

**HOW INTERCOUNTRY ADOPTION PROPELS THE PRACTICES OF
CHILD TRAFFICKING AND EXPLOITATION IN KENYA.**

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Law School**

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DECLARATION

I, **Beatrice Kavata Ngungua** declare that **How Intercountry Adoption Propels the Practices of Child Trafficking and Exploitation in Kenya** is my own work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signature:

Date:

This dissertation has been submitted for examination with my approval as a University Supervisor.

Signed by the Supervisor:

Date:

DEDICATION.

I dedicate this work to my loving parents and siblings, for their support, trust and guidance in me throughout the whole period. I'd also like to dedicate this work to the Almighty God because it is only through Him that the work of our hands will be blessed.

ACKNOWLEDGEMENT.

My deepest gratitude goes to my supervisor, Dr. Victor Lando, who has guided me throughout this whole journey, has been patient with me even despite the Covid-19 pandemic and with whom this work would not have been accomplished. I learnt a lot and I pray that the Lord may guide you in all that you do.

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Abstract.

Adoption being an advantageous process, it tends to be beneficial to the prospective birth parents by relieving both financial and emotional stress of unplanned pregnancy and single parenting, the adoptive parents by enabling them to become parents when they may not have been able to otherwise and for the adopted children by being placed with families who have planned, prepared and longed for a child. As for Intercountry Adoption, there has been great controversy about the benefits and dangers of international adoption. Those against it view it as the ultimate kind of exploitation, the taking by the rich and power of the children born to the poor and powerless. Proponents of international adoption see it as a positive thing, where parents reach out to children in need and the cultural and racial differences viewed as a chance for the parents and children appreciate one another's differences. Taking a closer look at the trends of International Adoption in Kenya and globally, it tends to be leaning more towards the risky side as opposed to the beneficial side as history has proved. The adoption system tends to treat vulnerable children as properties hence the whole idea of child trafficking and exploitation. This is mostly blinded by the fact that Intercountry Adoption has been painted as a successful system that tends to build up a family-like environment for a child in a means of upholding their best interest principle. This research paper gives a detailed research finding that move to show the negative impact that Intercountry Adoption sets to impose on vulnerable children thus abusing the child's best interest principle as well as identifying some of the measures required to combat those violations.

TABLE OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child.
CA	Children Act.
CRC	Convention on the Rights of the Child.
IOM	International Organization for Migration.
UN	United Nations.

TABLE OF CASES

In Re A M (Baby) [2015] eKLR.

In Re ARE (a child), [2008] 1 KLR (G & F) 609.

In Re AW (A Child), [2006] eKLR.

In Re BW (An Infant), [2008] 1 KLR (G & F) 616.

In Re Child R.K. [2015] eKLR

In Re of P M (Baby) [2017] eKLR.

In Re SS (Baby) [2019] eKLR.

In the Matter of the Adoption of Baby D.M (Minor), 2013.

Minister for Welfare and Social Development v Fitzpatrick and Others, 2000 (3) SA 422 (CC).

Takhar v Gracefield Developments Ltd, [2019] UKSC 13.

TABLE OF STATUTES AND LEGAL INSTRUMENTS

Kenyan Legislation

Children (Adoption) Regulations, 2005.

Children Act No 8 of 2001.

Constitution of Kenya, 2010.

Counter-Trafficking in Persons Act No 8 of 2010.

International Treaties

Convention on the Rights of the Child, 1990.

Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993.

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.

Regional Instruments

African Charter on the Rights and Welfare of the Child, 1999.

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CHAPTER ONE

INTRODUCTION

1.0: Introduction.

This chapter seeks to give an introduction to this paper. This is done by first giving a brief description on what adoption and delves deeply on what International adoption entails. It then seeks to give a co-relation of International Adoption to child trafficking and the effects that it has on the parties involved. This chapter also gives a detailed background to the whole study by establishing the context of the study. It also provides literature reviews and theoretical reviews of different authors explaining more in detail on how Intercountry Adoption links to child trafficking. It also provides research questions and objectives that will help guide the turnaround of this paper on how it will be assessed. Limitations and justifications of this study are also produced to show the problems faced during the conducting of the research as well as why this study was done and what it aims to achieve at the end of the paper.

1.1: Definition of the term Adoption and Child Trafficking.

The term adoption may refer to a personal act, a process of law, or a social service. As a personal act, adoption involves three sets of participants known collectively as the adoption triad; the adopted child, the birth family, and the prospective adoptive family, and is now viewed as a lifelong process rather than a single act.¹ As a legal process, adoption has been defined as “the method provided by law to establish the legal relationship of parent and child between persons who are not so related by birth.”² Adoption as a social service addresses the needs of adoption members through such steps as identifying and legally freeing children to be adopted, selecting and preparing families for adoption, preparing and placing children in adoptive families.³

¹ Kathy Zamosny, 'The Practice of Adoption' [2003]31 TCP 651, pp 2. https://www.researchgate.net/publication/240280376_The_Practice_of_Adoption_History_Trends_and_Social_Context accessed 25 August 2019.

² *Ibid.*

³ *Ibid.*

A baby is given up for adoption when a parent gives up all rights of that baby or when a baby is taken away from a parent for various reasons.⁴ When a mother gives up his or her child up for adoption, it may be because of inadequate financial resources. Due to this, one needs financial support be able to work and provide for the expenses of raising a child. Unwanted or unplanned pregnancy can also lead to a mother giving his or her as she may not be prepared to handle the pregnancy and the responsibilities of being a parent.⁵

The question that arises is how then can adoption amount to child-trafficking. Taking a closer look at International Adoption, it can be defined as a form of adoption in which the child's habitual country of residence is changed, and in which the child's parents are of a different nationality than the child's, whether or not they live in the child's country of residence.⁶ Intercountry adoption then amounts to child laundering in instances which involve illegally obtaining children for adoption which can occur through identifying vulnerable mothers and coercing them to give up their babies for a price, forging and illegally obtaining birth certificates and also by falsely assuring the mother that her baby has died etc.⁷ These are just some of the actions that lead to the abuse of Intercountry adoption thus amounting to child laundering.

A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of threat or use of force or other forms of coercion, abduction, fraud or deception.⁸ Child trafficking falls within this definition because it is where a child has been transferred from one nation to another, whether using force or not to exploit the child.⁹

The Daily Nation reports that out of six victims exploited for forced labour, sexual exploitation and other reasons such as begging in Kenya is a child. The trafficked children's profile tends to be

⁴ *Ibid* 1 pp 19.

⁵ 'Destiny Adoption Services, What Are Reasons for Putting Your Child Up For Adoption?' (2017).<<https://destinyadoption.com/what-are-reasons-for-putting-your-child-up-for-adoption/>> accessed 25 August 2019.

⁶ Florence, Intercountry Adoption *Innocenti Digest* no. 4, International Child Development Centre, pp 2. <https://www.unicef-irc.org/publications/102-intercountry-adoption.html> accessed 12 July, 2020.

⁷ *Ibid* 6, pp 6.

⁸ Section 3, Counter-Trafficking in Persons Act.

⁹ *Ibid*.

different from the one of adult victims globally, in terms of recruitment and means of control.¹⁰ Statistics from the International Organization for Migration (IOM) show that over 40 percent of children were recruited through a family member or a relative which means that the participation of the family is four times higher for child victims than in cases affecting adults.¹¹ This research therefore seeks to understand the laws governing adoption in Kenya with an aim of trying to link it with child trafficking.

1.2 Background to the Study

Adoption clearly played an important part in ancient life as attested by literary and legal sources dating back almost four millennia. To understand the risks and advantages associated with adoption, there is the need to reflect on adoption and how it has shaped the current laws on adoption. One of the earliest legal texts referring to adoption is the Code of Hammurabi.¹² This code, dating from the eighteenth-century contains many features that are still relevant to modern adoption law. For example, the code established that adoption was a legal contract that could only be executed with the consent of the birth parents. Information on adoption in the early Modern Era is highly fragmented and it is difficult to reconstruct an overall picture of the legal practices in effect during this period.¹³

The exploitation of individuals for profit has a long history and efforts to address which can be traced back at least a century. However, it is only over the past decade that trafficking has become a major concern. During that same period, a comprehensive legal framework has developed around the issue. These changes confirm that a fundamental shift has taken place in how the community thinks about human exploitation. It also confirms a change in expectations of what governments and others should be doing to deal with trafficking and to prevent it. Hence, the victim-centred approach is also gathering increased support from the community.¹⁴

¹⁰ Dorothy Otieno (2019). One in six human trafficking victims is a child. *Daily Nation*.
<https://www.nation.co.ke/newsplex/humantrafficking/2718262-5214246-h9nhwn/index.html> accessed 28 Aug 2019.

¹¹ *Ibid.*

¹² Osei Sarpong, 'Adoption Practices Fueling Child Trafficking in Ghana', [2018] ECHTS 1. pp 2.

¹³ *Ibid.*

¹⁴ United Nations Human Rights (2019). *Human Rights and Human Trafficking*. p.1.
https://www.ohchr.org/Documents/Publications/FS36_en.pdf accessed 28 August 2019.

Trafficking of people including children from Kenya to other nations was the most prevalent in Kenya in 2018 at 60.2%.¹⁵ In the year 2009, the US Department of State reported that, Kenyan children were trafficked for various domestic and agricultural activities among them: herding, working in recreational establishments, and for prostitution, as well as involvement in sex tourism sector at the coastal region. The report suggested that it was real that, human trafficking is being practiced as a modern-day slavery where buying and selling of human beings for the purpose of exploitation was practiced.¹⁶

According to the analysis of the 206 prospective adoption cases, Sweden had the highest number of prospective adoptive parents coming to Kenya. It was followed by the US, Germany and Italy. From 63 cases analyzed from the courts, the committee found that 44 cases were filled in the high courts in Nairobi, Mombasa and Kisumu after the moratorium of November 26, 2016. Of these, 20 children were placed for inter-country adoption after the moratorium, contrary to the Cabinet decision. This means some children are declared free of adoption when they are not adoptable,” the report says. In all the 49 cases, the report says, there was no evidence of tracing done prior to declaring children free for adoption. The report questions the reason for offering all “available’ cases for adoption to other countries yet there were local parents willing to take up the children. The team found that some foreigners were offered more than one child within a span of two years, while the list of Kenyans waiting to adopt children was as high as 440. The team attributed this to the fact the foreigners paid more for adoption.¹⁷

1.3 Literature Review.

Several authors have written extensively on the issue of some of the abuses of International Adoption that amount to child trafficking; both locally and internationally. The same is discussed below:

¹⁵ *Human Trafficking in Kenya*. Nairobi, pp 15. <http://crimeresearch.go.ke/wp-content/uploads/2018/05/Human-Trafficking-in-Kenya.pdf> accessed 7 October 2020.

¹⁶ Elizabeth Mbuka, (2016). ‘*An Assessment of the Nature and Character of Child Trafficking in Kenya: A Case Study in Mombasa County.*’ University of Nairobi.

¹⁷ Standard Newspaper. (2018). Child trafficking: How foreigners sneak out children. <https://www.standardmedia.co.ke/article/2001284421/child-trafficking-how-foreigners-sneak-out-children> accessed 28 August 2019.

Orr focuses on Human Trafficking through international adoption in her article and states that those most impacted by international adoption can be divided into two separate groups; the emotionally involved and the financially engaged. The kids, the birth parents, and the adoptive parents are the mentally engaged in the inter-country adoption process. Those financially involved in the international adoption process are the adoptive parents, the surrendering country, and the inheriting country. Both the emotional and financial categories of international adoption are heavily invested in the international adoption process. Other problems children in orphanages face are access to formal education.¹⁸

She also asserts that children that have been institutionalized for an extended period of time and then adopted often have difficulties acclimating to their new families and environments. They are more susceptible to running away from home and college, learning problems, becoming impulsive and promiscuous, and fascinated by fire lighting.¹⁹

Ngugi asserts that adopting in Kenya has been made easy since Kenya is a signatory to the Hague Convention (HC); an international instrument of the United Nations (UN) which monitors child adoptions worldwide. There are also guidelines which are additional to this and are made to ensure the Kenyan child is able to join a family while protecting every right of that child before, during and after the adoption process. She also contends that traditionally, children were valued and owned by the community and that the extended family played a role of protecting its members. This is to mean that orphans were taken care of by their uncles and aunts. Due to changing socio-economic factors, her opinion is that the extended family support mechanisms have weakened and are incapable of coping with the increasingly high standards of living.²⁰

According to Ouma, he views children rights as a distinct category of rights and their protection and promotion is recognised as crucial in the broader protection of human rights. This categorisation derives from the vulnerability and ‘helplessness’ of children, that is, children are not able to make their own decisions and as such need to be protected by adults through social

¹⁸ Shelly Orr, ‘Human Trafficking Through International Adoption’ (Global Honours Thesis, University of Washington Tacoma 2018).

¹⁹ *Ibid.*

²⁰ Jacquei Wahu Ngugi, ‘Factors Influencing Child Adoption in Kenya: The Case of Children’s Homes in Nairobi County’ (MA Thesis, University of Nairobi 2014).

networks or legislation. The issue of children is seen as one of universal concern, and codification of children rights are seen to recognise the moral claims of children on society.²¹

He is also of the opinion that on the principles and philosophy of adoption, adoption as an institution is seen to serve the best interests of the child, a philosophy that forms the core of the UN Convention on the Rights of the Child (CRC) which states that 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.²²

Baker argues that parents acquire property rights in their relationships with their children based on their emotional investment in child rearing and custody is the reward for that emotional investment.²³

This paper focuses on domestic adoption of children in Kenya by stating that most children without parental care and the majority of those living in institutions are not, and should not be, available for adoption. The lack of reliable data and variations in the use of terminology make it especially difficult to establish how many of the children labelled ‘orphans’ in national statistics are in fact double orphans, and therefore more likely to be adoptable. Although reliable data is scarce, it is believed that approximately 90% of children living in residential care have either one parent or close relative alive and traceable.²⁴

It also explores on the data for Kenya and states that it is scarce and unreliable. A government report stated that the Adopted Children Register does not disaggregate data as to whether adoptions were local or intercountry and reproduces figures provided by the registrar for the period 2000 to September 2008, adding to a total of 1,395 adoptions. On the other hand, a recent study found that

²¹ Fredrick Daniel Ouma, ‘International Child Adoption: An Examination of Kenya’s Implementation of International Standards since 1990’ (MA Thesis, University of Nairobi 2008).

