Law of the Child Act and the Regulations provide child adoption requirements and procedures meant to safeguard the child's best interests. However, the framework they create is plagued with the following shortcomings and gaps that defeat their goal in practice.

The existence of non-harmonised provisions in the Act and the Regulations challenges adherence to the law in practice. For example, several different procedures can be used to identify a child for adoption. The problems associated with child identification could, among other possibilities, be solved by referring to the 'freeing for adoption procedure' under the Child Protection Regulations, 2014. Unfortunately, since the Child Protection Regulations came later than the other Regulations, child adoption practice does not always adhere to their provisions. Departure from the Child Protection Regulations potentially leads to protection issues, especially where children are identified for adoption, who have parents and relatives who are capable and willing to care for them.

The impact of legal pluralism on child adoption is evident in the way in which the formal law of child adoption is utilised in Tanzania. The existence and operation of other legal orders on

child adoption alongside state law affect formal child adoption practice in two main ways. One, Tanzanians' understanding of child adoption is influenced by customary and religious laws in respect of child care. As a result, birth families and, in a few observed cases, mandated officers, fail to fully comprehend the effects of an adoption order, especially regarding the permanent severance of familial relations and its associated consequences. This is one of the grounds for low use of the formal law of adoption. Two, the influence of other legal orders makes Tanzanians who engage in formal child adoption do so for other compelling reasons that are not always child-centred. For instance, non-resident Tanzanian adopters, for the most part, adopt children to comply with the immigration laws of their host states rather than to safeguard the child's best interests. Also, the interplay between different legal orders in some adoptions may compromise the child's best interests. For example, applying customary laws post-adoption pursuant to section 68 of the Act may affect adopted children's inheritance rights in intestate devolution of property.

The legal and institutional shortcomings in the practice of child adoption result in an inadequate child protection framework, especially in adoptions with an international element. For instance, the Law of the Child Act and the Regulations insufficiently provide for post-adoption monitoring and support to ensure that the child's best interests continue to be safeguarded. Tanzania maintains that all adoptions with an international element are domestic adoptions regardless of the fact that the adopted children may reside abroad with their non-resident Tanzanian or non-Tanzanian adoptive parents. Since the country is not a party to the 1993 Hague Convention on Intercountry Adoption, adopted children living abroad have minimal protection under the Adoption of Children Regulations. In the course of the study, the researcher could not find evidence in practice of post-adoption monitoring for adopted Tanzanian children living abroad as envisaged in the law.

The existing laws for the protection of children are yet to have a substantial impact in practice. It was noted in the course of this study that a considerable number of Tanzanian children live in an environment that exposes them to risks of significant harm. For example, the number of children living and working on the street is constantly increasing. Also, there is an increase in reported practices that affect children's welfare, such as child abandonment, abuse, and violence, especially physical and sexual. Unfortunately, the majority of the victims are those children without proper family care. And where children are placed in informal care, instances of abuse by relatives and neighbours are increasing. This indicates a significant weakening of the traditional care systems that ought to protect children.

7.2.4 Potential of Child Adoption as a Solution to the Problem of Children without Parental Care

The child adoption trend in Tanzania shows a current increase in adoptions by African Tanzanians, both resident and non-resident. However, adoptions with an international element still dominate the practice of formal child adoption in Tanzania. These include adoptions by non-resident Tanzanians, resident non-Tanzanians, and mixed couples. On the potential of child adoption as a measure to help alleviate the problem of children without parental care in Tanzania, the study revealed the following major findings.

Considering the number of registered adoptions, the general child adoption practice in Tanzania is still very low. Taking into account the average number of registered adoption orders per year, which is 42 (including adoptions by non-Tanzanians), the number of Tanzanians adopting per year is negligible in comparison to the 2019 NBS estimation of a population of almost 60 million. While the number of resident Tanzanians eligible to adopt, for instance who meet the age requirement of 25-50 years, is higher than the number of eligible resident non-Tanzanians and non-resident Tanzanians, the highest numbers of adoptions in Tanzania are those with an international element. Thus, only a slight number of resident Tanzanians use the formal law of child adoption.

An analysis of the registered adoptions shows that most adopters come from professional groups. This means that Tanzanians who do not engage in any formal profession hardly use the formal adoption law. It can be assumed that the cultural background of the Tanzanian majority inhibits understanding of and desire to use formal child adoption.

On the other hand, because certain social benefits institutions, such as health insurance, rely on formalised relationships, there has been a gradual increase in the number of adoptions by resident Tanzanians. Although this is not sufficient ground for establishing adoptive relations, it serves to show that resident Tanzanians can use the formal law of adoption when prompted to do so.

