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Nalishebo M. Muyoyeta

Entitled:

THE ADOPTION ACT: HOW NECESSARY IS IT
IN THE ZAMBIAN CUSTOMARY SETTING?

be accepted for examination. I have checked it carefully and I am satisfied that it
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DECLARATION

I, Nalishebo M. Muyoyeta, solemnly declare that this work represents my own ideas and is not a product of any other work produced or submitted by any person to the University of Zambia or any other institution.

Signature  

13/02/09  
Date
DEDICATION

To my father Henry S. Mufalo Muyoyeta for your encouragement and words of wisdom.

To my Husband Muliokela Wamunyima and my son Mufalo for your support and patience.
ACKNOWLEDGMENTS

I would like to thank all the people that have made it possible for me to complete this peace of work which was very challenging.

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INTRODUCTION

The aim of this research is mainly to examine the provisions of the Adoption Act\(^1\) in relation to the Zambian customary law. The pluralistic nature of the Zambian legal system renders both statutory and customary law applicable. Statutory law is applicable as a result of the law as was adopted from Britain, the ex colonial power. Customary Law on the other hand comprises of practices and usages of indigenous people. It is also recognized in the Zambian Constitution.\(^2\)

In the Zambian customary setting, the concept of formal adoption did not exist because of the extended family system which exists in the Zambian culture and takes care of those children who are orphaned. Apart from one’s parents, a child regards his aunts and uncles as mother and father and all cousins are considered as brothers and sisters.

Traditionally society made room for children whose parents for one reason or another failed to take care of them. What used to happen and still happens to a lesser extent is that those children were immediately placed under the care of relatives. In the event of the death of both parents, the situation was the same in that the surviving relatives took over the responsibility and care of the orphans. It was unheard of for children to be placed in an orphanage just because they had lost both parents. There was always a relative even if remotely related who could take care of the children.

\(^{1}\) Cap 59 of the Laws of Zambia
\(^{2}\) Cap. 1 of the Laws of Zambia.
STATEMENT OF PROBLEM

In Zambia as in other parts of the world there has been a growing number of orphans as a result of the deaths arising from the HIV/AIDS pandemic. Prior to colonization, most people in the Central African region which now forms Zambia, lived in small scattered rural communities. Today, Zambia represents one of the most highly urbanized countries in Africa, with about 43 per-cent of its population living in urban areas. Urbanisation is only one of the factors which has changed the life style of many Zambians. Other factors include the modern cash economy, exposure to western and other cultures, the influence of religion, and education. In recent years these factors have been compounded by gradual deterioration of the economy, unemployment and, quite possibly, the onset of AIDS epidemic.³

A discussion with Mrs. Angela Miyanda of Kabwata Orphanage indicated that the number of orphans has increased tremendously over the last few years given the above factors, and also the fact that a lot of people are not conversant with the law of adoption more especially the indigenous Zambians who are in total ignorance of this law. Most Zambians are content with being mere guardians to orphans.

RATIONAL OF RESEARCH

This research aims to point out the plight of orphans in Zambia and also point out that customary law was very effective in taking care of orphans. Orphans were unheard of

as they were absorbed into families under the extended family. Although there are legal provisions governing adoption, only a few people are aware of this law, as the government has not taken any steps to sensitise the public about its existence. This paper will also look at international adoption as an option to be considered in an effort to solve the problems of orphans.

METHODOLOGY

This study will use secondary sources, namely, Statutes, decided cases, published texts, such as books, periodicals and newspaper articles. Field research will be undertaken to various institutions such as the Ministry of Community Development and Social Welfare, the Subordinate Courts, the Registrar of Births and Deaths offices and orphanages for perusal of records and interviews. The research will also interview those who have adopted to get an understanding of how the extended family has reacted. The research will also interview people at random to try and see what they think about adoption and also to see if they have any knowledge of adoption laws. In addition, Statistics will be compiled both local and international to show the magnitude of the problem and to also show how the world is responding in giving the orphans a second chance to have a family.
CHAPTER ONE

ADOPTION, AN INTRODUCTION

1.0 INTRODUCTION

This chapter discusses the historical background to the Law of Adoption in Zambia taking cognizance of the fact that this concept is new to indigenous Africans as in the customary setting, the concept did not exist because of the extended family system in which a child is regarded as everyone's child and is well protected. This chapter will also endeavor to look at the definition of adoption as this is a very cardinal point in relation to this whole paper.

1.1 HISTORICAL BACKGROUND TO THE LAWS OF ADOPTION

Adoption existed in various forms throughout the world and dates back to antiquity. Biblically it dates far back before the birth of Christ when Moses an Israelite was adopted by king Pharaoh's daughter during the Israelites exile in Egypt.¹ In these societies, adoption was primarily to ensure the continuity of wealthy families by providing for inheritance of property and the performance of ancestral worship. Roman law, for example permitted adoption only to provide heirs to the childless, and provided that adopters must be past bearing age and the adoptee must be an adult.² In ancient Rome, the adoption of boys was a fairly common procedure, particularly in the upper class. The need for a male heir and the expense of raising children were strong incentives to have at least one son, but not many children. In the imperial period, the system also acted as a mechanism for ensuring a smooth succession, the Emperor taking his chosen successor as his adopted son.³ Probably the most famous adopted man in ancient times was Augustus Caesar. He was born Gaius Octavius, he

¹ Barbra T. Adoption: A Second Chance. (Open Books) 1977, p.3
² ibid
³ ibid
was adopted by his great-uncle Julius Cesar. His sister Clodia is also one known example of a Roman woman being adopted.\(^4\)

In later years the number of orphans increased greatly especially after the first world war, and this in turn led to a large increase in de facto adoptions. In order to have some sanity and order in this area the Adoption of Children Act 1926 was passed.\(^5\) In America, during this same period adoption was seen primarily as a service for childless couples, a way of providing them with a substitute child to satisfy their emotional needs and cement their marriage.\(^6\)

It is therefore true to suggest that adoption in early days was regarded as a means of furthering the interest of adopters. Nowadays the concept has changed. Attention is being focused primarily on the welfare of a child, in principle his needs, his right to love, security and normal family upbringing.\(^7\)

In Zambia on the other hand, the historical background of Adoption Law\(^8\) cannot be complete without looking at The Child Care and Adoption Society of Zambia (CCAS). It is a voluntary charitable non-political, non-religious, non profit making and non-governmental organization (NGO) which was formed by an Act of Parliament in June 1956 as Cap 136 due to heightened public interest in the problem of child welfare. It was registered in 1957 as a central Apex Co-Ordinating

\(^{4}\) ibid
\(^{6}\) Supra note 1, p.7
\(^{8}\) Cap. 54 of the Laws of Zambia
Organization for childcare services. This society was established for Europeans to take care of children born out of wedlock or unwanted babies to be placed in homes where they could be cared for. After Independence, the CCAS was handed over to private citizens in the Zambian community to continue running it. Even though they were all these changes, the actual contents of the Act have remained the same since 1956 with minor changes.

The CCAS is a nation-wide organisation with branches all over the country. The Lusaka branch runs the Chilenje Transient Home as a sole project and it was opened in 1979. This home can only accommodate twenty children but it must be pointed out that it receives an average of fifty to sixty children per year from various parts of Zambia and about ninety percent of these children come from within Lusaka. The only other branch that has a Transient Home is Ndola which runs on the lines of Lusaka raising its own funds. This home can only accommodate sixteen children. The two Homes’ major programmes are adoption and fostering. There are other homes in other towns mainly along the line of rail.