²² *Ibid.*

²³ Katherine Baker, ‘Property Ruled Meets Feminist Needs: Respecting Autonomy by Valuing Connection’ [1998] Vol.59 OLJ 1580.

²⁴ Denise Stuckenbruck, ‘Advancing the Rights of Children Deprived of Parental Care: Domestic Adoption of Children in Kenya’ (MA Thesis, University of Fribourg 2013).

between 2003 and 2006, 387 local adoptions and 256 intercountry adoptions were completed in the country.²⁵

The new thing that this paper seeks to add to the Kenyan view on increasing adoption issues is that illegal adoptions violate various child rights standards and values, including the child's best interests, the principle of subsidiarity, and the prohibition of inappropriate economic gain such as adoptions resulting from crimes such as abduction and sale of and trafficking in children, fraud in the declaration of adoptability, falsification of official documents or coercion, and any illicit activity or practice such as lack of proper consent by biological parents, improper financial gain by intermediaries and related corruption, constitute illegal adoptions and must be prohibited, criminalized and sanctioned as such.²⁶

According to Ferreira, she claims that the problem of race matching and cultural preservation is not unique to South Africa in the context of interracial adoption. The practice in Canada was to maintain Aboriginal kids in their societies because of the Aboriginal belief that community rights override individual children's rights. This faith is comparable to that of South Africa's native individuals. Children are seen as community assets, and what is in the child's best interests tends to be defined as blood connections rather than living circumstances.²⁷

However, due to the belief that children are viewed as communal resources and that their best interests should be subordinate to those of the community should, she is of the view that the South African legislation as it puts the interests of the community before the interests of the child is morally wrong. The best interests of the child should not be determined by considering anyone other than the individual child. If the child is put first, the result will be that any decision taken will be in the best interests of the child, and of no one else.²⁸

From the above literature review analysis, it is evident that in all matters involving child adoption, the child's best interest is the most paramount. Therefore, the abuses of Intercountry adoption that

²⁵ *Ibid.*

²⁶ United Nations Human Rights, Tackling Illegal Adoptions and Addressing the Rights of Victims. <<https://www.ohchr.org/EN/Issues/Children/Pages/Illegaladoptions.aspx>> accessed 12 July 2019.

²⁷ Sandra Ferreira, 'Interracial and Intercultural Adoption: A South African Legal Perspective' (LLD Thesis, University of South Africa 2009).

²⁸ *Ibid.*

have been mentioned above seems to threaten the best interest principle by not advocating the rights of the child. Taking a closer look home, the Kenyan cabinet officials raised a ban on foreign adoptions. A moratorium tends to serve a temporary solution more than a permanent one which is an existing gap as well.

Also, there is little or no laws and sanctions on how to deal with the human traffickers, how they get punished and little or no progress has been made in relation to that issue. There are also no laws or regulations provided to enhance the facilitation of taking care of the victims and how to ensure that they get better at the end of the day. The laws have sought focus more on punishing the victims as opposed to how the victims should be catered for.

There is a gap when it comes to the process of adoption as the agencies dealing with adoption do not really go an extra mile to know the welfare of the child post adoption. The children placed in their respective adoptive families may be going through harassment and mistreatment and due to not following up, this may end up being a silent issue that is not being addressed. Also, the authors have failed to mention on how the issue of adoption is a stringent and tiring process where before an adoptive parent gets to adopt a child they would have gone through quite a lot of hustles. Also, where the child might want to know his/her birth parents, it may be really hard to convince the child to be comfortable to go with the new family.

1.4 Problem Statement.

Kenya's 2010 Constitution acknowledges that all children must be protected against abuse, negligence, damaging cultural practices, all forms of violence, inhumane treatment and penalty, and dangerous or exploitative labour.²⁹ It affirms that kids have fundamental rights, including the right to education, nutrition, shelter, parental care and health care. These provisions are in line with those mentioned in both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child (ACRWC), to which Kenya is a signatory.³⁰

A form of child protection from negative surrounding circumstances is through adoption. As much as adoption brings about a beneficial solution to the prospective birth parents, the adoptive parents

²⁹ Article 53, Constitution of Kenya.

³⁰ UNICEF and Global Affairs Canada. (2015). *Taking child protection to the next level in Kenya*. pp 2 https://www.unicef.org/protection/files/Kenya_CP_system_case_study.pdf accessed 21 August 2019.

and the adopted children, the challenges and the problems being faced cannot be ignored. There is little or no accountability given by the adoption agencies after the children have been adopted by their respective adoptive parents whether domestically or internationally. Cases are becoming rampant on how the adopted children are being subjected to both physical and verbal abuse by their foster parents. The little accountability that the authorities have shown in coming to the rescue of these children also begs the question of how effective is the legal framework governing adoption in Kenya on the side of the adoptive parents. This is to mean that if a background check had been done by the authorities or the adoptive agencies, then what the missing factor?

Despite the Kenyan cabinet officials raising a ban on foreign adoptions, child trafficking issues happening through Intercountry adoption are still rising and becoming rampant. This is simply because a moratorium is more of a temporary solution than a temporary one. The laws being provided as a means to punish the offenders are quite unrealistic. There needs to be more stringent laws on how to punish them as well as creating laws that seek to cater for the protection of victims.

Therefore, what can be concluded as a problem facing child protection in Kenya in the context of International adoption is that child trafficking is becoming more rampant due to the fact that the current laws governing children or trafficking do not define in essence the meaning of child sale or child trade thus ending up putting the country's children at risk. This in turn has created a loophole for fraudulent vested interests, masquerading through the ownership of children homes, adoption agencies and legal firms representing children and child adopters to engage in the unscrupulous business of child trafficking under the guise of charity.³¹

1.5: Theoretical Framework

Adoption is both a theoretical and a practical process. Therefore, the following are some of the theories that are involved in the shaping and understanding of the process of adoption:

1.5.1 Utilitarianism Theory

Utilitarianism is a philosophical and economic doctrine that the best social policy is that which does the most good for the greatest number of people with its main proponents being Jeremy Bentham and John Stuart Mill. Jeremy espoused the doctrine of utilitarianism which he defined

³¹ Xinhua, Kenya Bans Child Adoption by Foreign Nationals, 2019 http://www.xinhuanet.com/english/africa/2019-09/12/c_138387280.htm accessed 19 July 2020.

virtue in terms of utility. An action which produced the greatest pleasure was morally right while an action which produced pain was considered as being morally wrong. Bentham outlined the concept of utility by stating that utility is meant by that property in any object, whereby it tends to produce benefit, advantage, pleasure, good and happiness to prevent the happening of mischief, pain, evil or unhappiness to the party whose interest is considered.³²

The utilitarian theory in relation to my topic on adoption, is that the interest here being considered in the best interest principle of the child which is the principle consideration which must be borne in mind in all decisions and actions relating to a child. When one is facing unwanted pregnancy, there are only three options; to parent the child, to terminate the pregnancy or to give up the child for adoption. When it comes to adopting a child, it is hard to put into words what one will gain from undertaking this particular decision. Teenagers who become pregnant unexpectedly, might not be ready to parent and therefore may opt to give up their children for adoption mostly because of wanting to focus on their education.

The question here will be, is the decision for adoption maximising pleasure and minimising pain or vice versa? Putting up the child for adoption may relieve financial and emotional stresses of unplanned pregnancy on the prospective birth parents as well as allow them to continue pursuing their goals without putting their career on hold, for the adopted children, they are placed with families who have planned, prepared and longed for a child which leads to them being in a stable and loving home and for the adoptive parents, it enables them to become parents when they may not have been able to otherwise. Therefore, the issue of adoption leads more to happiness and pleasure while preventing evil and pain.

1.5.2 Attachment Theory

Attachment theory focuses on people-to-people interactions and bonds, especially long-term relationships, including those between a parent and baby and romantic partners. The Attachment Theory was created by the first attachment theorist, a British psychologist John Bowlby, describing attachment as an "enduring psychological connection between people." These theories proposed that attachment was merely the result of the feeding relationship between the child and the

³² L.B Curzon, *Jurisprudence* (2nd Edition, Cavendish Publishing Limited, 2005).

caregiver. Because the caregiver feeds the child and provides nourishment, the child becomes attached.

He discovered that attachment was marked by clear patterns of behaviour and motivation. Attachment is another person's emotional connection. Bowlby thought that children's earliest bonds with their caregivers have a tremendous effect that goes on throughout their lives. International adoption is a type of adoption in which an individual or couple becomes a child's legal and permanent parent who is a national of another country. Overall, potential adoptive parents must fulfil their nation of residence's legal adoption criteria and those of the nation the child's nationality maintains.

Finally, different risk factors that can often interfere with the capacity of the child to adjust and form attachment bonds are regarded. Furthermore, consideration must be given to the emotional stability of prospective relatives. This involves getting a kid corresponding to the parents' emotional willingness. Some parents are better suited to addressing the more severe emotional or physical needs of children. Studies have shown that families that are well adapted to the needs of the child, who have positive attitudes and coping skills are likely to succeed in developing strong relationships with their children.³³

1.5.3 Sociological School of Jurisprudence

The major proponents of this type of school are Von Jhering and Roscoe Pound. This theory emphasizes on the study of law in its socio-historic context and it is based on what the society needs and desires. The argument of sociological jurisprudence is that law is validated by social criterion. This means that the law arises because individuals live together and that it therefore exists in order to encourage conduct, which furthers social solidarity and prevents conduct which hinders it.

According to Von Jhering, the origin and the ultimate purpose of the law is social control and therefore, the law serves as an instrument for serving the society. To him, each society or community must find a law which best suits its purposes and aims. The society is always in a flux

³³ Toby Buchanan, 'The Impact of Attachment Theory on International Adoption' (MA Thesis, Dalla Baptist University 2004).

and to be able to suit the conditions of a changing society, the law must adapt itself to the changing conditions. The duty of the society from time to time is to shape the law in conformity to the new conditions and that duty is going to fall on the legal institutions ie the courts and the legislature.

Roscoe Pound asserted that the law exists in order to keep peace in a given society on a simple level. On a complex level, the function of the law is to balance the interests because of the continually growing recognition of human wants, demands and interests which he categorized into three as individual interests, public interests and social interests.³⁴ Trafficking of children serves as a human rights infringement which violates the human dignity of a person.³⁵ To finalise the process, once the parties have ascertained to freely consenting to inter-country adoption, to make it binding, they have to sign relevant documents which should be in writing. The indigenous nation must also guarantee that the child's surrender is not caused by any kind of payment, compensation or coercion and that no contracts can be made until after the mom has given birth to the baby in question.³⁶

In conclusion, the Utilitarianism theory surmises that when it comes to adoption, as long as it serves the greater good, which is ensuring that at the end of the day the child is placed in a family like environment where they are protected by upholding the child's best interest principle, then that will be considered morally right. At the point where International adoption is abused and places the children in danger by trafficking them then according to the theory, it is considered a moral wrong. As for the sociological theory, the society's duty is to shape the law in conformity to the new conditions. The country renouncing the child has the duty to ensure that the adoption is serving the best interests of the child. It also has a duty to ensure that the children being adopted fit the criteria for being adopted not children who have been abducted.

³⁴ Omony John Paul, *Key Issues in Jurisprudence: An in-Depth Discourse on Jurisprudence Problems* (1st Edition Law Africa 2013).

³⁵ Sribbas Goswami, 'Human Trafficking: A Sociological Study on Tribal Women of Jharkhand,' [2018] RG 9.

³⁶ *Ibid* 18.

1.6: Research Objectives

Research objectives tend to convey and guide the researcher on the purpose of the research and what ought to be achieved at the end of the paper. The following are some of the objectives that this paper seeks to address:

1. To examine the extent to which the Counter-Trafficking in Persons Act addresses the issue of child trafficking through adoption.
2. To assess the abuses that take place in the context of International Adoption.
3. To analyse the legal framework governing domestic and International Adoption laws in Kenya.
4. To determine whether there are legal domestic and International precedents should an adopted child be found to have been abducted.
5. To expose and analyse the gaps surrounding adoption practices in Kenya.

1.7 Research Questions.

Research questions tend to provide the foundation of the study. They guide the researcher on how to examine the whole study. The following are some of the research questions set to be addressed in this paper:

1. What is the legal framework governing adoption laws in Kenya?
2. What are the gaps surrounding child adoption practices in Kenya?
3. How would the courts be able to ascertain child trafficking through International Adoption?
4. What are the legal precedents should an adopted child turn out to have been abducted?
5. How does the Counter-Trafficking in Persons Act address the issue of child trafficking through adoption?

1.8 Justification of the Study.

This study is important in that, to those that lack knowledge and information on the issue of adoption, it will be beneficial in that it will give more insight to them as well as give them adequate information on the process of adopting children in Kenya. The outcome of this research will be beneficial in that it will aid the courts and respective authorities on implementing the rights of the child in particular upholding the best interest principle. This study is unique in that it helps on the assessment or considerations of the adoptive family characteristics on the child.

This research will also aim to assess the adoptive child's characteristics that will in the end affect the process of adoption. This is because it may be hard to try and convince the child to be comfortable enough to go with the new family. This research is relevant as it will give insight on adoption agencies and how they affect the adoption process. Since there is little or no laws governing the issue of human traffickers in the name of international adoption, this study will seek to generate information that will be useful to the government and local authorities on how to deal with the said matter. It will also seek to improve on the existing policies and laws governing adoption in Kenya.

1.9 Hypothesis.

This research proceeds on the assumption that in matters relating to adoption:

- a. The constitution should be upheld. As the grund norm, it sets the precedence for the other subsidiary laws which means that any law that is inconsistent with it is null and void.
- b. The best interests of the child should be paramount. Before making decision that will affect the child, one should pick a decision that in the end, will bring about the best of the child's happiness, emotional development as well as its security.
- c. The process of international adoption brings about both the protection and violation of the rights of the child.