These factors, considered in the light of the weakened traditional child care system, the high practice of institutional alternative care and the move to deinstitutionalise, and the still low practice of foster care and fit person placements, show the significance of child adoption as an important solution for children in need of alternative care.

7.3 Conclusions

In answer to the research questions and based on the research findings, this study has the following conclusions.

The current legal, policy and institutional frameworks on child adoption do not have the capacity to adequately manage child adoptions with an international element. Although the new Act and Regulations create a broader framework that provides more explicitly for adoptions by non-resident Tanzanians and resident non-Tanzanians than the preceding legislation, they have shortcomings that render them incapable of handling these two types of adoptions effectively.

The Law of the Child Act and the Regulations consistently provide that child adoption must be in the child's best interests. However, legal and institutional deficiencies coupled with a lack of strict compliance in practice jeopardise adherence to the child's best interests in the adoption process. The increased legal and procedural requirements in adoptions with an international element further complicate the process and leave more room for non-compliance with the dictates of the best interests principle. Thus, in child adoptions by non-resident Tanzanians and resident non-Tanzanians, the best interests of children are not always sufficiently examined before taking a decision.

The Law of the Child Act and the Child Protection Regulations attempt to provide a comprehensive procedure meant to guarantee child protection in all alternative care processes. Other Regulations that provide specifically for given alternative care placements contribute further to the protection framework. The laws, together with the institutional framework they create, build the child protection system in Tanzania. However, the Child Protection Regulations are not reliably implemented in practice. Thus, specific measures meant to safeguard the child in the adoption process under the Regulations, such as the 'freeing the child for adoption procedure', are not adhered to in every case. Also, there was no evidence in practice suggesting that post-adoption protection measures established under the Adoption of Children Regulations are usually complied with, especially for adopted children living abroad. Non-harmonisation of the law that establishes the child protection framework and non-compliance with the law in practice result in a weak legal and institutional capacity to protect children in the adoption process. Thus, the law and practice of child adoption with an international element do not guarantee sufficient protection for the children concerned.

In terms of numbers of registered adoptions, the statistical findings of this study in combination with previous studies, covering the period from 1944 to 2018, indicate a low child adoption rate. Compared to the size of the Tanzanian population and the extent of the problem of children in need of parental care in the country, child adoption as currently practised in Tanzania has a very low potential to help in alleviating the problem.

7.4 Recommendations

The research findings show deficiencies in the legal, policy, and institutional frameworks that challenge the management of child adoptions with an international element. Also, the analysis of child protection practice has revealed some problems that must be addressed to ensure that children without parental care are guaranteed sufficient alternative care and protection, both in temporary family-based measures and, where suitable, in adoption. This part suggests strategies to cure the shortcomings in the law and practice, especially of adoptions with an international element.

7.4.1 Legal Reforms

It is recommended that the mandated authorities in legal drafting, enactment, and implementation work on legal reforms in the following ways:

The authorities should review and amend the Law of the Child Act and the Regulations made under it to correct all the formal errors in the black letter of the law in respect of language, typing, numbering, and cross-referencing.

Also, the Law of the Child Act and the Regulations made under it should be reviewed and amended to correct and clarify inconsistencies, misconceptions, omissions, and ambiguities in the content of the laws. The requirements and procedures under the legal framework should be harmonised so that they will apply uniformly and avoid confusion in practice.

The responsible authorities should review the law and ensure it not only recognises the influence of other legal orders, such as customary and religious laws, on the alternative care of children, especially in child adoption, but explicitly provide for their interaction with state law and how to manage the resulting effects of such interaction. This is imperative to ensure that the rights of children in alternative care are protected.

The Adoption of Children Regulations should provide for the entire adoption process in terms of requirements and procedures for every type of adoption. Therefore, the Regulations should be amended to make them a one-stop centre for all adoption requirements and procedures. This will eliminate the need to consider provisions scattered in several legal texts, which complicates the management of adoption cases for the mandated authorities and legal practitioners. Also, the amendment should address specific procedural gaps in open adoption and adoption by non-resident Tanzanians.

Further, the authorities need to review the law and practice in respect of the existing alternative care placement measures to ensure that they are practical in view of Tanzania's socio-cultural and economic situation. The review should also ensure that there is sufficient

legal guidance regarding the formal requirements and procedures for these measures. In this regard, placement with fit persons should not be operationalised without gazetted regulations that ensure consistency in practice.