There is also the Kasisi Children’s Home. This home is situated 30 kilometers out of Lusaka and it was opened in 1928 by Sisters of the Polish congregation ‘The Little Servants of María Immaculata to take care of orphans. It began with eight children and has now become a well organized orphanage that offers a loving home for two hundred and thirty children. Over the past three years the number of children at Kasisi has grown substantially, due to the combined effects of poverty and AIDS.

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9 Brochure produced by Childcare and Adoption Society of Zambia, Lusaka Branch Executive Committee. Revised September 2005
10 Ibid
11 Ibid
12 Http://www.kasisichildren.organisation.org/
Increasingly, families are no longer able to take care of orphaned children, as used to be common practice. Head lines in local newspapers tell the story of how babies are dumped, how children are lost and no relatives come forward to claim them and end up in orphanages. A story in a local newspaper recently tells of how a young mother of twenty three years dumped her one-week old baby in a pit latrine.\textsuperscript{13} Poverty levels are so high that people cannot afford to add an extra mouth to feed.

1.2 THE LEGAL AND INSTITUTIONAL FRAME WORK FOR ADOPTION IN ZAMBIA

The law of adoption is contained in the Adoption Act Cap 54 of the Laws of Zambia. This was a reproduction of the English Adoption Act of 1950 with minor or no amendments at all. It was enacted in this country in 1956 as Cap 136. After Zambia’s political independence, it was re-edited to Cap 281. It was further amended but with minor changes to Cap 54 and it is the current law on adoption in Zambia. The Department of Social Welfare of the Ministry of Community Development and Social Services oversees adoption in Zambia.

Other statutes that deal with the matters of orphans are Juveniles Act Cap 53 of the Laws of Zambia. This Act relates to the process of handling of juvenile delinquents and protection of juveniles in need of care. The Juveniles Act also caters for the establishment of Reformatories and Approved Schools as well as identification of suitable homes or institutions for children in need of care. The Juveniles Act provides for foster care and the establishment of Voluntary Homes. The difference between

\textsuperscript{13} The Post, Thursday, November 15, 2007
these two Acts is that the Juveniles Act provides for foster care and the establishment of Voluntary Homes while the Adoption Act provides for the adoption of children.

In Zambia the legislation that covers the rights of the children are scattered in various instruments, including the Constitution and twenty six other pieces of legislation.\textsuperscript{14} Zambia is also signatory to the United Nations Convention on the Rights of the Child (hereinafter referred to as the CRC), it was unanimously adopted by UN General Assembly on 20\textsuperscript{th} November 1989 and entered into force on 2 September 1990.\textsuperscript{15} The CRC has been ratified or acceded to by 191 states, making it the most widely accepted human rights treaty in the world.\textsuperscript{16} Since Zambia follows the dualist theory, international human rights treaties it has ratified do not automatically become part of the domestic legal system unless Parliament enacts appropriate legislation to this effect. Dualists see domestic law and international law as independent of each other. They hold that the two systems are mutually exclusive and can have no contact with and no effect on each other. If international law is applied within a state, it is only because it has been expressly incorporated into municipal law.\textsuperscript{17}

\textbf{1.3 DEFINATION OF ADOPTION}

There is no statutory definition of the term adoption. The Adoption Act is silent on this. However Adoption can be defined as a process whereby a child’s legal parentage is entirely and irrevocably transferred from those formerly having parental rights,

\textsuperscript{14} The include, The Penal Code, Cap. 87; the Legitimate Act Cap.52; the Interstate Succession Act.Cap59; the affiliation and Maintenance of Children Act Cap.64; the Birth and Deaths Registration Act Cap.51; the Education Act Cap.134; the Employment of Young Persons and Children Act, Cap274; the Apprenticeship Act, Cap. 275; the Citizenship of Zambia Act, Cap 124; the Wills and Administration of Testate Estates Act, Cap. 60; the Marriages Act, Cap.50.


\textsuperscript{17} Wallace R. M. M,\textit{International Law} (4\textsuperscript{th} edition) Sweet and Maxwell. (2002) p.35
usually the natural parents, and vested in the adopters. Adoption is also a welfare and protection measures that enable an orphan or definitively abandoned child to benefit from a permanent family. From the above definitions, it is quite true to say that adoption involves becoming a parent, on the part of the adopter and becoming a child on the part of the adoptee through a legal process, rather than through a biological process.

Adoption is entirely the creation of statute. It is actually impossible to adopt a child without a court order. A mere arrangement whereby a parent seeks to transfer his rights and obligations is ineffective. When an adoption order has been made all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant are vested in the adoptive parents. Legal adoption normally presupposes a complete and final separation between the child and its natural parents. The child, henceforth, looks to the adopters as its parents and the natural parents relinquish all their parental rights and duties forever out of the child’s life. After the finalization of an adoption, there is no legal difference between adopted children and those born to the parents.

The status conferred by adoption is as follows;

a) the Infant is treated as if he/she had been born in wedlock;

b) the child is treated as if he/she were not the child of any person other than the adopters;

c) the adopted child who was illegitimate at birth becomes a legitimate child of the adopter from the date of the adoption order;

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19 UNICEF, International Child Development Centre, digest
20 Cap.54(14)(1)
d) the child assumes the name of the adopters and has a right to nationality of the adopters;

e) he/she has a right to inherit from the adoptive parents as if they were his natural parents;

f) extinction of natural parents rights and vesting them in the adopter parents means all rights to consent to marriage are of adopting parents;

g) maintenance orders as to custody of the child will be made to a spouse as if the child was a natural child of the adopters;

h) the law prohibiting degree of consanguinity apply with regard to marriage, notwithstanding that the infant may or has since been adopted by other parents;

i) Article 21 of the UNCRC provides that a system of adoption shall ensure that the best interest of the child shall be paramount.

The purpose of adoption laws is to help the children who are either neglected by their parents or who have lost their parents through death and have no homes of their own to be placed permanently in homes where they can be cared for. The adoption law ensures that these children are fussled into a normal family life where they are assured of love, care and protection and given an opportunity essential for their development. The Act among other things gives legal protection to children to ensure that their best interest are safe guarded and to make sure that no child is placed in a home that is unsuitable for him or her.
1.4 TRADITIONAL AND CUSTOMARY VALUES ON ORPHANS

The Zambian family consists of both the nuclear and extended family system. High levels of poverty coupled with HIV/AIDS have lately threatened the continued existence of the extended family. This has reduced the capacity of the family to care for their members especially those of the extended. Over the last few years the number of orphans has grown substantially, due to the combined effects of poverty, unemployment and AIDS. Poverty levels are very high in Zambia with seventy percent of Zambians living below the poverty line.\textsuperscript{21} The number of children orphaned because of AIDS as at 2001 was six hundred and thirty thousand and it is estimated that the number of orphans will rise to nearly one million by the year 2014.\textsuperscript{22}

To appreciate the role of a custom in any given legal system, it is of paramount importance to define the concept custom. A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained force of law in a particular locality.\textsuperscript{23} Essentially what is referred to as custom are rules followed by society at large, or some parts of it, in the intercourse of the members of society with each other. Custom is therefore basically a usage or practice of the people which by common adoption, and by long and unvarying habit, has become compulsory, and has become the force of law, with respect to a place or subject matter of which it relates. Customary law evolves out of various norms and

\textsuperscript{21} The Post, Monday November 5, 2007
\textsuperscript{22} Zambia Demographic and Health Survey. 2001-2002 by Central Statistics Office
practices of indigenous people. It is an ever-fluid and dynamic system which responds to changing social, economic and political conditions.\textsuperscript{24}

Today Zambia represents one of the most highly urbanized countries in Africa with forty-three per-cent of its population living in urban areas. Urbanization is only one of the factors which have changed the life style of many Zambians. Other factors include the modern cash economy, exposure to Western and other cultures, the influence of religion, and education. These factors have been compounded by gradual deterioration of the economy, unemployment and, quite possibly, the onset of AIDS pandemic.\textsuperscript{25} As a result, the traditional mechanism for the care of the vulnerable children, the extended family, has started to break down under the pressure of poverty and disease. HIV undermines the carrying capacity of families and communities by deepening poverty due to loss of labour and the high cost of medical treatment and funerals.\textsuperscript{26}

Traditionally society made room for the children whose parents for one reason or another failed to take care of their children. What used to happen and still happens to a lesser extent is that, those children were placed under the care of relatives. Even in the event of death of both parents, the surviving relatives took over the responsibility and cared for the orphans. The traditional values support the view that children should be kept by their own kith and kin.