1.10 Research Methodology.

This research will be adopting a qualitative research method especially desktop based to be able to evaluate and analyse the adoption laws both in Kenya as well as in South Africa. This research makes use of the following methodologies:

A doctrinal legal research methodology which involves under primary sources, an analysis of the legal concepts and propositions governing the act of adoption. This also involves researching on the past cases on adoption together with the acts of parliament, government reports as well as parliamentary debates. Under the secondary sources, journals, articles, theses, books, conference papers and reports that contain information on adoption will also be used. The purpose of using a doctrinal legal research methodology is that it helps acquire quick answers to the legal problems being faced. Such a research methodology will also aid in identifying the existing gaps and

loopholes under adoption e.g. the reviewing of the cases and acts of parliament will help identify a gap like there are little or no laws governing adoption.³⁷

A comparative methodology of research will also be employed in making an analysis of the Kenyan laws on adoption in contrast with the adoption laws in South Africa. The reason for picking South Africa as a comparative to Kenya is because Kenya has borrowed heavily on the South African laws especially their constitution. Kenya has also borrowed from the South African's Children's Act (CA).³⁸ The importance of using a comparative methodology for research is that one is able to acquire information from a vast angle and saves time. This study's research will also mean going to the library to read books to gather more information on the issue of adoption. The library research will seek to analyse scholarly articles and writings on the issue of adoption in Kenya and internationally.

The reason for not using a quantitative research methodology to gather information for this study is that information may be limited as some topics it may be difficult as they are too difficult to quantify in numbers. Also, quantitative research is not time effective as doing interviews and questionnaires take quite some time therefore wasting time.

1.11 Limitations of the Study.

The following are some of the limitations present in conducting this research:

1. There is limited research in the African context as most of the literature focuses on the Western side only.
2. Inadequacy of resources in the library relating to my research topic especially in the Kenyan jurisdiction was a limitation.

³⁷ Ankita Chakraborty, 'Doctrinal Legal Research' (LLM Thesis, Indian Institute of Technology Kharagpur, 2015). pp 4-7.

³⁸ Fatuma Rashid, 'The Legal and Regulatory Framework of Surrogacy in Kenya: Theory and Practice.' (LLM Thesis, University of Nairobi 2018). pp 11.

1.12 Chapter Breakdown.

Chapter one sets out the abstract, background to the study, problem statement, literature review, research questions and objectives, hypothesis, the theoretical framework, justification of the study as well as the research methodology of the topic.

Chapter Two focuses on the concept of adoption as well its origins, its evolution and how it was imported to Kenya. This chapter also analyses on the traditional concept of adoption making reference to Kenyan communities and lastly, the pros and cons of adoption as well as the statistics of domestic and International adoption in Kenya.

Chapter Three focuses on the analysis of the legislative framework of domestic and International adoption as experienced in Kenya giving reference to Acts of Parliament, International Treaties and relevant case law.

Chapter Four exposes the gaps in the Kenya's legal and administrative framework on adoption vis a vis the Counter-Trafficking in Persons Act and other laws. It also provides a comparative analysis with other jurisdictions that is, South Africa and Ghana, based on the identified gaps.

Chapter Five chapter contains a conclusion and a summary of the findings of the study. It shall also contain a set of recommendations for Kenya giving reference to the adoption gaps identified in Kenya, South Africa and Ghana in order to close the outstanding gaps facing adoption in Kenya.

CHAPTER TWO

ORIGINS AND EVOLUTION OF ADOPTION IN KENYA

2.0: Introduction.

This chapter focuses on the concept of adoption and how and where it evolved and originated from and its importation in Kenya. It also explains in detail the traditional concepts of adoption within the Kenyan communities in particular the Kikuyu community. This chapter also provides statistics of adoption in Kenya in order to provide a clearer picture of how the process of adoption has been applied in the country.

2.1: Concept of Adoption.

Adoption as a concept has different dimensions in various legal systems. It also serves a very important social purpose also. Like other social institutions adoption is essentially a product of historical and evolutionary processes. Different economic ends and social demands of times have gone into shaping it through the successive ages. Today, adoption is prevalent in one form or the other in almost all the legal systems of the world barring a few countries. But there are national variations in adoption laws and procedure.³⁹

Adoption has been defined by various sociologists as a legal procedure which permanently terminates the legal relationship between the child and his or her biological parents and initiates a new parent-child relationship.⁴⁰ A variety of adoption types are practiced today are explained below in detail:

Domestic adoptions which can be either public or private. Public adoptions (foster care) involve children in state child welfare systems who cannot be returned to their birth families for safety or other reasons which may be abuse of a child by the parent, neglect of the child by the parent not providing basic needs, where a parent is suffering from drug abuse etc. Private domestic adoptions can be arranged through non-profit agencies that are licensed by the state or through independent

³⁹ Legal Rights of Children in the United States of America in Anna Mamalakis Pappas, Law and the Status of Child in 2 Vol. P. 701. See D.C. Manooja, Adoption Law and Practice, pp 6.

⁴⁰ *Ibid* 39.

adoptions that involve a third party assisting birthparents and adoptive parents with the direct placement of children.⁴¹

International adoption is the adoption of children from other countries by citizens of a particular country. Transracial adoption can be either domestic or international and refers to the placement of children with adoptive parents of a different race or ethnicity. Special needs adoption refers to the adoption of children, usually from the child welfare system, who are older than 5 years of age, members of minority or sibling groups, or have physical, emotional, or developmental problems.⁴²

Open adoption refers to the sharing of information and/or contact between birth families and adoptive families. Adoption openness is a broader term that refers to a range of pre-placement and post-placement contact between birth and adoptive families including accessibility to and exchange of information either directly or through a mediator, participation by birthparents in selection of adoptive parents and placement arrangements, and indirect or face-to-face interactions between birth and adoptive families.⁴³

2.2: Origins of Adoption.

2.2.1: Adoption Laws in the Early Modern Era.

While adoption may be as old as human society itself, the motivations for adoption have changed over time. Today, adoption is undertaken mainly to provide a home for children deprived of parental care and to satisfy the desire of individuals or couples to care for and rear a child. In contrast, societies of the past regarded adoption as a means for preserving family lineage, enabling continuation of the ancestor worship, creating political alliances and ensuring care for adoptive parents in their old age.⁴⁴

Early modern French jurists upheld the inheritance claims of birth children and collateral heirs above those of strangers. As a result, adopted children began to be perceived in French society as incomplete family members and were barred from inheriting in intestate successions. During the same period, however, canonists continued expanding on the legal framework developed during

⁴¹ *Ibid.*

⁴² Evan B. Donaldson Institute, 2002; National Adoption Information Clearinghouse [NAIC], 2002b).

⁴³ *Ibid* 1, pp 3.

⁴⁴United Nations Department of Economic and Social Affairs, *Child Adoption: Trends and Policies*, 2009. pp 5.

the twelve and the thirteenth centuries. In *De Sancto Matrimonio*, one of the leading canonic treaties of its time, Tomas Sanchez asserted that there were two types of adoption: Arrogation Adoption which was viewed as the ‘perfect adoption’ in that the one that adopted was placed under his or her new father’s paternal power and made his necessary heir and simple adoption where the person remained subject of his or her natural father’s paternal power and had the right to share in the natural father’s estate, not that of the adoptive parents.⁴⁵

2.2.2: Modern Adoption Laws.

The first modern adoption laws were passed in the second half of the nineteenth century in response to the increasing belief that society should play a more proactive role in promoting the welfare of children. Under the influence of this new ideological framework, adoption began to be advocated not simply as a legal mechanism to establish heir status but as a means of promoting the best interests of the children.⁴⁶

The origin of children’s rights work in Kenya can be traced to the ravages of the Second World War when many children were rendered orphaned, abandoned and neglected. Following this, a group of women of the East African Women’s League felt that there was a strong need for a special legislation to be enacted to protect and care for this category of children. The group put pressure on the colonial Government, urging for a special committee to be set up to look into, and come up with specific recommendations on how best to improve laws concerning children, and to encourage the spirit of voluntary work for children in need of care and protection.⁴⁷

The Adoption Law was imported to Kenya in 1933, as the Adoption Ordinance 1933. This was replaced by the Adoption Act which is included in the Children Act, 2001. The aims of the Adoption Bill were stated by the then Ministry for Local Government, Health and Housing. The main purpose of the debate was to import legal adoption. The aims of Legal Adoption were stated as to ensure that adopted children are treated exactly in the same way as children of natural parents regarding rights and privileges, and as blood brothers or sisters of the natural children of the adopters; to incorporate Adoption Societies which had not been recognized; and to set a legal

⁴⁵ *Ibid* 43, pp.10.

⁴⁶ *Ibid* 43, pp.13.

⁴⁷ Child Welfare Society of Kenya. 2020. *Historical Background*. <https://www.cwsk.go.ke/about-us/who-we-are/historical-background/> accessed 11 March 2020.

precedent in preference of legal adoption over traditional adoption, which allowed adoptive children to be taken away by their relatives from the adoptive parents.⁴⁸

In 2001, Kenya enacted The Children Act to establish adoption. The Children Act provides that a child is in need of care and protection when he/she has no parent or guardian or has been abandoned, neglected or abused.⁴⁹ In order to meet the growing child protection needs, an office within the Ministry of Gender, Children, and Social Development, was established. The Department deals with creating awareness on adoption, guardianship and foster care and, seeks to work in the best interest of the child. The Government of Kenya is currently promoting awareness in the above topics. Programs like Cash Transfer Programme for Orphans and Vulnerable Children managed by the Office of the Vice President and the Ministry of Home Affairs, provide financial support to the households taking care of orphans and vulnerable children.⁵⁰

2.3: Traditional Concepts of Adoption in Kenyan Communities (Kikuyu Community of Kiambu District).

In the colonial period, traditional adoption served the needs for alternative care family by allowing street children who lacked families to be placed in a family environment. At the time, the standards of living were quite low hence people could be able to afford feeding the homeless children which means they were well take care of by members of the society.⁵¹ One thing that would have prevented members of the society from adopting children, especially boys, would be on how to provide land for them.⁵² Luckily, the communal land catered for that.

Traditional adoption has no legal framework in Kenya. This was clear especially in cases where the natural parents of the adopted children would come to claim them after a long period of time.⁵³ This can be better explained by the traditional concepts of adoption in the Kikuyu Community of Kiambu District. Reference is made specifically on the girl-child where a natural parent claims

⁴⁸ Justus M, 2006. *An overview of Adoption Laws in Kenya and Emerging Challenges*.

⁴⁹ Section 119, Children Act.

⁵⁰ *Ibid* 48.

⁵¹ Lynett Midega, 2002. *Some Legal and Social Aspects of Adoption*. University of Nairobi, pp 8-9. <http://erepository.uonbi.ac.ke/handle/11295/53935> accessed 25 April 2021.

⁵² *Ibid* 48, pp 4.

⁵³ *Ibid* 48, pp 5.

custody of the child in a pecuniary motive especially on the recovery of the daughter's bride price.⁵⁴

Still making reference to the Kikuyu community, a case was provided; *Provincial Commissioner, Central Province's Civil Appeal Case No 3 of 1951*, with the facts being both parents of a girl died and her aunt took her in as her child and nurtured her till she grew up. She later got married and her aunt was paid the full bride price. The girl's brother tried to claim custody of his sister and the full bride price. It was evidently clear that the action to recover her sister's custody was merely a formality to acquire the full bride price from his aunt.⁵⁵

He then took the matter to the Chura African Court where his claim was dismissed on account of there being unreasonable delay in bringing the matter to Court. He then appealed to the District Officer who upheld the decision of the Chura elders. It was then in 1956 where the Kiambu law panel came up with the following rules that governed matters adoption in the Kikuyu community:

1. At the point the issue of adoption of a child is brought up, attempts will be made to be able to locate the parents of the child. If their plans do not bear fruit, then the proposed adoptive parents will be placed before the Chief and if no objections are raised, then the adoptive parents will be given custody.⁵⁶
2. The natural parents of the child may claim custody of the child 5 years from the date the adoptive parents were granted custody on condition that they pay the adoptive parents all the costs they incurred in the course of raising the child.⁵⁷
3. If the natural parent of the child abandoned the child, he/she will be called to make a written declaration that he/she renounces the right to claim the child.⁵⁸

⁵⁴ A Simmance, 2020. The Adoption of Children among the Kikuyu of Kiambu District. *Journal of African Law*.3, pp.3 <https://www.jstor.org/stable/744988> accessed 17 March 2020.

⁵⁵ *Ibid* 52.

⁵⁶ *Ibid* 48, pp 6.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

We can therefore see that even before laws were enacted that governed child adoption and protection in Kenya, adoption was still taking place with rules governed by the Chief of the area which ensured the full realization of the principle of the child's best interest.

2.4: Benefits of International Adoption.

International adoption tends to serve three parties exclusively the prospective birth parents, the prospective adoptive parents and the adoptable children. The same reasons that promote the idea of child trafficking in Intercountry Adoption for example high level of poverty, is the reason that promotes to the high-rate increase of Intercountry adoption.⁵⁹ Some of the benefits that prospective birth parents enjoy from Intercountry adoption would be the fact that there would be a relief from the financial stress from the unplanned pregnancy as well as it aids them in the continuation of their careers and goals without having to put them at halt.

For the prospective adoptive parents, this would enable them to be able to become parents since some of the reasons that they opt for adoption would be because of infertility. Lastly, for the adoptable children, they would benefit in that they would be placed in a family like environment that they had lacked before as well as them having access to better opportunities such as better healthcare and education. In all these, the best interests of the child are paramount and therefore Intercountry Adoption should be one that aids children to adopt them in line with the standards provided in the Hague Convention.⁶⁰

2.5: Risks of International Adoption.

The following are some the risks that are attached to the process of Intercountry Adoption:

2.5.1: The Withdrawal of Adoptable Children from their Birth Country.

Intercountry Adoption tends to demonstrate an increase in the demand for young and healthy infants which may lead to most of the adoptable children being removed from a country. This in

⁵⁹ Gabriela M, 2014, The "Quiet Migration": Is Intercountry Adoption a Successful Intervention In the Lives of Vulnerable Children? *Family Court Review*, 52(1), pp.6. https://www.researchgate.net/publication/262828937_The_Quiet_Migration_Is_Intercountry_Adoption_a_Successful_Intervention_In_the_Lives_of_Vulnerable_Children/link/5a7b3563458515c95de41f3e/download accessed 24 April 2021.