The authorities should review and amend the law to make recognition of formal and informal kinship care go hand in hand with appropriate regulation to ensure sufficient protection of children in this type of care. The Law of the Child Act recognises children in the care of their relatives as having parental care, and in accordance with the doctrine of family privacy, the state may be hesitant to interfere. However, due to the reported risks of significant harm children in kinship care are exposed to, some state interference is warranted to protect the child's best interests.

Law makers should adopt comprehensive criteria for determining the best interests of the child under the Law of the Child Act, 2009. The criteria will give uniform guidance for interpretation, determination, and application of the principle in all matters provided for under the Act. The criteria listed in Zanzibar's Children's Act, 2011 should be used to draw lessons.

The legislature should establish in the law rigorous procedural guidance and training for social welfare officers and judicial personnel involved in best interests determination. This is essential since definitive guidelines on the child's best interests determination in the legal texts may be unrealisable, and there are socio-cultural diversities, which are ever-changing, that further complicate the determination process. Therefore, qualified human resources are a mandatory requirement for the robust implementation of the child's best interests principle.

The responsible authorities should establish under the Law of the Child Act, 2009 recourse to the court for social welfare officers and other mandated authorities to seek interpretation of the law. The Act oversees sensitive matters, such as child adoption, that potentially changes the lives of children and their entire families. Therefore, legal clarity is required in its implementation. Since social welfare officers are non-lawyers, legal interpretation may not be their strong suit. Regarding those provisions that lack a consistent understanding and application, the officers or other interested parties should be able to move the court to provide an interpretation. Having a provision to this effect in the Act should prove beneficial in safeguarding the child's best interests through effective legal implementation.

The Legislature in consultation with the Judiciary should improve court accessibility in matters of child adoption. The Law of the Child Act, 2009 gave the Resident Magistrates' and District Courts a mandate to rule in open adoptions in order to enhance accessibility of the court. However, since open adoptions are limited to relatives of the child, this provides only a narrow window of improvement to court accessibility. Tanzanians who seek to adopt non-

related children still have to petition the High Court. Since it is a higher court, they require legal representation, which can be unaffordable. The law should be revised to see how access to the lower courts can be extended to other adoption applicants, especially resident Tanzanians.

The authorities should review the law in order to strengthen the child protection framework in child adoptions with an international element. Post-adoption monitoring and support initiatives for adopted children whose parents are residents or citizens of other countries need more definitive procedural provisions. The intimated involvement of the Commissioner of Social Welfare and ISS in the Adoption of Children Regulations is not a sufficient protection mechanism, as social welfare officers lack any knowledge of the process abroad. Established procedures such as periodical reporting requirements for the adoptive parents, home visits by ISS personnel, and a collaborative child protection referral sytem between the Department of Social Welfare and social welfare institutions in the receving countries could be some of the ways to monitor and support the progress of the adopted child. In the case an adopted child is suffering or at risk of suffering significant harm, then the collaborative child protection referral system can be used to ensure appropriate measures are taken by the host social welfare institutions to safeguard the child's best interests. These collaborative measures can be secured by way of signing bi- or multilateral agreements between Tanzania and common receiving countries.

7.4.2 Policy Reforms

Policy-makers should harmonise and coordinate policies and policy documents concerning child welfare. Since these policy texts are multiple and sometimes contradictory, there is a need to unify them and have only few solid documents whose implementation can be coordinated and guaranteed.

Also, the policy-makers should ensure that policies adopted in the field of child welfare align with Tanzania's socio-cultural, economic, and political environment. Policies that reflect these realities have more potential in implementation than otherwise.

The Tanzanian Government should develop a political will to ensure that children's rights and welfare are guaranteed. Despite the existence of multiple laws, policies, and institutions to safeguard the child's best interests, the lack of a political will to provide requisite resources for overseeing their implementation leads to inadequate protection in practice.

7.4.3 Institutional Improvements

The Government of Tanzania and other specified institutions should take measures to improve institutional management of child adoption in Tanzania. To achieve this, the following measures need to be taken.

There should be a central body (in the form of a specialised agency) for children's matters independent of the Ministries that work with children. Children's issues do not get the right attention under the MoHCDGEC because of the Ministry's broad mandate. Also, several other Ministries handle children's matters without any special means to ensure the child's best interests are always upheld in their endeavours. Thus, a central body charged with coordinating all children's matters in the sense of care and protection, health, education, labour, and others, will go a long way to ensuring that children's rights and welfare are safeguarded. In child adoption, the central body would oversee the work of the Department of Social Welfare which is the accredited body that manages the child adoption process. The body will ensure that the law is effectively implemented and that children are protected pre- and post-adoption.