In the Zambian customary setting, the concept of formal adoption did not exist because of the extended family system in which a child is regarded as everyone’s child. The physical move of a child from its natural parents to any member of the

\textsuperscript{24} Inheritance in Zambia, Law and Practice. Women and Law in Southern Africa, p. 60
\textsuperscript{25} The Changing Family in Zambia. Women and Law In Southern Africa Trust. p.10
\textsuperscript{26} Ibid
extended family is simply by agreement between the "parents" and who so ever is in physical custody of the child and exercises parental rights over the child. The concept of adoption or inalienable of rights does not exist.27

It is commonplace observation that the legal and judicial system in contemporary Africa is pluralistic. It encompasses not merely law derived from the continent's ex-colonial powers, now supplemented by post independence legislation and a system of courts to apply the law, but also a body of indigenous or customary law applied mainly in the customary courts.28 The pluralistic nature of Zambian legal system renders both statutory and customary law applicable. Professor Anyangwe states as follows on how the dual system of laws came about in the African society.

"In the early years of colonization, colonial policy towards indigenous law was not rigidly established. Each colonizing power was then still busy trying to subdue the local people and establish a colonial government. Because each power came along with its own system of law and because each adopted a policy of qualified toleration of indigenous law, a dual system of laws came to exist in each colonial territory."29

Customary law is controversial in the sense that it is not always accepted as law by jurists. Some of the reasons for this claim are the fact that its application may be limited to a particular group of people; it is uncertain and generally inadequate to regulate modern relations. Often it is subjugated to the national law. However, it remains an important part of the Zambian legal system and, as in many other African

29 Ibid
countries, it dominates family and personal relations.\textsuperscript{30} Professor T.O. Elias has this to say on customary law. \textit{Besides the English common law, equity and statutes of general application, and the ever-growing bulk of locally enacted laws, the third branch of Nigerian law is made up of the various bodies of customary law throughout the country, and this includes Islamic law where applicable. Each of the High Courts in the country is enjoined to observe and enforce rules of customary law which are applicable and not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force.}\textsuperscript{31}

In Zambia, adoption is a new phenomenon. It is still seen as a foreign concept because people marry for procreation, to have their own children. Therefore adoption is not readily accepted in the family setting. In the event that a couple fail to conceive children as a result of medical inability which inevitably results in feelings of anxiety and insecurity, it is more acceptable for the couple to take one of their own from the extended family and not a stranger.

It has been seen in this chapter that the Adoption Act governs the adoption of children. The Act in itself is a good gesture by the legislature to care for orphans and those unfortunate children whom for various reasons lack parental care. It is a well known fact that Zambians have a negative attitude towards adoption. This is because of customary values and traditional beliefs that a child should be kept by blood relatives. Africans had their own way of taking care of orphans which were quite effective thus a lot of our local people saw no need for adoption if they could get a

\textsuperscript{31} T.O Elias. \textit{Law in a Developing Society} p. 128
relatives child and bring it up as there own. When we look at an average Zambian family, most homes have dependants, who might be orphans or dependants whose parents are unable to take care of them. In an interview with Mr. Charles Mubita of Veterinary School, University of Zambia, Lusaka. Mr. Mubita has three dependants, one being an orphan and the other two being his brothers children who lives in his home village. He states that Lozi’s are patrilineal, his brothers children are as good as his own, so he sees no reason why he should go through a rigorous process to adopt them. In Zambia we have the kinship system and basically there are two types, the patrilineal and matrilineal systems which will be discussed in the next chapter.
CHAPTER TWO

CUSTOMARY VIEWS ON ADOPTION

This chapter will endeavour to look at the social impact of adoption in Zambia. It will also deal with the Zambian customary law in relation to adoption and how it is generally perceived by the African people. In addition it will deal with matters relating to inheritance by the children under the patrilineal and matrilineal systems of customary law. This chapter also looks at available statistics on adoption in Zambia, the purpose is to try and see if the attitude toward adoption is changing among the Zambians.

2.0 THE PLIGHT OF AN ORPHAN IN ZAMBIA

It has been observed that of the many vulnerable members of society, young people who have lost one or both parents are among the most exposed of all. This is true of sub-Saharan Africa, where few social support systems exist outside of families and where basic social services are largely inadequate. Generally orphans live under economic hardships. Without parents to care for them, children are forced to take up the frightening adult responsibility of supporting the family. Traditional safety nets are unraveling as more young adults die of AIDS related illnesses.

It is a known fact that thousands of children grow up with little or no contact with their families. One wonders why these children suffer so much when Zambia has ratified the Convention on the Rights of the Children (CRC). Article 19(1) of the CRC obliges states parties to take appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental

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violence, injury or abuse, while in the care of parent(s), legal guardian(s) or any person who has the care of the child. The CRC which guides UNICEF’s work states that every child has the right to know and be cared for by his own parents, whenever possible. UNICEF believes that families needing support to care for a child should only be considered when, despite assistance, a child’s family is unavailable, unable to look after him or her.

2.1 REASONS FOR ADOPTING

There are many reasons why fertile couples or individuals adopt children; often people adopt out of;

a) compassion, sometimes motivated by religious or philosophical convictions,

b) the death of both biological parents, and the orphans left behind are put up for adoption,

c) where a child is found abandoned and the biological parent is never traced,

d) where biological parents are still available, the biological parents may place their child for adoption because they are unable to adequately care for the child, because they have failed to receive the resources they need to parent.

e) adoptive parents may wish to adopt to avoid passing on inheritable diseases.

There are approximately four million and one hundred thousand children in Zambia and according to the 1996 Living Conditions Monitoring Survey, thirteen percent of these are orphans. A study undertaken by Zambia Demographic and Health Survey reveals that sixty-two percent of children under the age of fifteen are living with both natural parents, eighteen percent of them live with only their mothers, whereas four
percent live only with their father and sixteen percent are fostered or at least not living with either parent.\textsuperscript{33} This has given rise to child-headed households in Zambia.

In 2004, Family-Health International published a study indicating that 1-2 percent of Zambian households are headed by a child. From a child-rights perspective, however, it is too many. There is urgency in addressing this matter and making sure that these children have their rights fulfilled. Children who head households are not able to go to school. It is hard for them to maintain the household income and to be good care givers for younger children, who are also managing the grief of losing their parents.\textsuperscript{34} Orphans are looking after fellow orphans. One wonders as to what has happened to the African customary system were they were no orphans as these were taken care of by the extended family.