⁶⁰ *Ibid* 48, pp 7.

turn means that the needs of the native adopters will be met while the domestic adopters will be left with children who have lower chances of being adopted.⁶¹

2.5.2: The Child's Cultural Deprivation.

The removal of the child from their birth country in turn leads to them being deprived of their birth culture. The adoptable children may have been taught cultural beliefs from their birth country but that may change the moment they are adopted by the native adopters. The native adopters may require the refusal of any association of the child with their country's culture. This deprivation will in turn lead to them losing their own birth culture.⁶²

2.5.3: Racism and Discrimination.

Due to the child's culture being deprived it may in turn lead to them being racially discriminated against. Racial discrimination has been defined as any exclusion which is based on race, colour, health, ethnic groups with the sole purpose of preventing one from enjoying and exercising their rights and fundamental freedoms in all sectors of life.⁶³

It has been identified time and time that Intercountry Adoption serve better opportunities to children who go from African countries to Western countries. Question is are the children adopted by the native adopters going to be fully accepted in the receiving countries?⁶⁴ In Western countries especially the USA, racial discrimination is an issue that is prevalent and is growing as an ongoing issue present today. Kenya as a sending country is bound by laws which provide that every person is equal before the law and is entitled to equal protection.⁶⁵ It goes further ahead and states that the

⁶¹ Linda Richter, 2010. International Adoption: *Benefits, Risks, and Vulnerabilities*, pp.20. <https://perspectives.waimh.org/wp-content/uploads/sites/9/2017/05/Zero-to-Three-Corner.-International-Adoption-Benefits-Risks-and-Vulnerabilities.pdf> accessed 24 April 2021.

⁶² *Ibid* 60.

⁶³ OHCHR, '*Dimensions of Racism*. Proceedings of a Workshop to commemorate the end of the United Nations Third Decade to Combat Racism and Racial Discrimination', pp.11. <https://www.ohchr.org/documents/publications/dimensionsracismen.pdf> accessed 24 April 2021.

⁶⁴ *Ibid* 48, pp 36.

⁶⁵ Article 27(1), Constitution of Kenya.

state shall not discriminate directly or indirectly against any person on any grounds such as race, sex, health status, religion, disability, culture or ethnic origin.⁶⁶

Therefore, I believe that most receiving countries are bound by rules that prohibit against racism and discrimination. Such adopted children tend to be treated as immigrants where they are restricted from enjoying the general application of their basic human and legal rights which in turn defies the principle of the child's best interest.

2.5.4: Risk of Child-Laundering.

Intercountry Adoption has often been painted out by abuses such as child trafficking and child exploitation. These are practices that have been fuelled by the state of poverty which propels illicit financial gain of Intercountry Adoption, corruption by people who facilitate the process of adoption, illegally avoiding the process of adoption by for example making false birth declarations and thirdly seeking changes in policies by attempting to persuade competent national authorities to make exceptions to certain laws in specific cases.⁶⁷

The 1993 Hague Convention regulates laws and regulations with regards to the protection of children involved in the process of Intercountry Adoption which has been ratified or acceded to by contracting and non-contracting states. In as much as there is a Convention that guides the whole process of Intercountry Adoption, cases are still rising since the standards the Convention have provided are not being met.

2.6: Statistics of International Adoption in Kenya.

Since the moratorium on the ban of International Adoption was placed in Kenya in 2014, statistics of the same date from 9 years ago which makes it hard to establish how International adoption has been working in Kenya. It was provided that the figures recorded for International adoption ranging from 2003-2008 was 20-40%.⁶⁸

⁶⁶ Article 27(3), Constitution of Kenya.

⁶⁷ *Ibid* 44, pp 6.

⁶⁸ *Ibid* 24.

2.7: Statistics of International Adoption Globally.

On the other hand, statistics of International Adoption for instance in the United States, they provide reports annually on the statistics of International adoption. The Department of State which serves as the Central authority of United States as provided for in Article 6 of the Hague Convention provides annual data of Intercountry adoptions in and out of the United States.⁶⁹

In the fiscal year 2019, it was provided that 2971 immigrant visas were provided by the government in order to facilitate the adoption of children abroad. The overall number of Intercountry adoption decreased most especially from 2 main countries that is China which recorded a decrease of 656 and Ethiopia which recorded a decrease of 166. On the other hand, in as much as there was an overall decrease, there was an increase of the number of Intercountry adoption from specific countries such as Colombia which recorded an increase of 15, Hungary which recorded an increase of 17, Ukraine which recorded an increase of 50 and Liberia which recorded an increase of 21.⁷⁰

The global statistics of 2004-2019 provided that as a receiving state, United States ranked the highest with the most received number of Intercountry adoptions with the number being 182, 620. On the other end, as a country of origin, it was ranked at top 20 with the number of Intercountry adoptions being 2869.⁷¹

Unlike the United States, South Africa has not provided their statistics on their application of Intercountry adoption. It was up until October 7th, 2020 that South Africa decided to lift their moratorium on the ban of Intercountry adoptions.⁷²As per the global statistics, it provides that ranging between 2004-2019, South Africa as a country of origin had a total Intercountry adoptions

⁶⁹ *Annual Report on Intercountry Adoption (2019)*
<https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/Tab%201%20Annual%20Report%20on%20Intercountry%20Adoptions.pdf> accessed 28 April 2021.

⁷⁰ *Ibid* 69, pp 2.

⁷¹ Peter Selman, 2019. *Global Statistics for Intercountry Adoption: Receiving States and States of origin 2004-2019*. pp 2. <https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf> accessed 25 April 2021.

⁷² <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/south-africa-lifts-moratorium-on-intercountry-adoptions.html> accessed 25 April 2021.

of 3445 and was ranked at top 20 which is contradictory given that the ban was simply lifted in 2020.

2.8: Conclusion.

From the above findings, conclusion can be made to the effect that even prior to the enactment of the 2010 Constitution, adoption was still taking place locally in our communities and even so, the child's best interest was always paramount. The only problem with adoption in the traditional setting was the fear of the natural parents having to deprive the prospective adoptive parents of the custody of their children give that at that time the laws governing the adoption and protection of children were not fully placed. International adoption tends to serve as both a benefit and a risk but in order to curb the risks, a country ought to enact laws that will facilitate the protection of children in line with the child's best interests. Since Kenya has not recorded or provided any data to the public with regards to Intercountry adoption, then it is up to us as a country to create a database that records each and every Intercountry adoption that takes place in and out of the country because from there is how as a country, we can learn how to prevent some of the problems that are associated with the whole process of Intercountry adoption.

CHAPTER THREE.

AN ANALYSIS OF THE LAWS GOVERNING DOMESTIC AND INTERNATIONAL ADOPTION IN KENYA.

3.0: Introduction.

This chapter will focus on the analysis of legislative framework of adoption in Kenya with a midst to try and referencing it to relevant Acts of Parliament, International Treaties that Kenya has ratified on the rights of the child in reference to adoption and relevant case law to show how the courts have tried and set the precedent on how various issues regarding adoption will be tried. It will also give the processes and the prerequisites that one needs to satisfy in order to be able to adopt domestically. This chapter will also focus on the legislative framework of international adoption in Kenya, giving the conditions and processes that a foreigner needs to satisfy in order to be able to adopt a child in Kenya.

3.1: Legislative Framework of Adoption in Kenya.

In analyzing the legislative framework governing adoption in Kenya, reference is going to be given with regards to the Constitution, Acts of parliament, international treaties as well as relevant case law relating to adoption.

3.1.1: National Laws.

3.1.1.0: The Constitution.

The constitution has been known as the supreme law of the land that binds all state organs. A child as a person who has not yet attained the age of majority which is eighteen years.⁷³ The constitution states gives various rights of the child which in reference to adoption includes parental care and protection which includes equal responsibility of the mother and father to provide for the child.⁷⁴ The adoption process has always been based on the notion and principle of the child's best interests. Together with **Section 4(2) of the Children Act, Article 53(2) of the constitution** states

⁷³ Article 260, Constitution of Kenya.

⁷⁴ Article 53 (1), Constitution of Kenya.

that in matters concerning the child, a child's best interests are the principal considerations which must be borne in mind.

In determining the best interest of the child, the courts consider; the relationship between the parents and the child, the manner in which the parents exercise parental responsibility, the ability of the care-giver to provide for the needs of the child and the age and maturity of the child.⁷⁵

3.1.1:1: The Children Act.

Before the enactment of the **Children's Act No 8 of 2001**, adoption laws were governed under the **Adoptions Act Cap 143 Laws of Kenya. The Act, Chapter 141**, was enacted in 2001 in order to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the child and for connected purposes. The Act repealed the Adoptions Act, Guardianship of Infant's Act and Young Persons Act, all of which were harmonized and updated into one set of legislation.

The Act has borrowed greatly from the United Nations Convention on the Rights of the Child (CRC), and the African Charter on the Rights and Welfare of the child which the Government has committed itself to. The Government attempted to demonstrate that the rights provided in these instruments are also provided in the National Law. The Act became operational on 1/3/2002. The Act provides for establishment of institutions dealing with children and gives guidelines on issues of children's welfare, legal aid, custody and care of children, foster care, guardianship and adoption.⁷⁶

The Children Act does not define adoption but it is defined as the process through which a child is permanently placed with an alternative family and is provided with new permanent legal parents and severs all rights, duties, obligations and liabilities between a child and a child's natural

⁷⁵ Patrick Kiage, *Family Law in Kenya: Marriage, Divorce and Children*, 2016 Nairobi: Law Africa Publishing (K) Limited, pp.281-282.

⁷⁶ *Ibid* 48.

parents.⁷⁷ The Children Act defines an adoption order as order under Section 154 vesting the parental rights and duties relating to a child in the adopter. The said **Section 154 Children Act** states that the High Court has the discretion to make an adoption order upon application authorizing an applicant to adopt a child in which the proceedings shall be heard and determined in chambers with the identity of the child being kept confidential.

An adoption committee shall be established by the Minister whose functions shall be to formulate the governing policy in matters of adoption as well as monitoring adoption activities in the country. Under the pre-requisites for adoption, a child resident within Kenya may be adopted irrespective of his or her citizenship and place of birth. The child must however have been in the continuous care and control of the applicant within Kenya for at least three consecutive months preceding the filing in court of the application. The application must also be preceded by an evaluation and assessment of both the child and the applicant conducted by a registered adoption society in Kenya.⁷⁸

In a bid to ensure and secure the best interests of the child, especially its safety and security, the law provides certain mandatory conditions, violations of which amounts to an offence which must be satisfied before an adoption. For convenience, the pre-requisites may be dealt with under three heads namely the child, the prospective adopter(s) and bars to adoption.

A. The Child.

i. The Child Must be a Resident in Kenya.⁷⁹

To qualify for adoption, a child must be a resident in Kenya and it matters not whether the child is a citizen or was born in Kenya or not. The residency requirement is however, qualified to the extent that the child must have been under the continuous care and control of the prospective adopter for at least three consecutive months preceding the application for adoption. This is to facilitate bonding between the child and the adopter(s) as stated *In the Matter of the Adoption of Baby D.M (Minor)*.⁸⁰

⁷⁷ Section 2 The Proposed Children Bill, 2016.

⁷⁸ Section 157(1) Children Act, 2001.

⁷⁹ Section 157(1) Children Act, 2001.

⁸⁰ [2013] eKLR.

The provision does not contain the word ‘*immediately*’ but it must be read into it to avoid absurdity for it could be argued that so long as an applicant has been with the child for some continuous period of three consecutive months he may apply notwithstanding that the care and control may have ceased. Such a construction would be decidedly inimical to the best interests of the child and would fail to deal with the mischief of unfamiliarity and strangeness that the timeline is intended to cure.⁸¹

i. The Child Must be At least six weeks old.⁸²

Most children who are found abandoned at infancy are usually much younger than six weeks and may have been literally dumped right after birth. They are likely to be in mortal peril from hunger and exposure so that on being found, they are first admitted into hospital or a children’s home. Once they recuperate and receive immunization and other care, they are ready for fostering as the first step to adoption. The law sets the minimum age limit for adoption at six weeks.⁸³

ii. The Child Must be Declared Free for Adoption.

A child cannot be adopted unless a duly registered and recognized adoption agency has assessed and evaluated the child as well as the prospective adopter(s) and declared the child free for adoption. It does this in a report that gives descriptive details of the child, the place it was found, the circumstances thereof and a conclusion that the child be declared free for adoption. It also issues a certificate with respect to that effect.⁸⁴

In the case of *Re Child R.K.*, the child had been abandoned where after it was found, it was then admitted to New life Home Trust on that same day. Efforts to trace the child’s surrogate and biological parents bore no fruit. For the applicants to be able to adopt the child, the child had to be declared abandoned by the Children’s Court and also declared free for adoption in order to be placed by the applicants.⁸⁵

⁸¹ *Ibid* 75, pp 311.

⁸² *Ibid* 75, pp 311-312.

⁸³ *Ibid* 75, pp 312.

⁸⁴ *Ibid*.

⁸⁵ [2015] eKLR.

iii. The Prospective Adopter.

Persons who may wish to adopt may do so upon an application either in their individual capacity as single applicants or jointly as spouses in accordance with the conditions set out in Section 158(1) of the Children Act which are discussed below:

i. Age.

The prospective adopter or either of the spouses in the case of a joint application must be at least twenty-five years old and is at least twenty-one years older than the child but has not yet attained the age of sixty-five.⁸⁶

ii. Relationship with the Child.

Any person who is a relative of the child, be it by blood or marriage, qualifies to apply to adopt the child and this includes a relative of the child within the extended family.⁸⁷ According to **Section 158(1)(c) Children Act**, the mother or father of a child also qualifies to apply for adoption of that child. This is quite a challenging situation as many would question why should the parent of a child apply for his or her adoption? The rationale behind this is that where the biological parent of that child marries a person who is not the biological parent of that child, and the two wish to make that child a child of the family, to effectuate that wish, the spouses would apply jointly to adopt that child.⁸⁸

A. Bars to Adoption.

Consistent with the need to protect children from possible harm, especially the possibility of sexual and other forms of exploitation and in keeping with treaty standards set out by the Convention on the Rights of the Child, the Children Act prohibits certain persons from adopting children.⁸⁹

i. Discretionary Bars.