The Department of Social Welfare needs to be restructured so that officers and responsibilities falling under the Department both at national and local levels remain wholly within its mandate. Making social welfare officers responsible under two different government ministries presents structural and administrative challenges that can only be addressed by reorganising the Department of Social Welfare. For instance, the Department under the MoHCDGEC can be extended to the local level by ensuring the sub-departments in the local government authorities are directly answerable to the Department and not to the authorities' councillors. This measure will also address the confusion on where the social welfare departments at the local government level belong and avoid the constant reshuffles, such as being placed formerly under the community development departments and currently under the health departments, which affects the allocation of resources to these social welfare departments.

The Government should allocate sufficient resources for the work of social welfare officers at the national and local levels. These include human, financial, and infrastructural resources. There is still a considerable shortage of social welfare officers, who should be in every ward of every district in the country. Also, there is a lack of adequate funds, office space, office equipment, and fieldwork equipment required for effective social welfare services. To ensure that all procedures in child adoption are fulfilled in practice, these resources must be available

in order to reduce the workplace pressures resulting from their shortages. These lead to coping mechanisms that occasion mismanagement of the adoption process.

Provision of legal training for officers who implement the Law of the Child Act, 2009 is an imperative demand. The Act and the Regulations made under it are not well understood by the officers who apply them in their daily work. A legal awareness-raising campaign with a series of seminars and workshops based on the Law of the Child Act would help to provide the required training for officers already trained in the law, such as judges, magistrates, lawyers, and other judicial personnel. However, for non-lawyers, such as social welfare officers, the Government and higher learning institutions must ensure legal training is incorporated in their curricula. This will assist in imparting skills for legal interpretation and application. Also, more specifically, the MoHCDGEC should organise periodical refresher courses for its officers in areas where they need training. Child adoption is one particular area that needs these courses, especially in light of the changes that came with the Law of the Child Act in 2009 and the subsequent Regulations made under it.

Courts should treat child adoption petitions with the reasonable care and urgency that they require. Adoption proceedings should not be postponed for long periods because of administrative issues such as reshuffling of judges. Since adoption procedures have set timelines under the Act and the Regulations, the court should also set an internal realisable timeline for child adoption proceedings depending on the definite court procedures.

In connection with the preceding recommendation, the Judiciary should establish a specialised High Court Division to handle children's matters and other family-related legal issues. This will improve accessibility to the High Court in adoption practice and reduce the duration of adoption proceedings. Also, it will allow for judges who have specified knowledge and experience of child law to handle child adoption matters. At the lower court level, the Juvenile Court already addresses all children's issues, except for child adoption. Appeals from this court should be able to go to a specialised higher court that can handle them with the required legal sensitivity.

Further, to ensure that the reforms bring about the required effect in the execution of legal functions ascribed to judicial personnel, the Judiciary must ensure strict compliance with the law. In this regard, court registrars should arrange for the registration of adoption orders themselves, within the time limit set by the law. The present practice of alloting this responsibility to the adoptive parents results in sporadic registrations and a lack of reliable data on child adoption.

All institutions should work on their data recording and keeping systems. Poor data management at the Department of Social Welfare is among the challenges encountered during field research for this study. Although there was talk of data systems in preparation and data retention tools were said to be already at the pilot stage, the Department could not comment on their progress. There is an urgent need to computerise data recording and keeping at the social welfare offices to ensure that files are well managed and stored. This will reduce complaints about data loss at these offices. Also, although the court has already made progress in this, more efforts are still required, especially in establishing an electronic case registry data system. RITA also needs to computerise the Adopted Children Register to avoid risks connected to paper trails.

7.4.4 Social Remedies

The Government of Tanzania and civil actors can play significant roles in addressing social circumstances that have an effect on alternative child care and child adoption in particular. Working in association, they could do the following:

The Government together with the civil society can organise campaigns dedicated to raising public awareness on formal child adoption. The public education should ensure that society understands what formal child adoption means, its reasons, and its legal requirements and procedures. This awareness will assist those who have a genuine wish to adopt for child-centred motives to do so, one way to speed up finding solutions for children in need of parental care and protection. It will also assist in reducing the number of applicants who want to adopt children only to access services such as health insurance or better education, since such type of adoptions are not necessarily in the best interest of the child.