\textbf{2.2 CUSTOMARY VIEWS}

It has already been pointed out that Zambia recognizes the applicability of African customary law. The Zambian legal system continues to be fundamentally dualistic. There is a clear division between the formal legal system, comprising statutory and introduced English Laws, and the traditional customary system, lumped with religious expectations and what has come to be known as living law or people's practices.\textsuperscript{35} The dual legal system has its greatest impact in the area of family laws. When it comes to family issues, most people tend to rely on customary law as defined by courts and informal dispute resolution mechanisms rather than on statutory law. Marriage issues are usually resolved by customary law in most cases, especially in marriages that are contracted under customary law. Courts can enforce the observance

\textsuperscript{33} 2001-2002 by Central Statistic Office in Partnership with Central Board of Health
\textsuperscript{34} Children in Need Network. Newsletter, vol. 11 October 2007 p. 7
\textsuperscript{35} Supra note 21 at p.77
of African customary law as long as it is not repugnant to justice, equity or good conscious. Adoption is a new phenomenon in Zambia and is by and large still seen as a new concept. Marriages are for procreation. A childless couple is expected to take a relative’s child within the extend family and not bring a stranger into the family. That child who is brought into the family will call the guardians father and mother and the biological children of the couple will be brothers and sisters. In Zambia the children will either belong to the father or mother depending on which tribal grouping they belong too. We have the patrilinal and matrilinaeal groupings.

Under the western oriented idea of a family or what is popularly known as the nuclear family; there is a male and female parent with direct, natural or legally adopted progeny. These are seen as the nucleus or basic social unity. From this a myriad of widening and loosening links connect the wider family, known simply as the extended family and perceived as very removed. Since the traditional African society tends, oftentimes, to emphasize this extended structure at the expense of the nuclear family, African families are generally viewed as oversized and unwieldy within the modern social economic setting of a money economy.36

Under statutory law, a child belongs to and has a name and identity derived from the parents. He or she enjoys the rights to maintenance, shelter and education. These rights are enshrined in the Constitution of Zambia,37 which is the supreme law of the land. They are also set out in Affiliation and Maintenance Provisions Act of 199538, in the Matrimonial Causes Act39 and Rules, and the Adoption Act.40 Thus a natural or

36 Supra note 6 at, p.76
37 Cap. 1 of the Laws of Zambia
38 Cap. 64
39 Cap.50
adoptive parent has a duty to sustain and nature his or her child, whether born in or out of wedlock.

Under the Interstate Succession Act of 1989,\textsuperscript{41} section 5 deals with distribution of the estate and states,

S5 (b) fifty per cent of the estate shall devolve upon the children in such proportion as are commensurate with a child’s age or educational needs or both;

S5(d) ten per cent of the estate shall devolve upon the dependants in equal shares:

As regards an adopted child he or she will have an equal share with the biological children from the fifty per-cent provided by law. International Conventions, such as the Africa Charter on the Rights of Children, emphasize that the child’s interest are of primary concern. We can already see that from section 5(b) of the Interstate Succession Act that children who are not adopted but are mere dependants are greatly disadvantage as compared to their counterparts who are adopted.

Customary law varies from statutory law, and also varies according to ethnicity. The history of African Customary Law in the pre-colonial and colonial era is best described according to the kinship system.\textsuperscript{42} Inheritance in Zambia is governed by both customary and statutory law. The pre-colonial law in Zambia was essentially customary in character, having its source in the practices and customs of the people which regulated the community and were used to solve disputes between individuals and groups.\textsuperscript{43} In this paper two types kinship systems that are practiced in Zambia will be looked at and these are the matrilineal and patrilineal kinship system in relation to inheritance and how generally orphans are looked at by these two systems.

\textsuperscript{40} Cap. 54
\textsuperscript{41} Cap. 59
\textsuperscript{43} ibid
2.3 THE MATRILINEAL KINSHIP SYSTEM

The matrilineal system is based on inheritance through the mother. Inheritance covers the whole spectrum of the community’s wealth, status, wives and power. The maternal side of the family will be the ultimate beneficiary in each inheritance. This meant that the group on the mother’s side headed by uncles who have their heirs apparent nephews (sons of their sisters).\textsuperscript{44} For instance amongst the Tonga people of southern province, the children of sisters in the family at large are so closely linked that they all have equal rights to inheritance in the event of the uncles death. The Tonga customary law excluded children of the deceased and his widow from inheriting. They practiced levirate succession and priority was given to brothers (parallel cousins) and nephews (his sister’s children) of the deceased since uncles were considered parents in law.\textsuperscript{45} A discussion with a Mr. James Musanje a Tonga from Mapanza, confirms the fact that under the Tonga custom children belong to their mother’s lineage and are the responsibility of their maternal uncles. If a Tonga man died his matrilineal kin would share his estate. These being his brothers, sisters, nephew and nieces. The successor would also assume the obligations and responsibilities of the deceased which entailed looking after the widow and her children.\textsuperscript{46} In terms of households, they reside with their natural parents, and their father has control over them as a source of labour to help them produce food for the family.

The matrilineal system valued the place of the woman in society and held her in high esteem as a means of enlarging the clan. This was so as a woman was vested in the belief that only a woman new the true father of her children and hence only she could

\textsuperscript{44} Ngulube N. Some Aspects of growing up in Zambia (1989) p.4
\textsuperscript{45} Supra note 20 p.60
\textsuperscript{46} ibid
have a true claim of them. Should the marriage be dissolved due to divorce, the children go with the mother back to her village.

2.4 THE PATRILINEAL KINSHIP SYSTEM

The patrilineal kinship system entails that the father had total control and complete control over his children. One of the main distinctions from matrilinealism in this system was the status of children. Unlike in the matrilineal societies where children had no right to their father’s wealth but to their uncle’s, children in patrilineal societies belonged to their fathers in all respects.47

The Lozi’s of western province are patrilineal and a child draws its identity from its biological father provided the necessary payments were made either in the form of lobola,48 damages or maintenance where a child is born outside wedlock. It is in their father’s village that the children can enjoy full status and rights over resources such as land. If the marriage is dissolved due to divorce or death of their father, the children remain with their father’s kin. Inheritors under the Lozi customary law are children of the deceased both male and female who get equal shares of the property.49

The Lozi’s regard as a child of the family, male/female, as almost anyone who is underage and is a part of the household. The lack of distinction is evident from the absence of a word to describe a cousin, as everyone is a sibling. Fostered children enjoy the same rights and obligations as the natural children of the household, except when it comes to claiming property and succeeding the head of the household. At this point, each child must look to his/her natural parents, and particularly to his/her

47 Supra note 38 p. 53
48 Bridegroom is expected to pay dowry to in laws to confirm that a marriage has taken place
49 Supra note 20 p.73
father. Normally heritage of property falls to the children of the deceased. 50 An interview with Nduna Kalonga 51 from the Barotse Royal establishment, over the sharing of an estate where it involves minors stated that benefits are usually given to the first born if of majority age. He will manage the estate on behalf of brothers and sisters who are still going to school. The right to inheritance from the father and mother goes to the children first. If the children are minors the family will appoint someone to hold the estate in trust for the children.

It would also be ideal to look at the position of children of the spouse. The children of the spouse could be those from a previous marriage or the illegitimate children of the partner in marriage. Under the African customary law these children cannot inherit from their stepfather. They will be expected to inherit from their biological father. On the other hand if we take a look at those children who have been adopted they are at law as good their biology children and they are entitled to inherit from there parents.

2.5 THE LAW ON ADOPTION OF CHILDREN OF THE SPOUSE AND BY FAMILY MEMBERS

Adoption is a process whereby parental responsibility is by court order taken from the natural parents to the adopters. The child is treated in law as if it were a natural child of the adopters and the parental connection with the child’s natural parents is extinguished.52 The Adoption Act under section 3(3) allows a mother or father to adopt his/her child alone or jointly with her spouse. This provision covers cases of step parents (mother or father).