Persons falling in this category are by reason of being situated, barred from adopting. This bar is however discretionary in that the court may still make an adoption order if the applicant is able to satisfy it that special circumstances exists that entitle the applicant to the adoption sought or that

⁸⁶ Section 158(1) (a) Children Act, 2001.

⁸⁷ *Ibid* 75, pp 313.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*.

it is in the best interests of the child for the order to be made in the following circumstances; A sole male applicant in respect of a female child, a sole female applicant in respect of a male child, an applicant or joint applicants who has or both have attained the age of sixty-five and a sole foreign female applicant.⁹⁰

ii. Absolute Bars.

In the following situations, the court may be forced to not grant the adoption order if it is satisfied that the applicant or in the case of joint applicants, both or any of them are:⁹¹

- a. Not of sound mind within the meaning of the Mental Health Act (Cap 248).
- b. Has a criminal record i.e. they have been charged and convicted by a court of competent jurisdiction for any of the offences set out in the Third Schedule which are offences against morality as set out in the **Penal Code Cap 63** which are the defilement of idiots or imbeciles, the detention of females for immoral purposes, the conspiracy to defile, attempts to procure abortion, unnatural offences such as having carnal knowledge of any person against the order of nature etc. and indecent practices between males.
- c. Homosexuals.
- d. In the case of joint applicants, if they are not married to each other.
- e. Is a sole foreign male applicant.

In having these bars, the law appears anxious to keep children out of harm's way, the assumption being that the categories of people listed are a potential threat to the physical and moral wellbeing of the children. A sane and safe family set up based on a heterosexual marriage is taken to be the normal environment into which a child should be adopted.⁹²

This was stated in the case of *Re ARE* (a child) when the judge denied an application by a sole foreign male applicant for leave to adopt pursuant to the Guardianship of Children (Practice and Procedure Rules), 2002, then in force. She held that the family set up was an integral part of a child's wellbeing and as nothing would preclude the applicant from leaving the jurisdiction of the courts, it would not be in the best interests of the child to be with a priest who had no family and

⁹⁰ Section 158(2) Children Act, 2001.

⁹¹ Section 158(3) Children Act, 2001.

⁹² *Ibid* 75, pp 314.

would keep travelling all over the world. Therefore, the judge denied the application even though she acknowledged that it was arguable that the child might have been better off in some kind of institution where he could get food and shelter and live with grown up men instead of the abject poverty in which he lived with his poor mother and three siblings.⁹³

In the Kenyan state, things are quite different as the Kenyan courts tend to place a high standard view on family ties when deciding on adoption matters. Therefore, it is for this reason that a balanced and a well-adjusted family, be it unitary or extended and whether founded on a monogamous or polygamous marriage, often tips the balance in favor of adoption. In the case of *Re BW (An Infant)*, the biological parents of a child separated when she was only three years old and the mother relocated to France, where she had remarried. The father, who had custody of the child, soon passed away leaving the child in the care of her cousin. The cousin contracted an Islamic marriage which was polygamous and the couple took the child and lived with her like their own, having lost their only child at infancy. They subsequently applied for adoption and the application was allowed with the judge stating that the said applicants are financially sound, well-educated and they have bonded with the extended family of the applicants and the biological mother has consented to the adoption.⁹⁴

3.1.2: International Laws.

Our constitution in Article 2(5) states that the general rules of International Law shall form part of the laws of Kenya. Therefore, Kenya has ratified some treaties that focus on the rights of children which we will narrow it down to adoption rights of children.

3.1.2.0: Convention on the Rights of the Child.

Kenya ratified the CRC in 1990 and it became part of the laws of Kenya. It provides that a child whether temporarily or permanently deprived of his or her family environment or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special

⁹³ [2008] 1 KLR (G & F) 609.

⁹⁴ [2008] 1 KLR (G & F) 616.

protection and assistance provided by the state. The state parties in accordance with their national laws shall ensure alternative care for such a child.⁹⁵

It also provides that the state parties that recognize the adoption system shall ensure that the best interests of the child are paramount and shall ensure that the adoption is authorized by competent authorities, that inter-country may be considered as an alternative means of child care, that the children concerned by the inter-country adoption enjoy safeguards and standards equivalent to those existing in the case of national adoption and that appropriate measures shall be taken to ensure that inter-country adoption does not result in improper financial gain for those involved in it.⁹⁶

According to the second Kenya CRC report, the government formulated regulations to ensure that the adoption of children, in accordance with Article 21 is undertaken within the best interests of the child as the paramount consideration. In 2002, the family division of the High Court was established which has led to faster and more efficient handling of adoption cases.

3.1.2.1: African Charter on the Rights and Welfare of the Child.

Kenya ratified the ACRWC in 2000. Article 25 of the Charter states that children who are separated from their parents should get special protection and should be provided for with alternative means of family care. With regard to the same article, the ACWRC report provided recommendations to Kenya's first report by stating that there should be the establishment of follow-up mechanisms to verify the standards for the establishment of the structures and the collection of data which will enable the control and management of the number of children admitted into those shelters.⁹⁷

3.2: Legislative Framework on International Adoption in Kenya.

The Children Act provides for the regulation of International Adoption by providing for the regulations that the Minister in consultation with the council to make regulations for the making of international adoptions and prescribing safeguards thereof.⁹⁸ Subsequently, the Children

⁹⁵ Article 20, Convention on the Rights of the Child.

⁹⁶ Article 21, Convention on the Rights of the Child.

⁹⁷ *Ibid* 24, pp 58.

⁹⁸ Section 182(b) Children Act, 2001.

(Adoption) Regulations, 2005 also provides for the legislative framework of international adoption in Kenya. There is established an adoption committee in Section 155(1) of the Children Act which provides for the functions of the committee in relation to international adoption to be to consider, review and either approve or reject applications for the registration of international adoption societies, co-ordinate international adoptions and approve foreign agencies wishing to conduct adoption in Kenya, maintain updates from time to time a register of approved international societies and regulate the fees that are charged by adoption societies for processing of applications for adoption.⁹⁹

Section 177(1) of the same Act provides for the restrictions of persons against making arrangements for the adoption of children with bodies that have not been registered as adoption societies by the Act, which includes both local and foreign adoption societies. Foreign Adoption Societies are societies other than local adoption societies that have been approved by the government of the receiving country with the receiving country being a country where the adopted child will ordinarily reside and gain citizenship and which are signatories to the Hague Convention.¹⁰⁰ Therefore, in this regard, a foreign adoption society shall not initiate adoption arrangements in Kenya unless it has been approved by the adoption committee.¹⁰¹

An application for an international adoption shall be made through a local adoption society and shall be accompanied by the required documents in which in 30 days, the local adoption society shall forward the same to the adoption committee.¹⁰² Where an approval for adoption is either granted or denied, the same shall be forwarded to the foreign adoption society within 60 days with detailed reasons for the same.¹⁰³ Where an application for adoption has been approved, the foreign adoption society shall arrange for the prospective adopter to travel to Kenya within three months from the date the foreign adoption society received the notification approval.¹⁰⁴ The local adoption

⁹⁹ *Ibid* 21, pp 30.

¹⁰⁰ Regulation 22 Children (Adoption) Regulations, 2005.

¹⁰¹ Regulation 23(1) Children (Adoption) Regulations, 2005.

¹⁰² Regulation 24(1) Children (Adoption) Regulations, 2005.

¹⁰³ Regulation 25(1) and (2) Children (Adoption) Regulations, 2005.

¹⁰⁴ Regulation 26(1) Children (Adoption) Regulations, 2005.

society shall introduce the adopter to children available for adoption who matches the adopter's preference and if willing, the adoption shall process from then.¹⁰⁵

The child intended for adoption shall then be placed in the care of the adopter for three continuous months with supervision by the local adoption society. Upon its completion, the local adoption society may assist the adopter in making an application to the High Court for an adoption order and approval of the adoption committee to the adoption arrangements.¹⁰⁶ If the local adoption society is not satisfied with the conduct of the adopter during the placement period, it shall inform the adoption committee which shall carry out investigations as to the suitability of the adopter and shall communicate the result of such investigations to both local and foreign adoption societies and if the adoption arrangements are stopped by the adoption committee, the same shall be informed to the local and foreign adoption societies of the decision within a reasonable period.¹⁰⁷

Where the High Court grants the adoption order, the local adoption society shall inform the foreign adoption society in order to plan for the necessary travel arrangements of the child to depart from Kenya.¹⁰⁸ The foreign adoption society shall send reports of the progress being made by the adopted child in the receiving country once every three months during the first two years upon the making of the adoption order and shall continue sending them until the child has gained the age of majority or until the third annual progress report.¹⁰⁹ The adoption committee shall stop any adoption arrangements where the foreign adoption society breaches any of the provisions stipulated and shall bar it from engaging in other adoption arrangements in Kenya for a period that the committee shall deem appropriate. After, it shall transfer all files relating to ongoing adoption arrangements in Kenya to another approved foreign adoption society and shall notify the local adoption society within reasonable time after which it shall transfer all files relating to ongoing adoption arrangements in Kenya to another approved foreign adoption society and shall notify the local adoption society within reasonable time.¹¹⁰

¹⁰⁵ Regulation 26(2) Children (Adoption) Regulations, 2005.

¹⁰⁶ Regulation 26(4) Children (Adoption) Regulations, 2005.

¹⁰⁷ Regulation 26(5) and (6) Children (Adoption) Regulations, 2005.

¹⁰⁸ Regulation 27(1) Children (Adoption) Regulations, 2005.

¹⁰⁹ Regulation 27(2) Children (Adoption) Regulations, 2005.

¹¹⁰ Regulation 28(1) and (2) Children (Adoption) Regulations, 2005.

3.3: Prerequisites for International Adoption.

As per Section 162 Children Act, international adoption is where a joint application is made by two spouses who are not Kenyan citizens nor their residents.¹¹¹ Following that, the parties need to be spouses in order for an adoption order to be granted. This means that the two have to be married to each other and one which is in line with the Kenyan system, meaning one that does not affiliate to the partners being homosexuals. This requirement is meant to ensure that a Kenyan child, subject to an international adoption gets placed in a family set up that accords with the Kenyan conception of the family.¹¹²

The applicants must then obtain consent from a court of competent jurisdiction in the country where one or both spouses reside, permitting them to adopt a foreign child.¹¹³ Another prerequisite would be that before granting an adoption order, the court must be satisfied that the said country will not only respect and recognize the adoption but will also grant resident status to the child.¹¹⁴ Lastly, the applicants must have been authorized and recommended as persons who are suitable, both morally and financially, of adopting a foreign child.¹¹⁵

In the case of *Re AW (A Child)*, the applicants, husband and wife were Netherlands citizens with the first applicant aged 31 and the wife 32 years. The child to be adopted was a Kenyan boy who was abandoned by the mother when he was 2 years old. Both applicants work and are financially stable. The child has been in the care of the applicants and was then declared fee for adoption. The judge was satisfied by evidence placed before her and held that the applicants were fit and proper persons to adopt the child in question which would have been in the child's best interests to be adopted by the applicants, who met the requirements of Part XII of the Children Act, 2001 relating to adoptions. An international adoption order was therefore made under sections 154 and 162 of the Children Act, 2001.¹¹⁶

¹¹¹ Section 162 Children Act, 2001.

¹¹² *Ibid* 75, pp 323.

¹¹³ Section 162(a) read with Section 158(4) (e) Children Act, 2001.

¹¹⁴ Section 162(b) Children Act, 2001.

¹¹⁵ Section 162(c) Children Act, 2001.

¹¹⁶ [2006] eKLR.

3.4: Conclusion.

Following the enactment of the Constitution and the commencement of the Children Act, the issue of dealing with children that have no temporary or permanent family-like environment has almost been resolved in that they are able to receive alternative means through adoption and with the help of the state. At this point we can easily say that as a country or a world we cannot do without laws. Laws tend to govern each and every process that people undertake and with that, to avoid disruptions in the adoption sector, that has led to the establishment of national and international laws that tend to govern how the adoption system is adapted in the country. These laws play a major role when it comes to the identification of the surrounding gaps following the adoption system and which when solved, will make the system a much better place and one that does not lead to any detriment in the upholding of the best interest of the child which is sought to always be kept paramount in any matter affecting the child.

CHAPTER FOUR

A COMPARATIVE ANALYSIS ON THE PRE-EXISTING GAPS OF THE LEGAL FRAMEWORK ON ADOPTION IN KENYA AND US

4.0: Introduction.

This chapter focuses on the gaps present that bar the proper functioning of the process of international adoption otherwise used interchangeably as inter-country adoption. The gaps discussed in this chapter are based on a comparative analysis of three jurisdictions which are Kenya, Ghana and South Africa. This chapter first begins with an introduction of how inter-country adoption surfaces in a country to connect itself with child trafficking. It also discusses the parties involved in this processes that make it harder for the legal framework of international adoption to be regulated in a country. Processes that amount to child trafficking through international adoption are also mentioned herein. Secondly, the gaps existing in the legislative and administrative regulation of adoption in Kenya, followed by those in Ghana and South Africa are discussed giving reference to the legal instruments governing adoption in each jurisdiction. Lastly, the chapter discusses a conclusion which summarizes all that is discussed in this chapter.

4.1: Link between Intercountry Adoption and Child Trafficking

We have tackled both local and international adoption in Kenya and it is evident that adoption seeks to mainly serve the purpose of allowing couples to create families by accepting those children that lack homes or a family-like environment but what seems to be the arising issue in this context is the fact that child theft and trafficking are arising out to be global concerns with respect solely to international adoptions.