Also, complex social problems resulting primarily from poverty and globalisation need to be addressed. A lack of financial resources compromises the ability of parents to care for their children appropriately, leading to children without parental care and protection. Poverty and globalisation also add to the weakening of the traditional care system as relatives and community members cannot care for the children of others, and prefer to keep only a small nuclear family.

Further, there should be initiatives to tackle child abandonment as a unique social problem that contributes to children being without parental care in Tanzania. The societal environment that forces women to abandon their children is the first item to work on. There must be adequate age-appropriate sexual and birth control education in schools and religious institutions such as churches and mosques. This will assist in not producing unwanted

children in the first place. Also, sexual violence must be eliminated so that women do not conceive after being raped. Most significantly, how a girl or woman with an unwanted child is treated in society determines what happens to that child. The government and society should provide support rather than shun these women. In the instance that a girl or woman who has abandoned a child is caught, they should not be treated as criminals but should be given psycho-social education and support that will enable them to take back their children and rear them themselves.

7.5 Cases for Further Research

In the course of the study, the researcher identified the following socio-legal issues as areas for further research:

1. A situational analysis of informal kinship care in Tanzania.
2. The status of institutional child care and the move to deinstitutionalise in Tanzania.
3. The care and protection of children in conflict with the law in Tanzania.
4. Jurisdiction and practice of Tanzania's Juvenile Court.
5. A comparative analysis of child adoption law and practice by non-resident citizens in various countries of Africa and Europe.

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List of Legal Instruments, Laws, Policies and Policy Documents

1. International and Regional Legal Instruments

1.1. United Nations Instruments (also League of Nation's)

1.1.1. Binding Instruments

Convention on the Rights of Persons with Disabilities, 2006.

Convention on the Rights of the Child, 1989.

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1.3.2. Non-binding Instruments

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1.4. EAC Instruments – Non-binding Instruments

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1.5. SADC Instruments

1.5.1. Binding Instruments

SADC Protocol on Gender and Development, 2008.

1.5.2. Non-Binding Instruments

SADC Code of Conduct on Child Labour, 2000.

2. Laws, Policies and Policy Documents of Tanzania

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2.2 Principal Legislation

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2.6 Laws of Zanzibar

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3. Laws of Other Countries

3.1. Constitutions

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3.2. Principal Legislation

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1.2. High Court of Tanzania

High Court of Tanzania (Dar es Salaam District Registry), At Dar es Salaam, "Matayo K. Kihwelo vs. Gabriele Brandolini", (Misc. Civil Cause No. 452 of 2020, ordered on 01.12.2020).

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High Court of Tanzania, At Dar es Salaam, "In the Matter of Adoption Ordinance, Cap. 335 and in the Matter of Master Ayaz and Two Others", LRT (1978).

High Court of Tanzania, At Dar es Salaam, "In the Matter of LKIM, a Child of Usa River, Arusha and In the Matter of Application for Adoption by RET and JEY of Usa River, Arusha" (Misc. Civil Application No. 103 of 2009, ordered on 30.03.2010).

High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, 2009 and In the Matter of A (Infant) and In the Matter of an Application for an Adoption Order by JVPB and EG of Dar es Salaam" (Misc. Civil Case No. 43 of 2011, ordered on 23.12.2011).

High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, 2009, In the Matter of Adoption of M (the Child) by PLK and PMK (Petitioners) of Texas, USA" (Misc. Civil Case No. 169 of 2011, ordered in 2014).

High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, In the Matter of RKSM (Infant) and In the Matter of an Application for Adoption by LBM of London, UK" (Misc. Civil Cause No. 9 of 2012, ordered on 07.08.2014).

High Court of Tanzania, At Dar es Salaam, "In the Matter of the Law of the Child Act, 2009 and In the Matter of Application for an Adoption Order by JNH and EMV and In the Matter of GC, the Adoptive Child" (Misc. Civil Cause No. 55 of 2015, ordered on 10.11.2015).

High Court of Tanzania, At Moshi, “In the Matter of the Adoption of Children Act, Cap 335 and In the Matter of BSM, Infant and In the Matter of an application for an Adoption Order by DLH and MWH, Petitioner” (Misc. Civil Application No. 10 of 2010).

High Court of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, “In the Matter of the Adoption of Children Act, Cap 335 and In the Matter of CPO, Infant and In the Matter of an Application for an Adoption Order by KLT and SECT” (Misc. Civil Cause No. 131 of 2009, ordered on 02.02.2010).