50 ibid
51 Intermediaries between the chiefs and village headmen
52 Supra note 14 at p.386
Adoption may be made under section 4(a) by any person who has attained the age twenty five and is at least twenty-one years older than the infant adopted or to be adopted.

2.6 INTRA FAMILY ADOPTION

Not all adoptions are from outside of the family. Intra family adoption occurs when a child is adopted by an existing close family member and or his/her partner. A common example is a step-parent adoption, where the new partner of a parent may legally adopt a child from the parent’s previous relationship to cement a new family following divorce or death of one’s parent. Intra family adoption can also occur through surrender, as a result of parental death, or when the biological parent cannot care for the child such as when declared unfit due to illness, example could be mental illness, or due to constant abuse of the child and a family member agrees to take over the care of the child. This is very common in Zambia as most house holds have dependants because their parents are not able to look after them and send them to school due to poverty. Though in Zambia I must hasten to confirm that most of these are not legal adoptions.

2.7 QUALIFICATION FOR ADOPTION

A relative can also adopt a child under section 4(b), of the Adoption Act if the adopter is a relative of the child he/she must have attained the age of twenty one unless, by section 4(c) the applicant is the mother of the child.

The adoption of an illegitimate child by its own mother or father
(a) The adoption of an illegitimate child by its own mother and her husband (the child’s step father)

(b) The adoption of a legitimate child of a former marriage by its mother and her second husband (the child’s step father). This has however been discouraged given the consequential extinguishment of the legal links with half his family, potentially damaging to the child. The preferred alternative was to extend the provisions enabling a step-parent to apply to become a guardian.\textsuperscript{53} The Courts required the applicants to prove that adoption was better than a joint custody order made by the divorce court.\textsuperscript{54} Although the above provision has no direct application where the parents’ marriage is ended by divorce or where the parents were not married in the first place, similar consideration have nevertheless been considered by courts

(c) The adoption of an illegitimate child by the grand parents or by a married brother or sister of the mother and their respective spouses. The courts have long had reservation about granting adoption to relatives fearing an order would distort the natural relationship particularly in cases of adoption by grandparents.

The main objective of family adoption is to remove from a child the stigma and disabilities resulting from illegitimacy and to keep it within the family.

It is quite common in the western world for couples to adopt the spouse’s children. In an interview with Mr. and Mrs. Ross of Lusaka a mixed couple of black and white,\textsuperscript{55} they confirmed that the husband applied to adopt his wife’s children from a previous

\textsuperscript{53} ibid
\textsuperscript{54} ibid
\textsuperscript{55} Interview in December 2008
marriage considering that their father had died and they were quite young so that they became his children legally to enable him give them love and support.

Today most people think that adoption is a process in which a child, usually an infant, is permanently incorporated into a family into which he is born.\textsuperscript{56} A random interview with people from different walks of life gave a general overview on what the average person thinks of adoption.

Mr. Wasilota a teacher in Lusaka, is of the view that adoption is not part of our culture. He would not consider adoption but rather look after a less advantaged relation. His concerns were not knowing what traits, especially negative ones, the child inherited\textsuperscript{57}.

Mrs Wengelani, who works for a non governmental organisation in Lusaka, does not encourage children to be placed in institutions and does not support adoption. She feels adoption breaks down the family. She is of the view that a non-family member does not freely connect or bond with the child and that it is human nature to have this feeling, that this is not ones child. She is of the view that only in exceptional cases, like where a baby is abandoned should adoption be considered. She encourages the extended family to care for the children in need.\textsuperscript{58}

Generally speaking resort to adopt is by married couples who are unable to procreate any children for themselves. An interview with a couple in Lusaka who did not want to be named, the wife being a medical doctor and the husband an engineer, confirmed

\textsuperscript{56} Barbara Tizard, Adoption: a Second Chance, London: Open Book (1977) p.1
\textsuperscript{57} Interview in December 2008
\textsuperscript{58} Interview in December 2008
that they decided to adopted a baby after ten years of marriage as they did not manage to have a child of their own. The couple say the family was not happy with their decision to adopt as they should just have got an orphan in the family and legally adopt that child. The reason they give for not adopting within the family is that they did not what interference from the relatives who would also claim the child as their own. In Africa a child belongs to the whole clan.

2.8 STATISTICS

The law is very clear on who may adopt under Section 4(a) only a person who has attained the age of twenty five years and is at least twenty-one years older than the infant or by section 4 (b) if the adopter is a relative of the child he or she must have attained the age of twenty-one. In Zambia as already mentioned the number of orphans is quite high as a result of the AIDS pandemic. However it is important to look at some figures to give us an understanding of what the situation has been like in terms of the actual reality. According to statistics provided by Mr. Lawrence Mulenga of the Ministry of Social Welfare and Community Development the number of Children being adopted in Zambia is on the increase. The figures are as follows for the last 10 years;

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of applications received</th>
<th>Year</th>
<th>No.of applications r’ved</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>73</td>
<td>2003</td>
<td>139</td>
</tr>
<tr>
<td>1996</td>
<td>68</td>
<td>2004</td>
<td>221</td>
</tr>
<tr>
<td>1997</td>
<td>109</td>
<td>2005</td>
<td>164</td>
</tr>
<tr>
<td>1998</td>
<td>141</td>
<td>2006</td>
<td>46(^{60})</td>
</tr>
<tr>
<td>1999</td>
<td>113</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{59}\) Mr L. Mulenga the Senior Welfare Officer

\(^{60}\) These figures are from Mr. L. Mulenga
2001 142
2002 177

Statistics show that one thousand nine hundred and twenty four children were adopted all over Zambia between 1990 and December 2006. While during the period of 1989 to 1990 only fifty children were adopted.\textsuperscript{61} This shows a substantial increase in adoption cases. These figures are further broken down into numbers of application submitted for application and show the numbers of applications from Zambians and non Zambians.

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of Applications received</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995 to 2000</td>
<td>491</td>
</tr>
<tr>
<td>Applications by Zambians</td>
<td>313</td>
</tr>
<tr>
<td>Applications by non Zambians\textsuperscript{62}</td>
<td>178</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Period</th>
<th>Number of Applications received</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001 to 2005</td>
<td>675</td>
</tr>
<tr>
<td>Applications by Zambians</td>
<td>527</td>
</tr>
<tr>
<td>Applications by non Zambians\textsuperscript{63}</td>
<td>148</td>
</tr>
</tbody>
</table>

During this period, the AIDS pandemic and consequent orphan problem became more prominent and most people felt compelled to open their homes to these children. The question is how many of these children where adopted by Zambian families. Quite a good number of these were adopted by Zambians according to Mr. Mulenga but refused to give me the actual numbers.

According to Mr. Mulenga, one of the common reasons for adopting by Zambians is when an employee wishes to utilize the conditions of service at his or her working place for the benefit of dependants in his or her care. Conditions of service such as

\textsuperscript{61} ibid
\textsuperscript{62} Zulu E.K. (jnr) Adoption Act Vs Street Kids, Obligatory Essay, 2005
\textsuperscript{63} ibid
health care, education, and transport facilities are usually extended to the employee’s biological children, freely or at subsidized rate depending on what the employee’s conditions of service are. A discussion with the Director of Human Resource at Zambia Revenue Authority confirmed that the company insists on proof of adoption from employees who want to claim conditions of service for children other than their own. 64 When pressed to give an indication on the number of staff that had legally adopted, he confirmed six known cases of adoption at this institution.