During the adoption process, violations of the most basic rights of the child can occur which are often perpetrated under the cover of the supposedly humanitarian aim of the act and justified by the simplistic view that a child will somehow always be ‘better off’ in a materially rich country. The illegal acts can involve criminal networks, intermediaries of all kinds and couples prepared to carry out, be accomplice to, tolerate or simply ignore abuses in order to secure an adoption. Child trafficking often involves the collusion of a large network of individuals who can range from spotters on the lookout for pregnant girls, to hospital personnel, doctors and midwives, to birth

registrars, lawyers and passport and visa officials. This long chain of corruption can extend to receiving countries, where intermediaries are available to place the trafficked children.¹¹⁷

Question then becomes what amounts to an abuse of inter-country adoption specifically amounting to child trafficking. The following are ways in which they occur.

i. Illegally obtaining children for adoption

This may happen when the traffickers identify potentially vulnerable mothers especially adolescent single mothers and inciting them to give up their future or new born baby. The pressure may be exerted most especially at the maternity clinics and the hospitals right before the birth of the child has occurred. In some cases, it is founded on the moral or religious opinion that a mother who has a child out of wedlock is not the most suitable person to bring up a child properly. It may also happen when the mother is falsely informed that her child was stillborn or died shortly after birth in order to enable the child's anonymous removal from the hospital. It may also occur when there is the exchange of a child for financial or material rewards going to the family, the director or staff of an institution or sometimes to the institution itself. Women may also be offered financial incentives to conceive a child specifically for adoption in abroad.¹¹⁸

ii. Illegally securing permission to adopt.

This may occur by falsely obtaining certificates of aptitude to adopt that are accepted by the authorities in the country of origin of the child to be adopted and also by the corruption of local authorities and judges in order to obtain favorable decisions. Corrupt judges may, for example, accept false documents purporting to contain the consent of the birth parents. The bone of contention arises in instances where the judges have no idea that the documents presented have been falsified. What happens next? Are they to be held accountable for that?

Under such circumstances, a judgment made on the basis of fraudulent evidence, there exists available mechanisms for the judgment to be set aside. In *Takhar v Gracefield Developments Ltd*, the case concerned a factual background where the fraud was not raised by the claimant.

¹¹⁷ *Ibid* 7.

¹¹⁸ *Ibid*.

There, it was pointed out by the parties in their submissions that the fraud should have been discovered by reasonable diligence but the court found that in the context of a serious fraud that was material to the judgment, that “there is not, and should not be, a rule that want of reasonable diligence would lead to a blanket ban on bringing an action to rescind a judgment where the evidence is one that has been obtained by fraud.”¹¹⁹

iii. Illegally avoiding the adoption process.

This happens when there is the making of false birth or paternity declarations. Relatives sometimes relinquish a child they are temporarily caring for, pretending to be the birth parents. In other instances, both the birthmother and the prospective adoptive parents play an active role whereby, through pre-arranged agreement, the birth mother registers in the hospital in the prospective mother’s name or assigns paternity to the prospective adoptive father.

Although international adoption has the potential of providing children that have been deprived of families with loving homes and security, it also poses significant risks and problems for children involved in Intercountry adoption. It is also viewed as the process that poses a means of which there is an improper financial gain that in the end fails to take into account the child’s best interests. With children being viewed as commodities, unscrupulous institutions have been known to recruit children in order to profit from international adoption. The high demand for children has created rings of entrepreneurs who find and sell children by any means without due regard for their best interests. The danger is that the children have become products that are only valued only for financial gain that can be realized from their sale on international market.¹²⁰

The CRC and the ACRWC recognize the problems inter-country adoption poses for the best interests of the child if not properly regulated. Accordingly, state parties are mandated to take all the appropriate measures to ensure that in inter-country adoption, the placement does not result in improper financial gain for those involved in it.¹²¹ In *Minister for Welfare and Social Development*

¹¹⁹ [2019] UKSC 13.

¹²⁰ Irene Rushwaya, *A Critical Analysis of the Legislative Framework Regulating Inter-Country Adoption in South Africa and Ghana*. (LLM Thesis, University of Capetown 2014) pp 23.

¹²¹ Article 21(d), Convention on the Rights of the Child.

v Fitzpatrick and Others, the Honorable Judge Richard J Goldstone, making reference to **Section 24(1) of the Child Care Act 74 of 1983**, stated that, no person may give, undertake to give, receive or contract to receive any consideration in cash or kind, in respect of inter-country adoption of the child.¹²²

4.2: Gaps in Kenya's Legal and Administrative Framework on Adoption.

Kenya's position on International Adoption is that as much as there is a legal framework governing International Adoption in Kenya, there are pre-existing gaps that make it strenuous for its regulation. The Government of Kenya's situation Analysis of the children, young people and women in 2009 indicates that in 2006, an estimated 175,000 Kenyan children were reported to be victims of regional and international child trafficking for various forms of exploitation including sexual exploitation, labor, domestic servitude and illegal adoption.¹²³ According to **Section 3 of the Counter-Trafficking in Persons Act**, a person commits an offence of trafficking in persons when the person recruits, transports, transfers, harbors or receives another person for the purpose of exploitation by means of; threat or the use of force or other forms of coercion, abduction, fraud, deception and abuse of power of position of vulnerability.¹²⁴ **Section 4** also states that a person who for the purpose of trafficking in persons adopts a child or offers a child up for adoption commits an offence.¹²⁵

In an attempt to try and curb this issue, the government issued a moratorium in 2014 against all resident and inter-country adoptions as well as cancelling their licenses.¹²⁶ Kenya has been identified as a major point of origin, transit and destination of victims of trafficking. Although there is no official data on the patterns, trends and magnitude of the problem, anecdotal evidence

¹²² 2000 (3) SA 422 (CC).

¹²³ *Assessment Report of the Alternative Care System for Children in Kenya*, Austria: SOS Children's Villages International, 2014, pp 51.

¹²⁴ No 8 of 2010.

¹²⁵ *Ibid* 119.

¹²⁶ <https://www.president.go.ke/2019/09/12/cabinet-bans-child-adoption-by-foreign-national> accessed 7 October, 2020.

and newspaper reports point to an increase in the levels of internal and cross-border trafficking particularly of women and children.¹²⁷

In his judgment, Hon. M.W. Mugai pointed out that official communication from Ministry of East African Community, Labor and Social Protection of 14th February 2017 on inter country adoptions indicated that the moratorium arose from Kenya being cited as a source, transit and destination Country on human trafficking as stated above. The move on placing a moratorium on the ban of Inter-country adoption was also a response to concerns about increased child trafficking through abuse of Kenya's adoption processes by foreigners due to existing loopholes and to a 2014 US State Department Report on trafficking in Persons which ranked Kenya at tier 2 Watch List for non-compliance with minimum standards for elimination of human trafficking.¹²⁸

The moratorium was put in place pending the promulgation of laws, rules and regulations within the Children Act but also criminal legislation to guard against trafficking of children as well as to sanction such conduct. In addition to the Moratorium there were to be other measures put in place, namely the review of the Children Act and other related laws and Counter Trafficking in persons Advisory Committee.¹²⁹

It was also a means to show that there was a rampant violation of the adoption laws in Kenya either by private adoption agencies, children officers, law firms or judicial officials. The purpose of the ban was to enable the government to try and conduct a comprehensive audit of the policy and legal framework, the procedures and the key parties involved in adoption. This is because due to statistics, it is evident that children that were being adopted in and from Kenya, over 496 children were taken out of the country under circumstances that raise constitutional, legal and ethical questions under local and international legal instruments ratified by the country.¹³⁰

Other factors that lead to international adoption being connected to child trafficking is that there is lack of accountability from the main parties that facilitate adoption. Some of the documents

¹²⁷*Ibid* 15, pp 46.

¹²⁸*Re SS (Baby)* [2019] eKLR.

¹²⁹*In re A M (Baby)* [2015] eKLR.

¹³⁰Abiud Ochieng, Traffickers on the loose: How Children are sold to the Highest Bidder in the Name of Adoption, *Daily Nation*, 2018. <https://www.nation.co.ke/kenya/news/traffickers-on-the-loose-how-children-are-sold-to-highest-bidder-in-name-of-adoption-61498?view=htmlamp> accessed 14 July 2020.

presented in court pointed to fabrication, forgery, deception and falsification. This was evident whereby for instance, a birth certificate indicated that the child was born in 2002 while the death certificate of the child's father indicated that he died in 1995. In another, the name of the father in the death certificate was different from that in the child's birth certificate. These actions more or less paved way and room for child trafficking.¹³¹

The report and the recommendations by the task submitted stated that a pursuit of profits was the main motive for a majority of players in the adoptive service. The report mentioned that more than 80% of the children in institutions had traceable families but owners had commercial motives for holding them there. It recommended shutting down many institutions by re-uniting the children with their families. It also recommended public funding of local adoption services so as to remove the commercial motive by private agencies that had salary and operational overheads to pay.¹³²

So the question that begs is, Is the law the problem? Looking at legislation surrounding the protection of children, there are inadequate policies which ideally spell out how to address existing gaps which create room for International Adoption to foster Child trafficking. Related to this, is the fact that many duty bearers are not aware of all of the different laws, policies, regulations and guidelines related to child protection thus making it difficult for the fully implementation of the laws governing child protection in Kenya.

Taking a closer look at the Kenyan situation, the laws are not stringent when it comes to the punishment of the child traffickers. The sanctions provided in the **Counter-Trafficking in Persons Act** do not reflect on the gravity of the crime. **Section 3(5)** of the Act states that a person who traffics another person or finances and controls the commission of an offence, commits an offence and is liable to imprisonment for a term of not less than twenty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.¹³³

¹³¹*Ibid* 119.

¹³²Anita Chepkoech, Kenya Bans Child Adoption by Foreign Nationals. *Daily Nation*, 2019. <https://www.nation.co.ke/kenya/news/kenya-bans-child-adoption-by-foreign-nationals-202946?view=htmlamp> accessed 16 July 2020.

¹³³ *Ibid* 124.

But is that enough to bar the offenders from continuing the act of trafficking children through adoption? Meaning, such crimes are committed in a cartel/rings which goes ahead to show that regardless of whether one or two people have been convicted of such a crime, it does not mean that the crime stops as a whole. This is to mean that the stringent laws are likely to convict the criminal and deter him/her from committing any further crimes but it does not mean that it will deter the crime itself as a whole. The objective of the stringency in laws is to deter crime.¹³⁴

The law is also the problem in that looking at such instances, legislation governing child protection in Kenya mostly provides on the punishment of the offender rather than focusing solely on the victim. Does the law provide on how such children are to be handled? No. Human trafficking victims are often physically and emotionally abused and many do not identify as victims due to a lack of knowledge about the crime and the power and control dynamics involved.¹³⁵ Therefore, there not being laws that govern that specific area then goes ahead to defy the whole Best Interest Principle where in all matters concerning the child, the best interest of the child should be paramount.

Another reason as to why the law is the problem is where some policies have not yet been adopted as law. Unless and until such is done, protection of the children will never be fully implemented/addressed for example the Moratorium banning the process of International Adoption in Kenya. The difference between policies and laws is that a policy is that which outlines what a government is going to do and what it can achieve for the society as a whole. Policies are only documents and not laws but these policies can lead to new laws while laws are set standards, principles and procedures that must be followed in society which are mainly made for implementing justice in the society. While a law is framed for bringing justice to the society, a policy is framed for achieving a certain goal.¹³⁶ A moratorium then being a temporary suspension should then be made into law in order to make it binding.

¹³⁴ <http://www.legalserviceindia.com/legal/article-2356-the-relationship-between-stringency-of-law-and-deterrence-in-crime.html> accessed 16 November, 2020.

¹³⁵ <https://www.centerforpreventionofabuse.org/i-need-help-for-someone-else/helping-human-trafficking-victims/> accessed 22 December 2020.

¹³⁶ <https://www.etu.org.za/toolbox/docs/govern/policy.html> accessed 23 December 2020.

In conclusion, the problem that poses is that child trafficking is also becoming more rampant due to the fact that the current laws governing children or trafficking do not define in essence the meaning of child sale or child trade thus ending up putting the country's children at risk. This in turn has created a loophole for fraudulent vested interests, masquerading through the ownership of children homes, adoption agencies and legal firms representing children and child adopters to engage in the unscrupulous business of child trafficking under the guise of charity.¹³⁷

4.3: Gaps in Ghana's Legal and Administrative Framework on Adoption.

Ghana was the first country in the world to ratify the CRC on 5th February in 1990. In order to harmonize its national laws with the international human rights standards; Ghana promulgated a new constitution in 1992. The constitution was the first major instrument for the protection of children's rights in Ghana. Notwithstanding these positive developments, the constitutional provisions concerning the rights of children were considered insufficient to meet the principles of the CRC. Thus, efforts to offer better protection of the rights of children in Ghana resulted in the enactment of the Children's Act of 1998.¹³⁸

Ghana has followed the trend of other developed countries such as the United States when it comes to Inter-Country Adoption. While other developed countries have been arranging Inter-Country Adoption through licensed private organizations, the Ghanaian Government handled all the adoptions itself and no official means to foreign adoption existed. Ghana's position in the Inter-country adoption is different because of the existing exploitation and sale and trafficking of children by unlicensed residential care facilities.

Over the years, the Government of Ghana did not authorize foreign adoption service providers. Only the Department of Social Welfare was authorized to provide adoption services in Ghana. The Children's Act of 1998 was passed to reform and consolidate the law relating to children, to provide for the rights of the child, maintenance and adoption, regulate child labour and apprenticeship and related matters. Inter-country adoption and procedures were provided for in Section 85 of the Act which stated that the Department may investigate an application for inter-country adoption as an alternative means of child care, if a child cannot be placed in a foster or an

¹³⁷*Ibid* 31.

¹³⁸*Ibid* 117.

adoptive family in Ghana. Despite the Act providing for related procedures, the regulatory framework for inter-country adoption was lacking.¹³⁹

Due to the combination of lengthy waiting period and restrictive screening procedures in adoption, many prospective parents desperate for children started looking elsewhere. Unlicensed Residential Care Facilities began to take advantage of the system and spearheaded in the sale of children to foreign prospective parents in collusion with some corrupt officials. Without an official avenue to foreign adoptions, Ghanaian couples went through any avenue they could find. Often, they were scammed, their money was stolen and they remained childless, or if they did receive a child, they could not confirm where it came from.¹⁴⁰

Adoptions often occurred without authorization from the courts and the department of Social Welfare. The undefined system of adoption indeed encouraged the operation of unscrupulous agents in the country, increasing the possibility of child trafficking and other abuses. Foreign prospective adoptive parents illegally adopted children in Ghana without the recourse of the Act and the department of social welfare; charged with the responsibility of streamlining the process of inter-country adoption.¹⁴¹

The Ministry of Gender, Children and Social Protection, having noticed the rot in the processes of adoption in the various departments and the sale of children by people in connive with the officials placed a moratorium on child adoption in Ghana to address the current challenges and protect adopted children and their foster parents. Organizations have called for the country to ascend to The Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption (HCIA). This they believed would protect Ghanaian children and reduce the various forms of abuse in the country and within the various machineries mandated to promote the welfare of children by avoiding challenges such as child sale and trafficking, exploitation and child labor etc.¹⁴²

¹³⁹Chris Ankrah, Adoption Practices Fueling Child Trafficking in Ghana, 2018. *SSRN Electronic Journal*, pp 4.