High Court of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, “In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of Application for Adoption of AM, infant and In the Matter of an Application for an Adoption Order by MOM and AM of Kinondoni, Dar es Salaam” (Misc. Civil Application No. 583 of 2018, ordered on 08.11.2018).

High Court of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, “In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of GSG-the Infant and In the Matter of Petition for Adoption Order by DHN” (Misc. Civil Application No. 90 of 2011).

High Court of Tanzania, In the District Registry of Arusha, At Arusha, “In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of the Infant JBP and In the Matter of an Application for An Adoption Order by MBM and BPM”, (Misc. Civil Cause No. 17 of 2016, ordered on 04.02.2017).

High Court of Tanzania, In the District Registry of Arusha, At Arusha, “In the Matter of the Law of the Child Act, 2009 and In the Matter of MERM and CERM of Olasiti, Arusha and In the Matter of the Application for an Adoption Order by JRMS and DDD”, (Misc. Civil Cause No. 19 of 2018, ordered on 14.03.2019).

High Court of the United Republic of Tanzania, Dar es Salaam District Registry, At Dar es Salaam, “In the Matter of Application for Adoption of TGB, a Male Child and In the Matter of Application for Adoption of TGB by RB”, (Misc. Civil Cause No. 61 of 2011, ordered on 04.10.2012).

1.3. Court of Resident Magistrates

Resident Magistrate Court in Dar es Salaam, at Kisutu, “In the Matter of Application for Adoption under the Law of the Child Act, 2009 and In the Matter of IGM of Dar es Salaam

between GFM and AML", Unreported (Misc. Civil Application Case No. 124 of 2018, ordered on 21.03.2019).

Resident Magistrate Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, 2009, In the Matter of A (Infant) and In the Matter of Application for Adoption by CXM and LSL of Dar es Salaam" (Misc. Civil Application No. 10 of 2017, ordered on 04.08.2017).

Resident Magistrate Court of Moshi, At Moshi, "AAM, Petitioner vs. JAM and IAM, Infants" (Adoption Case No. 02 of 2017, ordered on 02.03.2017).

1.4. District Court

District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of the Child RJM of Mbezi Beach, Dar es Salaam and In the Matter of an Application for an Open Adoption by CFK and IMK of London, UK" (Misc. Civil Case No. 165 of 2008, ordered on 24.08.2018).

District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, 2009 and In the Matter of an Application for Custody of MJM by JW and AW" (Misc. Civil Cause No. 358 of 2016, ordered on 23.06.2017).

District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, 2009 an In the Matter of an Application for an Open Adoption of PJK by MPM" (Misc. Civil Cause No. 44 of 2017, ordered on 16.06.2017).

District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, 2009 and In the Matter of an Application for Adoption Order of FAHA by AHA of Jersey City" (Misc. Civil Case No. 163 of 2018, ordered on 29.10.2018).

District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of DWDM and In the Matter of an Application for an Adoption Order by GAK and HK of Jersey, USA" (Misc. Civil Case No. 143 of 2018, ordered on 24.07.2018).

District Court of Kinondoni, At Kinondoni, "In the Matter of the Law of the Child Act, No. 21 of 2009 and In the Matter of the Law of the Child EMJS and In the Matter of Application for an Adoption Order by RMM and PVM" (Misc. Civil Case No. 134 of 2018, ordered on 19.07.2018).

District Court of Kinondoni, at Kinondoni, “In the Matter of the Law of the Child Act 2009 and In the Matter of RCM of Kinondoni-Dar es Salaam and In the Matter of Application for an Adoption Order by ECK of Mbezi Beach, Kinondoni-Dar es Salaam”, (Misc. Civil Case No. 24 of 2018, ordered on 25.05.2018).

1.5. Juvenile Court

Juvenile Court of Dar es Salaam, at Kisutu, “In the Matter of the Law of the Child Act, No. 21 of 2009, In the Matter of an Application for an Open Adoption Order by HAB alias HAH and In the Matter of Open Adoption of AMAB” (Misc. Civil Application No. 142 of 2017, ordered on 17.07.2017).

2. Foreign Courts

Court of Appeal of England and Wales, “Re Valentine's Settlement” ([1965] 1 Ch 831).

Court of Appeal of New Zealand, Walker v Walker and Harrison [1981] NZ Recent Law 257.

England and Wales Appeal Division (Civil Division), “Re M” (Child’s upbringing), 2 FLR 441 (1996).

European Court of Human Rights, “I.S. v. Germany” (13 October 2014).