The other reasons that were given by Zambians for adopting is when an individual or family goes to work in a foreign country and want his/her dependants who in most cases are relatives to accompany the family. An official from the Ministry of Foreign Affairs confirmed that it was common for those going into foreign missions to actually adopt the dependants so that they could benefit from the benefits that are accorded to them. 65

The actual reality is that Zambians will adopt not because they are a number of children that need to be taken into homes but because there are circumstances that force them to do so, which is quite different from the people in the western world who will adopt because they would like to give the orphaned children love, a home and a family.

When we look at the statistics of 2006 there is a considerable decrease in the number of application for adoption. This is because the Minister of Community Development

64 Interview with Mr Bursh Nketani Director Human Resources
65 Interview with Administrative Officer, Ministry of Foreign Affairs
and Social Welfare suspended adoptions in the country until further notice.\textsuperscript{66} This was reported in one of our daily papers. The article stated that the Zambian government has uncovered and ended an adoption scam that involved flying children out of Zambia with adoptive parents, without proper adoption procedures being followed. As a result of these findings, three children have been withdrawn from the American families that were planning to adopt them. The then Minister of Community Development and Social Welfare Honorable Catherine Namungala, said that unconfirmed reports showed that at least 17 other children had been taken out of the country for adoption, without the knowledge of the government and without legally binding adoptions having taken place. The Minister claims that she is not against international adoptions, but that adoptions must follow the right procedures and laws.\textsuperscript{67} The main concern was that this could encourage or facilitate child trafficking if not handled properly. No child should leave the country without all the institutions involved clearing them to the very end. The court was the last institution to grant that authority and without the approval of the court no children should be taken out of the country.

\textsuperscript{66} Sunday Times, September 16, 2007
\textsuperscript{67} ibid
CHAPTER THREE

DOMESTIC ADOPTION VS INTERNATIONAL ADOPTION

3.0 TYPES OF ADOPTION

There are two types of child adoption and these are, domestic and international adoption. This chapter will focus on these adoptions and try and show how these are different but serve the same purpose. Adoptions are now taking place across bounders and continents. Globalisation and the development of technology has made it possible for those looking for children to adopt to look further than their boundaries. Information is readily available through the print media, television and the internet. Zambia has not lagged behind in this area of development as information on how to go about child adoption in Zambia is readily available on the internet.68

3.1 DOMESTIC ADOPTION

Domestic adoption is an adoption that involves adoptive parents and a child of the same nationality and the same country of residence.69 There is a lot of uncertainty on domestic adoption and unfounded stories which in some cases could have a negative effect on those who wish to adopt locally. Some of those wishing to adopt fear that the biological mother or parents might come and take the child away at some stage in future. A little education could go along way in this regard to clear some of the uncertainties. There is also the myth that when you adopt, you a buying the baby. This misconception comes from the fees involved in the whole process and this differs from country to country. The fees involved in adoption pay for such services as social work counseling and legal consultations and not ‘buying’ a baby, which is illegal around the world. All aspects of adoption are regulated by state laws and

68 //E:\Africa Adoption Blog- Adoption trouble in Zambia.htm
69 Supra note 7 p. 68
reviewed by judges who preside over finalization to ensure that baby buying does not occur.

Domestic adoption does involve an element of legal risk. Once biological parents have given consent, they have a small window of time in which to change their minds. It is vitally important for everyone involved, parents and children to know that birth parents have been given every opportunity to make the right decision and feel good about it. By the time an adoption is finalized both adoptive parents and birthparents are cognizant of the fact that the family formed by adoption is the one recognized as the child’s family under the law.  

3.2 INTERNATIONAL ADOPTION

International adoption is essentially a private legal matter between a private individual or couple who wish to adopt and a foreign Court, which operates under that country’s laws and regulations. It is a type of adoption in which an individual or couple becomes the legal permanent parents of a child born in another country. Thousands of orphans are created every year especially in Africa, these being mainly AIDS orphans, other orphans arise as a result of deaths due to malaria, a big killer in Africa. Other factors contributing to mortality rate of the adult population are famines, wars and political instability. An example is the Durfur conflict which has gone on for a long time, and has lead to a lot of children being orphaned. Traditionally in Africa, if a child becomes an orphan the extended family would automatically take that child in and care for him or her. We now see a situation were the extended family has already taken in more children than they can care for, because their extended families

70 Supra note 56 p.36
71 http://wwwworldbank.org/data/countrydata/htm/
72 http://glossaryadoption.com
have died or because their extended family lives in fear of HIV and associated stigmas, these children have no where to go and as a result orphanages are flourishing. Children live on the streets, children care for each other. Children live in unthinkable poverty with little or no hope for the future.

Many people in many African countries are starting to realize that the orphan crisis in their countries is overwhelming, and that international adoption is the best chance that many of the children have at living a life that includes love, security, education and medical care. An example is the case baby David Banda, who was adopted from Malawi by Madonna a pop star to give him a better life.73

In general, prospective adoptive parents must meet the legal adoption requirements of their country of residence and those of the country in which the child was born. The laws of different countries vary in their willingness to allow international adoptions. Some countries expressly forbid it, while as some other countries, notably many African nations have extended residency requirements for adoptive parents. In Zambia, section 4(5) of The Adoption Act requires that the infant must be resident in Zambia and the infant must have continually been in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order; and the applicant must have notified the commissioner for Juvenile Welfare of his/her intention to adopt the infant. In order to qualify for international adoption, a special license has to be obtained. Section 33(1) of the adoption Act reads as follows: The Commissioner may grant a license in the prescribed form, and subject to such conditions and restrictions as he may think fit, authorizing the care and possession of

73 Sunday Times of Zambia, 16 August, 2007, Malawi Father backs Madonna p.4
an infant for whose adoption arrangements have been made to be transferred to a
person resident abroad. An example of a license being grated to a prospective adopter
is as in the case of David Banda from Malawi who was adopted by Madonna. A
license was granted to her to take the child with her to the UK and this was before the
final hearing was heard to allow her to officially adopt the baby.

In South Africa, The Commissioner of Child Welfare is responsible to the Department
of Justice and is required for inter-country adoptions The Department of Social
Development is the central authority for all adoptions. Eligibility conditions for those
living in South Africa is five year. Eligibility requirements beyond that change based
on the circumstances of the case in question. For example, family members will be
given preference over non relatives. They will also approve the adoption application
in cases in which one spouse is South African. It can take up to two years to complete
South African adoption.\textsuperscript{74} As a result of this restriction and delay in processing the
applications the number of children adopted under international adoption are quite
low as the waiting period is to long. According to the United States of America
Department page on Intercountry adoption only seventeen children were adopted from
there in 2005.\textsuperscript{75} The number is extremely low considering the huge number of
orphans' in that country. This is greatly influenced by the fact that South Africa's
international adoption process has a five year residency requirement. This period is
too long and puts off would be adopters.

Adopting from Africa is becoming increasingly more popular especially from
Ethiopia than any other African country. The adoption numbers have been increasing

\textsuperscript{74} http://www.southafrica.to/people/Babies/Adoption
\textsuperscript{75} ibid
sharply in Ethiopia. Below are some numbers on adoptions by American citizens who are the biggest adopters from Ethiopia.

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Adoptions</th>
<th>Year</th>
<th>No. of Adoptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>289</td>
<td>2007</td>
<td>1,255</td>
</tr>
<tr>
<td>2005</td>
<td>441</td>
<td>2008</td>
<td>1,727</td>
</tr>
<tr>
<td>2006</td>
<td>732(^76)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

One well known adoption from Ethiopia is that of an American celebrity Angelina Jolie, who adopted a little girl from there\(^77\). In Ethiopia the procedure of adopting is not as complicated as in other African countries. Preference will be given to married couples. Parents must be at least 25 years old. The adopting parents can opt not to travel if they so wish to identify a child as this can be done by the appointed agent to the end including taking the child to the adoptive parents. The whole processes can take six to twelve months.