¹⁴⁰ *Ibid* 119.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* 119, pp 5.

In conclusion, similar to the Kenyan situation, the Ghanaian government has also implemented rules that will help prevent the abuse of inter-country adoption in the country and that is by placing a moratorium that will foster the protection of children from trafficking in a bid to continue inter-country adoption.

4.4: Gaps in South Africa's Legal and Administrative Framework of Adoption.

Prior to the enactment of the Children's Act of 2005, Intercountry adoption was not legally permitted in South Africa. The Child Care Act No. 74 of 1983 regulated all matters affecting children such as national adoption but it did not address Intercountry adoption. The Children's Act defines trafficking in relation to a child to mean the recruitment, sale, supply, transportation, transfer, harboring or the receipt of children within or across the borders of the republic:¹⁴³

- i. By any means including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child.
- ii. Due to a position of vulnerability, for the purposes of exploitation and includes the adoption of a child, facilitated or secured through illegal means.

The South Africa Child Care Act of 1983 does not make provision for inter-country adoptions. Prior to the decision of the constitutional court in the case of a South African child could only be adopted by a citizen or resident of South Africa. In the case, the prohibition against non-South Africans adopting a South African child as provided for in **Section 18(4) (f) of the Child Care Act of 1983** was deemed to be discriminatory to foreigners and inconsistent with **Section 28(2)** of the constitution which provides that a child's best interests are of paramount importance in every matter concerning the child. Paragraph 20 stated that:¹⁴⁴

The provisions of **Section 18(4) (f)** are too blunt and all-embracing to the extent that they provide that under no circumstances may a child born to a South African citizen be adopted by non-South African citizens. To that extent, they do not give paramountcy to the best interest of children and are inconsistent with the provisions of **Section 28(2)**.

¹⁴³ Pat Moodley, *Inter-Country Adoptions and Child Trafficking: A Fine Line Indeed*, 2006. *Taylor & Francis Ltd*, 1,2, pp 145.

¹⁴⁴ *Ibid* 120.

South Africa has acceded to the Hague Convention on Inter-Country Adoption on 1st December 2003 but there is no enabling legislation in place to facilitate ICA. Once a child has been removed from the country, the South African courts lose their authority as upper guardians of that child. The child is thus left entirely dependent on the goodwill of the prospective adopters. The legal situation clearly provides ample room for potential abuse of the rights of the young mothers and their children. According to **Section 10 of the Child Care Act**, prospective parents who wish to remove a baby from the jurisdiction of the court in which it was born must obtain permission to transfer the matter to a Children's Court into whose jurisdiction the baby is being moved. This is to ensure that adoption application processes are formally transferred to the latter court. The danger lies in the fact that if the babies are removed from the jurisdiction of the court without the **Section 10** transfer being formalized, all records of the child are lost and there is the danger the child gets lost within the system.¹⁴⁵

Section 24(1) and (2) of the Child Care Act states that no person may give, undertake to give, receive or contract, to receive any consideration, in cash, in respect of the adoption of a child. The court in Fitzpatrick's case found that Section 24 is designed to deter the practice of child trafficking, making the exchange of consideration in an adoption a criminal offence. Despite this decision, adoption agencies, especially those specializing in international adoptions, seem to be benefiting well from the ICA.¹⁴⁶

Therefore, to curb this issue, social workers need to be obtain full and informed consent of the mother who needs to understand the legal consequences of adoption and that her baby will be leaving the country and all the officials working in the field of ICA must advocate the view that any deviation from the strict legal rules governing inter-country adoptions must be investigated for possible contraventions of trafficking legislation.¹⁴⁷

4.5: Conclusion.

The issue of child trafficking in relation to inter-country adoption is quite an emerging issue in the country which tends to pose a threat to the children that lack an alternative form of child care.

¹⁴⁵*Ibid* 143, pp 146.

¹⁴⁶*Ibid* 143, pp 147.

¹⁴⁷*Ibid* 143, pp 148.

Countries such as Ghana, Ethiopia, South Africa and Kenya have gone ahead and issued a moratorium that would lead to the curbing of child trafficking through international adoption. Doing a comparative study with other countries will help figure out what more we can do as a country to enable to fully control this issue. There is seemingly less laws enacted to govern the regulatory framework of international adoption and child trafficking despite having the Children's Act and the Counter-Trafficking in Persons Act.

The laws present are insufficient because there is not a single definition of what amounts to child trafficking including what is the sale of children, the laundering of children etc. Having no backgrounds of what amounts to such, it therefore tends to open a floodgates situation on the issue of child trafficking through Intercountry adoption as the laws present are inadequate. There is also no proper definition of what constitutes an improper financial gain through inter-country adoption. Therefore, in order to control all these, the moratorium should be enacted as law because right about now, it was just but a directive. It being a law that has been passed will also aid in putting measures in place as well as penalties that will be present as a result of carrying out child trafficking through inter-country adoption.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0: Introduction

This chapter is a summary and conclusion of all the preceding chapters. It also summarizes the existing gaps that bar the actualization of the process of adoption which in turn lead to child trafficking in Kenya. From the gaps, this chapter will also delve into detail on the respective recommendations set to curb this matter and strengthen the laws that govern the adoption of children and the protection of children in Kenya.

5.1: Summary and Conclusions.

Chapter one is the overall introduction to the topic and provides a framework for the whole research paper. It gives an introduction on the process of adoption while linking it with trafficking. It also provides a background to the study which entails providing context to the process of adoption to enhance better understanding of the matter. Next would be the literature review which is a synopsis of scholarly sources on adoption which are solely based on secondary sources of law which includes books, journal articles, theses, dissertations etc.

This chapter also explains in detail about the problem statement which is meant to address the main problem set to be tackled in this paper. The problem statement mainly focuses on the gaps that hinder the actualization of adoption in a manner that does not lead to child trafficking. The theoretical framework is also included in this chapter where it introduces and produces theories that expound more on why the research exists. This chapter also analyzes research objectives and research questions which guide on the specific concerns or matters to be addressed in the paper. This chapter also justifies the study by providing rationale as to the reason of conducting this study. Lastly is the research methodology which explains on the type of the research method that has been used.

Chapter two focuses on the analysis of the concept of adoption, its origins giving reference to the early modern era and the modern day laws as well as its evolution and how it was imported to Kenya. It also highlights the traditional concepts of adoption in Kenyan communities most especially focusing solely on the Kikuyu community of Kiambu. This chapter also provides statistics of adoption in Kenya giving reference to the number of children that have been placed in

formal alternative care, the gender, marital status, age and educational level of the adoptive parents and the status of the adoption process, the gender and age of the children adopted and those to be adopted. This chapter concludes with the pros and cons of adoption.

Chapter three discusses on the analysis of the legislative framework of adoption in Kenya giving reference to Acts of Parliament (Statutes) i.e. Children's Act No. 8 of 2001, Penal Code Cap. 63, International Treaties i.e. Convention on the Rights of the Child (CRC) and African Charter on the Rights and Welfare of the Child (ACRWC) and relevant case laws relating to adoption. This chapter also focuses on the legislative framework governing International Adoption in Kenya giving reference to Children Adoption (Regulations), 2005.

Chapter four tackles and exposes the gaps in the Kenya's legal and administrative framework on adoption *vis a vis* the Counter Trafficking in Person's Act and other laws. This included also providing a link between Intercountry Adoption and child trafficking which involves tackling the question of what amounts to an abuse of Intercountry adoption specifically amounting to child trafficking. This chapter also involves a comparative analysis with other jurisdictions i.e. South Africa and Ghana based on the identified weaknesses.

Chapter five which is the final chapter is based solely on a summary and conclusions of all the chapters. It also summarizes the existing gaps that bar or hinder the actualization of the process of adoption which in turn leads to child trafficking in Kenya. From the gaps, this chapter will also tackle in detail on the respective recommendations set to aide in curbing this matter.

5.2: Recommendations.

This research proposes the following recommendations:

5.2.1: Ratification of Treaties that deal solely with the protection of children.

Currently in Kenya, as discussed in the earlier chapters, there is an existing 7 year old moratorium on the ban of Intercountry adoption. The ban is more or less a temporary solution than a permanent one that will not put an end to adoption abuses and in this case, child trafficking.¹⁴⁸ Therefore, the

¹⁴⁸ Kelly M, 'Curbing Child-Trafficking In Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish The Job In Cambodia?' (2003) 12 Washington International Law Journal, pp 624-625. <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1405&context=wilj> accessed 14 April 2021.

first step in a bid to try and curb child trafficking would be through a comprehensive turnaround of reforming the pre-existing laws which happens by advocating and carrying out changes in the legal system, usually with the aim of enhancing justice/efficiency. There are four main methods of reforming the law which are; to repeal the law (removal or reversal of a law), the creation of new law, consolidation (combination of a number of laws into one) and the codification (collection and systematic arrangement, usually by subject, of the laws of a state or country).¹⁴⁹

This would begin by ratifying and acceding to The 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 which bears in mind that in all foster placement and adoption procedures, the best interests of the child should be of paramount consideration. It provides that governments of the state parties to the Declaration should establish legislation and policies that ensure the protection of children who are involved in International adoption.¹⁵⁰ The Declaration provides that in Intercountry adoption, placements should, as a rule, be made through competent authorities or agencies with application of safeguards and standards equivalent to those existing in respect of national adoption. In no case should the placement result in improper financial gain for those involved in it.¹⁵¹

Therefore, Kenya should undertake a comprehensive legislative reform that examines the whole spectrum of legislation and regulations that affect the realization of children's rights. Indeed, a comprehensive and consultative review of existing legislation seems to be the most common and effective way to begin the harmonization process. Apart from putting the law in place, necessary measures to effectively implement the same, such as regulations, institutions, policies, and budget allocations should accompany law reform.¹⁵²

¹⁴⁹ Legal and Economic Empowerment Global Network (LEEG-net), SDG-enabling Law Reform Drive. <https://www.leeg-net.org/sdgs-enabling-law-reform-drive>

¹⁵⁰ Article 18, United Nations Declaration.

¹⁵¹ Article 20, United Nations Declaration.

¹⁵² Dr Benyam Mezmur, 2010. *The Sins of the 'Saviors': Child Trafficking in the Context of Intercountry Adoption in Africa*. p.26. <https://assets.hcch.net/upload/wop/adop2010id02e.pdf> accessed 14 January 2021.

5.2.2: Implementing and Monitoring the Hague Convention on the Protection of Children in respect to Intercountry Adoption.

Among other countries such as Burundi and South Africa, Kenya acceded to The Hague Adoption Convention in 2007. From International Law, we can delve into some of the stages of a treaty process i.e. ratification and accession. Ratification has been known to apply only to state parties that signed the convention at the time that it was open for signing such that only they can be able to ratify it. Accession on the other hand is meant for state parties that did not sign the convention at the time it was open for signing. They can accede to it but they cannot be said to have ratified the convention. Even with all these differences, state parties that have either ratified or acceded to a convention share the same rights and obligations. This is to mean that just the same way Zambia, a signatory to the Hague Adoption Convention, is bound to establish safeguards that ensure Intercountry adoption is done in the best interests of the child, so is Kenya.

The Hague Adoption Convention is an International Convention that provides detailed guidance on the implementation of Article 21 of the CRC which provides that state parties that authorize on the process of adoption shall ensure the best interests of the child shall be paramount. It also touches on International adoption and child trafficking in an effort to protect those that are involved from the corruption, abuses and exploitation that sometimes accompanies International Adoption.¹⁵³ The Convention provides that its objectives are to establish safeguards to ensure that Intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law and to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children.¹⁵⁴

As provided for in the Convention, Kenya is bound by Article 6 of the same which provides for the Central Authorities and Accredited Bodies which are the main institutions under the Convention that aid in fighting against child trafficking with respect to adoption. The Central Authorities are to co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objectives of the Convention by directly taking all appropriate measures to provide more information as to the laws of their

¹⁵³ Hague Convention, 1993.

¹⁵⁴ Article 1 (a) and (b), Hague Convention.

States concerning adoption.¹⁵⁵ It is therefore Kenya's obligation to establish a central authority as the point contact and authoritative source of information in order to create transparency and accountability.

The convention provides guidance and dictates on which state in the partnership is accountable for every aspect of the entire Intercountry adoption process. Therefore, both the child's state of origin (or sending country) and the receiving state, where the adoptive parents live, have clearly defined roles. Sending states, for example, must develop protections to protect children from abduction and human trafficking, protect birth parents from being pressured to give up their child and ensure that only children in need of a family who are unable to find one in their own country are eligible for Intercountry adoption.¹⁵⁶

On the other hand, the receiving state has an obligation to approve and supervise adoption agencies as well as ensuring that adoptive parents must be adequately screened and informed about raising an adopted child. The receiving state also grants the adopted child's visa, which allows her to reunite with her biological parents. The visa is usually provided on the basis of the documents provided in association with the legal process of the sending country which allows the receiving state to ascertain whether the legal process has met agreed-upon standards.¹⁵⁷

In a bid to try and prevent illicit activities that give rise to child trafficking with regards to International Adoption, Central Authorities are bound by Article 8 of the Convention which provides that they shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention. The involvement of Central Authorities has the capacity to eliminate or to minimize private adoptions, which, by definition, are adoptions that are conducted strictly or directly between prospective adoptive parents and the birth family without State involvement. Where private adoptions and some independent adoptions take place, the

¹⁵⁵ Article 7 (1) and (2), Hague Convention.

¹⁵⁶ Marijke Breuning, 'The Consequences Of Accession: The Hague Convention On Intercountry Adoption's Impact On Children's Rights' (2019) 24 *Journal of International Relations and Development*, pp 7-8. https://www.researchgate.net/publication/334099025_The_Consequences_of_Accession_The_Hague_Convention_on_Intercountry_Adoption%27s_Impact_on_Children%27s_Rights accessed 31 March 2021.