Supreme Court of Appeal of South Africa, *Zulu v S* (226/2016) [2017] ZASCA 207 (21 December 2016).

United Kingdom Supreme Court, “ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)”, [2011] UKSC (1 February 2011).

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Table of Interviews

SN	Interviewee	Institution/Location	Interview Date
1.	Advocate specialised in child adoption practice and a resident non-Tanzanian adopter	Victoria, Dar es Salaam	28.02.2018 15.01.2019
2.	Resident Magistrate 1	Juvenile Court, Kisutu Dar es Salaam	19.02.2018
3.	Social welfare officer	Adoption desk, DSW, MoHCDGEC Headquarter Offices, Dodoma	21.03.2018 22.03.2018
4.	Social welfare officer 1	DSW, MoHCDGEC Offices, Dar es Salaam	06.04.2018
5.	Social welfare officer 2	DSW, MoHCDGEC Offices, Dar es Salaam	06.04.2018
6.	Social welfare officer	SWD, Bunju Ward, Kinondoni, Dar es Salaam	04.01.2019 16.01.2019
7.	Volunteer 1	SWD, Bunju Ward, Kinondoni, Dar es Salaam	04.01.2019
8.	Volunteer 2	SWD, Bunju Ward, Kinondoni, Dar es Salaam	04.01.2019
9.	Intern 1	Community Development, Bunju Ward, Kinondoni, Dar es Salaam	04.01.2019
10.	Intern 2	Community Development, Bunju Ward, Kinondoni, Dar es Salaam	04.01.2019
11.	Para-social worker	Bunju Ward, Kinondoni, Dar es Salaam	16.01.2019
12.	High-ranking officer	RITA Headquarter Offices, Dar es Salaam	21.01.2019
13.	Social welfare officer 1	SWD, Kinondoni Municipal, Dar es Salaam	22.01.2019
14.	Social welfare officer 2	SWD, Kinondoni Municipal, Dar es Salaam	22.01.2019
15.	Social welfare officer 1	SWD, Kinondoni Municipal, Dar es Salaam	23.01.2019
16.	Social welfare officer 2	SWD, Kinondoni Municipal, Dar es Salaam	23.01.2019
17.	Manager	Msimbazi Centre Children's Home, Dar es Salaam	29.01.2019
18.	Youth care worker	SOS Village Ubungo, Dar es Salaam	29.01.2019
19.	Sponsorship secretary	SOS Village Ubungo, Dar es Salaam	29.01.2019
20.	Child protection officer	UMRA Orphanage Centre, Dar es Salaam	30.01.2019
21.	Manager	St. Theresa Mburahati Children's Centre, Dar es Salaam	30.01.2019

SN	Interviewee	Institution/Location	Interview Date
22.	Resident non-Tanzanian adoptive parent	Mbezi, Dar es Salaam	01.02.2019
23.	Social welfare offcer	SWD, Temeke Municipal, Dar es Salaam	04.02.2019
24.	Child carer 1	Kijiji cha Furaha, Mbweni Kinondoni, Dar es Salaam	05.02.2019
25.	Child carer 2	Kijiji cha Furaha, Mbweni Kinondoni, Dar es Salaam	05.02.2019
26.	Child carer 3	Kijiji cha Furaha, Mbweni Kinondoni, Dar es Salaam	05.02.2019
27.	Social welfare officer	SWD, Ilala Municipal, Dar es Salaam	07.02.2019
28.	Regional health officer	Regional Commissioner's Offices, Dar es Salaam	07.02.2019
29.	Social worker	PASADA, Dar es Salaam	13.02.2019
30.	Community Development Officer	PASADA, Dar es Salaam	13.02.2019
31.	Professor of law and family law expert	Mbezi Chini, Dar es Salaam	15.02.2019
32.	Non-Tanzanian adoptive parent and founder of a children's home in Tanzania	Interview conducted via e-mail	16.02.2019
33.	High-ranking officer	DSW, MoHCDGEC, Dodoma Interview at UDSM Kijitonyama Campus, Dar es Salaam	20.02.2019
34.	Resident Magistrate 2	Juvenile Court, Kisutu Dar es Salaam	21.02.2019
35.	Child protection specialist	UNICEF Tanzania, Dar es Salaam	21.02.2019
36.	Asistant Registrar	High Court of Tanzania, Dar es Salaam	28.02.2019
37.	High-ranking Judge	High Court of Tanzania, Dar es Salaam	01.03.2019
38.	Social welfare officer 1	DSW, MoHCDGEC Headquarter Offices, Dodoma	05.03.2019
39.	Social welfare officer 2	DSW, MoHCDGEC Headquater Offices, Dodoma	05.03.2019
40.	Legal officer	MoHCDGEC Headquarter Offices, Dodoma	05.03.2019
41.	2 Officers at the Registrar's Office	High Court of Tanzania, Dar es Salaam Registry	11.-14.03.2019 25.-27.03.2019
42.	Social welfare officer 1	Arusha Social Welfare Regional Offices, Arusha Town	19.03.2019
43.	Social welfare officer 2	SWD, Arusha Municipal	19.03.2019