Below are some statistics to show how international adoption is increasing in Africa

<table>
<thead>
<tr>
<th>Year</th>
<th>Year</th>
<th>Year</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>2007</td>
<td>2006</td>
<td>2005</td>
</tr>
<tr>
<td>Liberia</td>
<td>Liberia</td>
<td>Liberia</td>
<td>Liberia</td>
</tr>
<tr>
<td>267</td>
<td>314</td>
<td>_____</td>
<td>183</td>
</tr>
<tr>
<td>Nigeria</td>
<td>Nigeria</td>
<td>Nigeria</td>
<td>Nigeria</td>
</tr>
<tr>
<td>148</td>
<td>_____</td>
<td>62</td>
<td>65(^78)</td>
</tr>
</tbody>
</table>

3.3 NEGATIVE CONSEQUENCES OF INTERNATIONAL ADOPTION

International adoption can also be challenging because of the lack of documentation that is often needed to prove that a child is a legal orphan, and child trafficking occurs much too frequently. Child trafficking is a broad term that refers to buying, selling or

\(^76\) [http://ethiopia.adoptions.com](http://ethiopia.adoptions.com)
\(^77\) Times of Zambia, 17 July, 2006
\(^78\) [http://adoption.state.gov](http://adoption.state.gov)
illegal transportation of children. Child laundering is a more precise term that refers to the stealing of children who are then sold to adoptive parents as legitimate orphans. Often the pretence is that the child’s parents are dead when in fact the child’s parents are still alive. This is what happened in Chad where some French national wanted to take the children out of that country under the pretence that they were orphans when in actual fact most of the children were not. Some of the children who were called orphans were not, but children stolen from homes, in other cases the children were left at orphanages for temporary care or school for education. The people left in charge of the school sometimes sold the children. In some cases the parents sold the children as they cannot afford to feed them nor send them to school.\(^{79}\)

In Zambia the Minister of Community Development and Social Welfare has temporally stopped adoption until further notice as reported in one of the daily papers, under the title ‘State Suspends all Child Adoptions’ as already pointed out. This is following a revelation that some children had been adopted from Zambia without following the proper procedure. She revealed that up to seventeen children had already been adopted and taken out of the country without the consent of the government. She went on to say that the government was determined to stop such illegal acts and protect citizens. She further confirmed that the adoption of three orphans by some American nationals had since been withdrawn because the adoptions were not legally bidding.\(^{80}\)

Similarly in Chad, international adoption of children from that country have been suspended indefinitely. Sixteen European of these nine being French nationals and

\(^{79}\) The Post, Chad Magistrate Questions 16 Europeans Over Abduction, Nov.5 2006
\(^{80}\) Sunday Mail, September 16, 2007
seven Spanish nationals were arrested on 25th October 2006 and charged with child abduction and fraud for attempting to fly one hundred and three (103) children out of that country destined for new families in Europe without proper authorization. The abductors of these children claimed they were orphans from Sudan’s war-torn Darfur region. The NGO that was involved called Zoe’s Ark strongly denied it planned to sell the children for adoption but claimed it had a right to take them for adoption under international law. They also claimed that they were driven by compassion to help the orphans in Darfur, which borders with Chad. The NGO claimed it was given verbal statements from tribal leaders that all the children were Darfur orphans with no known relatives. The Charity insisted it was trying in good faith to take endangered children abroad for medical treatment. Chad’s interior minister confirmed that some of the children were Chadian and not all were orphans. The action was widely condemned some said since the procedure was not followed to adopt the children in the right manner then the children were kidnapped. UNICEF in Geneva also added its voice to the condemnation that the operation broke all rules. These children cannot be considered for international adoption and the priority should be to trace their families,” said a spokes-woman. Even if their mothers or fathers have died, it could be the case that they find relatives and a community and home to go back to once the conflict is over.

Jacques Hintzy, head of UNICEF in France, said that his organisation had been in contact with the children and most did not appear to be orphans. They are four or five

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81 Supra note 79
82 The Post, ‘French Nationals get 8 years with had labour’ December, 28 2006, p. 22
83 Foreign.news@thetimes.co.uk
years old on average. They are a little shocked obviously, he said. UNICEF will try to trace their parents, he added.\footnote{ibid}

**3.4 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW**

Recognizing some of the difficulties and challenges associated with international adoption, and in an effort to protect those involved from corruption and exploitation which sometimes accompanies it, the Hague Conference on Private International Law developed the **Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption** which was concluded on 29th May 1993 but came into force on 1st May 1995.

The preamble to the Convention on Protection of Children and Co-Operation in Respect of Inter-Country Adoption states:

*The States signatories to the present Convention, recognizing that the child, for the full and harmonious development of his/ her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his/ her family of origin.*

*Recognizing that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable home cannot be found in his or her State of origin.*

*Intercountry adoption shall be made in the best interest of the child and with respect to his or her fundamental right. To prevent the abduction, the sale of, or trafficking in children, each state should take, as a matter of priority, appropriate measures to enable the child to remain in his or her family of origin.*

\footnote{ibid}
The main objectives of the Convention are as follows under Chapter 1.

Article 1;

a) to establish safeguards to ensure that inter-country adoptions take place in the best interest of the child and with respect for his or her fundamental rights as recognized in international law;

b) to establish a system of co-operation amongst contracting states to ensure that those safeguards are respected and thereby prevent the abduction, sale of, or trafficking in children;

c) to secure the recognition in contracting states of adoptions made in accordance with the Convention.

The Convention has been ratified by seventy (70) countries. Several more countries are signatories to the Convention and are at various stages in taking steps to achieve full ratification.\textsuperscript{85} The Convention goes further to pronounce what the requirements are for inter-country adoptions and these are as follows Under chapter 1(4) (1)

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin

a) have established that the child is adoptable;

b) have determined, after possibilities for placement of the child within the State of origin have given due consideration, that an inter-country adoption is in the child’s best interest;

c) have ensured that;

\textsuperscript{85} Ibid
(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as maybe necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in termination of the legal relationship between the child and his or her family of origin. An example of consent of adoption became a source of concern to the world as was in the case of Madonna, a pop star who wished to adopt a child from Malawi, David Banda. This adoption made international headlines because David’s father had earlier told the press that he would not have consented to adoption if he had known it meant giving up his son. He initially thought Madonna would just educate and take care of him. He never thought that adoption meant that David would no longer be his son otherwise he would not have allowed the adoption.\(^{86}\) He however later told Time Magazine that he did not want to challenge the adoption, since he was unable to look after the child, he would be spoiling his future by taking him back.\(^{87}\)

(2) such persons, institution and authorities have given their consent freely, in the required legal form, and expressed it in writing,

(3) the consent has not been induced by payment or compensation of any kind and has not been withdrawn.

It has to be made very clear for those parents giving consent to have their children adopted what it means. They have to understand the fact that they cease to be the parent of that child in law and in fact. If the adoption goes ahead without explaining to them properly they can ask for revocation of the adoption as in the case \textit{Michael Macgarry v. Eric Macgarry}.\(^{88}\) The applicant sought an order for revocation of an adoption order made in relation to her children on 9\textsuperscript{th} January,

\(^{86}\) Sunday Times of Zambia, Malawi Father backs Madonna p.4
\(^{87}\) ibid
\(^{88}\) Case No. 1999/HP/374
1974 on the ground that the applicant did not at that time understand the effect of adoption. Further that the adoption order had created abnormal relationships in the family between the adoptive parents, the applicant and the adoptees. It was held:

i) The applicant did not fully understand the effect of adoption.

ii) The adoption order made on 9th January, 1974 was revoked

The main thrust of the Convention is to try and make it as easy and straightforward for those who wish to adopt across borders and also to ensure that there is a law that will be used to bind the contracting States who are parties to it.
CHAPTER 4

PROCEDURE OF PLACING ORPHANS

This chapter will look at institutions that deal with orphans and procedures of placing them for adoption.