¹⁵⁷ *Ibid*, pp 9.

possibility of ascertaining whether adoptability, subsidiarity, and other safeguards for Intercountry adoption have been complied with, is very difficult thus the need of the Central Authorities.¹⁵⁸

It has been provided as a general rule that the 1993 Hague Convention is mostly only applicable between two convention countries. This then goes ahead to prove that most sending countries, Kenya included, have not ratified the Convention which in turn means that there is an increase in the abduction cases in relation to International Adoption. Therefore, if both the sending and receiving countries, members or non-members of the Convention, apply to the Hague Convention, then it would lead to the furtherance of the realization of the best interest principle. So in order to avoid an prevent the abuses from taking place, let Kenya as a sending country apply all the regulations provided for in the Hague Convention and ensure that the receiving country that Kenya is in agreement with also applies the principles of the Hague Convention.¹⁵⁹

5.2.3: Co-ordination from Receiving Countries in Curbing Child Trafficking.

In order for Intercountry Adoption to work, there needs to be some level of co-operation from both the sending and receiving country. History has proved that most receiving countries tend to put authorities and adoption organizations of the sending countries under negative immense pressure to provide children that are capable and fit the requirements for being adopted which is a trait they should abstain from.¹⁶⁰ As long as negative pressure is inserted by receiving countries to sending countries, experience has shown that the likelihood of adoption being able to be conducted in a proper manner and in a way that safeguards the best interest of the child is very minimal and one that be compromised in such events.¹⁶¹

Receiving countries also have an obligation to place restrictions on adoption especially on countries that have constantly shown a pattern of adoption irregularities becoming so rampant. This should apply mostly where some officials of the sending countries were involved in any form

¹⁵⁸ *Ibid* 152, pp 27.

¹⁵⁹ Diana Furtado, 'International Adoption: How To Prevent Child Laundering' (Tilburg University 2017), pp 49-50. <http://arno.uvt.nl/show.cgi?fid=143436> accessed 1 April 2021.

¹⁶⁰ *Ibid* 152, pp 30.

¹⁶¹ *Intercountry Adoption: An African Perspective* (2012), pp 19. <https://bettercarenetwork.org/sites/default/files/attachments/Intercountry%20Adoption%20-%20An%20African%20Perspective.pdf> accessed 12 April 2021.

of child trafficking in the context of adoption. They also have an obligation to instill positive immense pressure by placing sending countries, in this case Kenya, under compulsion to ensure that their domestic adoption laws and policies are compliant with the adoption standards of the Hague Convention. This is also a way of ensuring that non-contracting states to the Hague Convention ratify the treaty and implement it.¹⁶²

Therefore, Kenya as a sending country, has an obligation to ensure that the receiving country its in agreement with collaborates with it and ensures the implementation of the Hague Convention standards in order to aid in the curbing of child trafficking with regards to adoption.

5.2.4: Strengthening Kenya’s Child Protection System and Services.

A child protection system may be described as a set of laws, policies, regulations and oversight needed across all sectors most especially education, health, security and justice in order to prevent and respond to protection related risks. The system seeks to prevent by working under the following objectives and aims; to support and to aid families in reducing social exclusion and to lower the risk of violence and exploitation.¹⁶³

Strengthening the current Kenya national child protection system and creating one at the devolved levels in order to coordinate and harmonize child protection services and activities will help in curbing the issue of child trafficking in relation to international adoption.¹⁶⁴ Child protections systems mostly work to prevent and respond to violence, abuse, neglect and exploitation against children in all contexts.¹⁶⁵ Some of the components of a child protection system are; opportunities for children to be able to convey and demonstrate their views and to be involved in matters that involve them, laws and policies that that safeguard children’s protection from abuse and exploitation in furtherance of the best interest principle, a centralized information system that

¹⁶² *Ibid* 158.

¹⁶³ Isabel Mwangi, *The Status Of Child Abuse And Child Protection in Kenya and Kilifi County 2014: Challenges and Recommendations* (2014), pp 5. https://keshokenya.org/wp-content/uploads/2019/02/Our-Children-Matter_Kesho-CP-Situational-Report-2014.pdf accessed 12 April 2021.

¹⁶⁴ Summary of the Outcome of Mapping and Assessing Kenya’s Child Protection System' (2010), pp 5. <https://resourcecentre.savethechildren.net/sites/default/files/documents/5122.pdf> accessed 12 April 2021.

¹⁶⁵ <https://resourcecentre.savethechildren.net/our-thematic-areas/child-protection/child-protection-systems> accessed 12 April 2021.

ensures a consistent information on the issue of child protection and lastly, a centralized government co-ordination mechanism that unify government stakeholders and departments at all levels.¹⁶⁶

In Kenya, there is a broad range of stakeholders that are involved and with well-defined responsibilities in guaranteeing child protection. To ensure a child protection system that fits the components explained above, there needs to be collaboration between all stakeholders which ensures the implementation and facilitation of the domestic child protection laws, policies and regulations enacted. It was held that it is necessary for various agencies, with the Court's included, regulating matters relating to children, a long-term solution should be created which entails placing the child's best interest first.¹⁶⁷

As a stakeholder, the Director of Public Prosecutions (DPP) has a role to play in ensuring that the child protection system is efficient enough to be able to facilitate the reason for which the system was created and that is promote the well-being of children through prevention of violence and exploitation, ensuring that in case it happens, prompt and coordinated action is taken to prevent further occurrence.¹⁶⁸

The DPP's responsibility covers investigating any form of crime that has been conducted against children. Its key roles in safeguarding a system that is child protected is through instituting criminal proceedings against persons who commit crimes that place a threat on the protection of children, ensuring that investigations involving children are done in a manner that is exhaustive and one that would lead to the fair dispensation of justice and they have a role in ensuring that the best interest of child are upheld during all criminal proceedings.¹⁶⁹

Another stakeholder involved in the safeguarding of the protection of children would be the Ministry of Justice, National Cohesion and Constitutional Affairs which has a mandate to oversee

¹⁶⁶ Rachel Palmer, *The Framework for the National Child Protection System for Kenya* (The National Council for Children's Services 2011), pp 11. http://www.childrenscouncil.go.ke/images/documents/Policy_Documents/The-Framework-for-the-National-Child-Protection-System.pdf accessed 14 April 2021.

¹⁶⁷ In re of P M (Baby) [2017] eKLR.

¹⁶⁸ *Ibid* 166, pp iii.

¹⁶⁹ *Ibid* 166, pp 19.

the overall social justice, national cohesion and constitutional affairs of child rights and protection in Kenya. Their roles include ensuring that human rights and justice are realized, contriving legal policies and reforms as well as guidelines that ensure the proper administration of justice in a way that will enhance the best interest principle of the child and they also have a role to provide legal education and advisory services to children and their families.¹⁷⁰

Therefore, in a bid to try and curb the whole process of child trafficking in relation to child trafficking, Kenya has a role of ensuring that the child protection system is strengthened by making sure that all stakeholders, in as much as they are performing different functions, work in collaboration with each other in ensuring the system is one that creates and implements policies that help safeguard children's protection from abuse and exploitation which will lead to the furtherance of the child's best interest principle.

5.2.5: Offering Financial Support to Birth Parents.

This action leads to families being kept together. It has been proven that some of the reasons that birth parents opt for placing their child up for adoption is due to financial constraints and the necessary means to take care and support the child.¹⁷¹ This in turn promotes the child's best interest principle. One of the requirements of Intercountry Adoption is that competent authorities should ensure that the consents from the birth parents is one that has not been induced by payment or compensation of any kind.¹⁷²

The financial aid being given should depend on the specific need and situation of the birth parent. This will help subsidize his or her own income post birth of the child and ease the financial burden they would have incurred if the baby was not given up for adoption. Childbirth can be expensive, and helping to cover these costs reduces a financial barrier that may prevent some women from choosing adoption. This leads to more potential adoption opportunities and a shorter adoption wait time.¹⁷³

¹⁷⁰ *Ibid* 166, pp 20.

¹⁷¹ *Ibid* 159, pp 43-44.

¹⁷² Article 4(c) (3), Hague Convention.

¹⁷³ https://www.americanadoptions.com/adopt/living_expenses_why accessed 14 April 2021.

As detailed in Chapter 4, children are being viewed as commodities which thus lead to the improper financial gain where children are sold. In most cases, the selling happens due to birth parents, extreme poverty and despair which leave them with no choice but to sell their children. Therefore, Kenya could set aside funds and distribute them equally in every county which would help facilitate in giving and providing financial aid to birth parents in vulnerable situations of extreme poverty and in turn it may help ease the process of Intercountry Adoption amounting to child trafficking which will help safeguard the child's best interest principle.

5.2.6: Accrediting and Approving Children Adoption Societies.

Those operating within the framework of the Hague Convention should ensure that their adoption societies and agencies must be accredited by their receiving country and approved by the sending country. Kenya has only one governmental adoption agency which is the Child Welfare Society of Kenya that was created in 1955. The reason for the accreditation and approval most specifically for societies that operate within the framework and standards of the Hague Convention is that even if an adoption agency is duly accredited and approved, it does not entirely guarantee a legal and ethical adoption.

Hence the need for only the ones operating within the confines of the Hague Convention to be accredited and approved since the risk of child abuse and a violation of their rights will be reduced.¹⁷⁴ Given that we only have 1 governmental adoption society with the rest being non-profit, it would be wise for the Kenyan government to ensure that a reasonable number of government societies are created in order to properly ensure oversight and supervision since the government has no control of what happens in non-governmental organizations.

If the risks of an agency-based system are to be decreased, the first requirement would be for Kenya to develop requirements and stringent criteria for the system to achieve in order to ensure that the accreditation and approval processes for the agencies are legal and in line with the Hague Convention standards. This would include financial standards; that is the fees charged and in-country costing of services, the suitability of any local agents or staff, and the quality of

¹⁷⁴ *Ibid* 152, pp 28.

information provided to prospective adoptive parents about the Intercountry adoption needs and process in the country of origin concerned.¹⁷⁵

In addition to the government creating more adoption societies in the country, it is also vital for it to limit the number of agencies approved for operating to no more than what is strictly necessary to cater to the expected number of children who may require adoption abroad. By failing to do this, an unhealthy competition is likely to emerge among agencies an action that will most likely contribute wholly to adoption abuses and lead to best interest principle not been taken into consideration.¹⁷⁶

5.2.7: Creating Laws that Delve into the Abolishment of Independent Adoption.

Independent adoption takes place where it is one that is organized without the intervention of an approved adoption agency. The reason as to why people take this approach is to be able to avoid oversight since it mostly involves prospective adoptive parents working with unregistered individuals or entities.¹⁷⁷ This also serves as an addition to some of the reasons why the country should ensure the accreditation and approval of adoption agencies and societies only that work within the standards of the Hague Convention.

Therefore, to be able to fully and properly curb the violation of children's rights and adoption abuses in this case child trafficking, Kenya as a sending country, in conjunction with receiving countries it is in agreement with, should ensure an establishment of objectives, laws and regulations that prohibit the undertaking of private and independent adoptions and laws that provide for stringent sanctions if one is found guilty of the same.

5.2.8: The Role of Media in Combating Child Trafficking with reference to Adoption.

The media is the most powerful tool of mass communication globally. It therefore has the potential to either protect or violate children's rights. The gaps surrounding them are that they lack the general capacity to be able to take on high profile investigative journalism to unearth issues such as illegal adoption amounting to child trafficking.¹⁷⁸ They also have a responsibility to ensure that

¹⁷⁵ *Ibid* 152, pp 29.

¹⁷⁶ *Ibid*.

¹⁷⁷ *Ibid* 152, pp 27.

¹⁷⁸ *Ibid* 152, pp 31.

by engaging in their investigative approach, they do not unintentionally assist traffickers to exploit people. By broadcasting or writing an article on trafficking through investigative journalism, the media not only educates the public but makes known to the public of issues typically affecting our children.¹⁷⁹

Therefore, those in the media have a duty to collaborate with hosts of stakeholders and in this case Ministry of Information, Communications and Technology in order for resources to be provided in order to facilitate the investigative journalism.¹⁸⁰ This also means the media's rights being enhanced by the Constitution of Kenya which provides for the freedom and autonomy of expression as well as the freedom of electronics, print and other media is also guaranteed.¹⁸¹

When reporting on child matters, journalists have to be extra-cautious on the angle the story takes. This should be done by ensuring that they alter the child's image and identity in the case of victims. This is to ensure that there is no further victimization from the community at large.¹⁸² Therefore, for child trafficking to be curbed, the Kenyan media has to create a partnership with each other and the relevant children departments and institutions fighting against child trafficking. The public needs to be educated in simple terms on how the process of child trafficking works. The community should also be able to understand the power of knowledge and how they can benefit from it given what the media has broadcasted.¹⁸³

5.3: Conclusion.

The above-mentioned practices would without a doubt play a huge role in curbing the abuses that take place in the context of International adoption. In as much as it would be a long shot to have a turn-around in the laws governing child protection in Kenya, it will be one that will be worth it given our current state. The ratification of treaties and implementation of the Hague Convention

¹⁷⁹ *Trafficking in Persons Protocol: The Role of The Media In Preventing Trafficking*, (2018), pp 513. https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_9-16.pdf accessed 19 April 2021.

¹⁸⁰ *Ibid* 152.

¹⁸¹ Article 34, Constitution of Kenya.

¹⁸² Ann Wambui, 'Role of Media in Championing Against Child Trafficking.' *Mtoto News*. (2019) <https://mtotonewsblog.wordpress.com/2018/09/29/role-of-media-in-championing-against-child-trafficking-in-kenya/> accessed 19 April 2021.

¹⁸³ *Ibid*.

will go a long way in ensuring the standards provided help in the curbing of International adoption abuses hence upholding the best interest principle of the child.

Therefore, as a country we need to protect the best interests of the child by ensuring that the recommendations provided above are taken significantly by each and every person. International adoption will only be considered legal if the above measures are taken into consideration. Otherwise, the abuses will keep prevailing and our children will be at a high risk of our children being deprived of a family environment.

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