SN	Interviewee	Institution/Location	Interview Date
44.	1 Officer at the Registrar's Office	High Court of Tanzania, Arusha Registry	20.03.2019 21.03.2019
45.	3 Officers at the Office of the Registrar General	RITA, Dar es Salaam	15.03.2019 25.27.03.2019
46.	Legal officer	RITA Headquarter Offices, Dar es Salaam	21.01.2019 15.03.2019
47.	Legal officer	National Bureau of Statistics, Dar es Salaam Offices	28.02.2019
48.	High-ranking officer	National Bureau of Statistics Headquarter Offices, Dodoma	06.03.2019
49.	Advocate	Victoria, Dar es Salaam	15.01.2019
50.	Lecturer in law and family law expert	University of Dar es Salaam, Dar es Salaam	04.03.2018 10.02. 2019
51.	Advocate and religious leader	City Harvest Church, Dar es Salaam	15.02.2019
52.	Judge	High-Court of Tanzania, Dar es Salaam Registry	27.06.2020
53.	Librarian	Parliament of Tanzania, Dodoma	06.03.2019
54.	Legal officer	Office of the Attorney General, Dodoma	06.03.2019
55.	A sample of randomly selected members of the public	Arusha and Dar es Salaam, at social welfare offices, in church, and on the street	January-March 2018 January-March 2019

Acronyms and Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACPF	The African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
BID	Best Interests Determination
Cap.	Chapter
CHRAGG	Commission for Human Rights and Good Governance
CRSA	Child Rights Situation Analysis
D by D	Decentralisation by Devolution
DSW	Department of Social Welfare
E.g.	*Exempli gratia* (for example)
EAC	East African Community
Ed.	Editor, Edition
FGM	Female Genital Mutilation
Fn	Footnote
HCCH	The Hague Conference on Private International Law
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome
I.e.	*Id est* (that is)
Ibid.	*Ibidem* (at the same place)
ISS	International Social Service
JALA	Judicature and Application of Laws Act
LGA	Local Government Authority
LGRP	Local Government Reform Programme
LHRC	Legal and Human Rights Centre
LMA	Law of Marriage Act
MDA	Ministries, Departments and Agencies
MKUKUTA	Mkakati wa Kukuza Uchumi na Kuondoa Umaskini Tanzania
MKUZA	Mkakati wa Kukuza Uchumi na Kuondoa Umaskini Zanzibar
MoHCDGEC	Ministry of Health, Community Development, Gender, Elderly and Children
MVC	Most Vulnerable Children
MVCC	Most Vulnerable Children Committee
NAP	National Action Plan
NBS	National Bureau of Statistics
NCPA	National Costed Plan of Action
NGO	Non-Governmental Organisation
NHIF	National Health Insurance Fund
NPA	National Plan of Action
NPA-VAWC	National Plan of Action for Violence Against Women and Children
NPHS	National Population and Housing Census

NSGRP	National Strategy for Growth and Reduction of Poverty
OAU	Organisation of African Union
Org.	Organisation
P.	Page
Para	Paragraph
PASADA	Pastoral Activities and Services for people with AIDS Dar es Salaam Archdiocese
PO-RALG	President's Office – Regional Administration and Local Government
Pp.	Pages
R.E.	Revised Edition
RITA	Registration, Insolvency and Trustee Agency
SADC	Southern African Development Community
SDG	Sustainable Development Goals
SWO	Social Welfare Officer
TACAIDS	Tanzania Commission on AIDS
TASAF	Tanzania Social Action Fund
TCRF	Tanzania Child Rights Forum
TDHS	Tanzania Demographic and Health Survey
UK	United Kingdom
UN	United Nations
UN CRC	United Nations Committee on the Rights of the Child
UNCRC	United Nations Convention on the Rights of the Child
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
URT	United Republic of Tanzania
USA	United States of America
VAC	Violence Against Children
VAWC	Violence Against Women and Children
WWI	World War One
WWII	World War Two