4.0 MINISTRY OF COMMUNITY DEVELOPMENT AND SOCIAL SERVICES

This Ministry involves the administration of the following pieces of legislation:

Probation of Offenders Act Cap 93

Juveniles Act, Cap 53

Adoption Act, Cap 54

Maintenance Orders Act, Cap 55

Day Nurseries Act Cap 313.

The Department of Social Welfare falls under this ministry.

4.1 DEPARTMENT OF SOCIAL WELFARE

Social welfare is the wellbeing of an individual, family or community. Social welfare services refers to programmes and activities aimed at assisting persons in difficult circumstances by strengthening individual lives, families and communities, particularly where people are poor and venerable. In Zambia social welfare services are provided mainly by the Government, complimented by the non-governmental organisations (NGO). The Department is headed by a director and all orphanages operate under his authority. Registration of the institutions is required under section 18 of the Adoption Act. The department does not run these institutions, but net-work

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89 Paper on National Policy on Social Welfare from the Ministry Community Development and Social Welfare
with and provides guidelines to NGO and individuals permitted to operate children homes. The Department also provides some grants to some of the homes. These homes provide care to children in need of care, (orphaned, abandoned or children whose parents or guardians are unfit to look after them).  

4.2 ROLE OF CHILD WELFARE OFFICER

The selection of potential adopters and placement of the child with them is clearly a crucial step in the adoption process. From the child’s point of view it is obviously important that the placement is a success so that every effort needs to be made, before the placement, to ensure as far as possible that the applicant will provide the particular child with a loving and secure home. The child-welfare worker has a big responsibility in ensuring that the home the child will be placed in will give the child the love, and support it needs. The Welfare Officer will visit the home and meet the family in there home in order to evaluate if they are an acceptable family or home to accommodate the child. According to an interview with Mrs Angela Miyanda of Kabwata Orphanage, it is important that the adopters truly understand the meaning of adoption. Some are ignorant and do not know the meaning of adoption. The whole process is explained to them by the welfare officer and they are told that they will not be able to reverse it once the adoption is completed by a court. The interview is also important as it helps the welfare officer to know the true intentions of the adopters and also helps them when they are making recommendations for the adoption.

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90 Brochure from Ministry of Community Development and Social Services  
91 Supra note 4 p. 383  
92 Interview in December 2008  
93 Interview with Musenge Mumba, Social Welfare Officer, Nov. 2008
4.3 ROLE OF SOCIAL WORKERS

The social worker is responsible for interviewing the prospective adopters. The social worker will also want to see the adopting couple in their home, usually more than on one occasion before he/she can make a decision. The social worker is primarily concerned with the happiness and prospects of the child; the happiness of the child is bound with the happiness of the adoptive parents, but the prime consideration must remain the happiness of the child.94 An adoption cannot take place without the knowledge of the Department of Social Welfare.95

Once it has been decided that the couple meet the qualifications for adoption the social worker then will advise them if a child is readily available. Under section 4(5) of the Adoption Act the law requires that the child is fostered for three months under the supervision of the social worker. This requirement can be waived when deemed by the court to be in the best interest of the child.96

4.4 ROLE OF THE LAWYER

The Lawyers role is to ensure that the relevant law criteria and procedure is followed. The lawyer advises the client accordingly on what the law is on adoption, that is, their rights and obligations. Most people are ignorant of The Law of Adoption, so the involvement of a lawyer helps greatly in clarifying issues and speeding up the process.97 Though it must be pointed out that most adopters use social workers and the Subordinate court to petition for an Adoption Order.

95 Section 22 of The Adoption Act.
96 Interview with Musenge Mumba
97 Interview with M. Muyaba of Ministry of Justice
4.5 ROLE OF THE COURT

An adoption order freeing the child for adoption may be made by Subordinate Court. The court must be satisfied about three things;

i) that the parents or guardian of the child freely, and with full understanding of what is involved, agrees unconditionally to the making of the order (unless this his/her agreement has been dispensed with);

ii) that no unauthorised payments or rewards for the adoption have been made or agreed upon; and

iii) that the order, if made, will be for the child’s welfare.\(^{98}\)

In reaching its decision, the court will rely heavily (though not exclusively) on the written report from the social welfare officer. All proceedings on child adoption are held in chambers due to the sensitive nature of the topic and also to protect the children against stigmatisation. The magistrate who handles the adoption has to interview all the interested parties to ensure that they all understand the implications of their decisions.\(^{99}\)

\(^{98}\) Supra note 5 p.408
\(^{99}\) Interview with F. M. Hamaundu, Subordinate Court Magistrate, Kitwe
CHAPTER FIVE
CONCLUSION AND RECOMMENDATIONS

5.0 CONCLUSION

The purpose of this paper was to examine the provision of the Adoption Act in relation to the Zambian customary law. The paper looked at the development of adoption in the country from the colonial period to date. In Zambia adoption is still seen as foreign concept as the acceptable norm is that people should look after their own kith and keen than to take strangers into their homes. It was and is still the accepted norm that a child, whether orphaned or not, was looked after by the family.

It is a matter of prime importance that the family should always be free to make provisions for its own children within its own scope, that is, grandparents, uncles, aunts should be free to adopt their own relatives but this is not the case in Zambia as most homes would like to keep the children as mere dependants in the home.

Adoption is never an option.

Another phenomenon we cannot escape from is the shift from dependence on the extended family to a setting were there is a predominance of the nuclear family setting. This is as a result of the economic hardships. Seventy per-cent of Zambians live below the poverty line as already pointed out. They cannot afford to take any more orphans as they themselves can bearly survive.

Various challenges have emerged in our society that have caused the breakdown of the extended family. The reality of today does not match up with the way things were before in the traditional setting. It is unfortunate that some Zambians would want to cling to old ways when their own traditional values have fallen, proof being the
number of children living in institutions when they have extended families, some of whom can actually afford to look after them. One of our daily papers had a head line “orphans relatives threaten to beat up social workers.”\textsuperscript{100} It was unheard of in the past to have orphans as there was always a relative, even if remotely related willing to take care of the orphans.

The Interstate and Succession Act, \textsuperscript{101} which was meant to address the problem of inheritance for orphans has been influenced negatively by customary law much to the disadvantage of the people it seeks to protect. At least for those children who are adopted they stand a chance of inheriting from their parents. As regards those children who are not adopted but are mere dependants, the Inheritance Act gives them only ten per-cent from the estate of their guardian.

Customary law varies from group to group and its application in relation to the best interest of the child can be radically different, depending on whether the tradition is matrilineal or patrilineal. As a matter of fundamental principle, statutory law takes priority over customary law, and customary law is not applied if it is deemed to run counter to generally accepted moral standards.\textsuperscript{102}

Zambians have a negative attitude towards adoption as we have seen from the statistics. Even though of late there has been an increase in the number of Zambians adopting, it is still a drop in the ocean compared to the army of children in orphanages and on the streets. The government, the church, the NGO’s and all interested groups with interest in the well being of the child need to widely sensitize the nation on the

\textsuperscript{100} The Post, Monday December 17, 2007  
\textsuperscript{101} Cap. 59 of the Laws of Zambia  
\textsuperscript{102} Supra note 23, p.410
advantages of adoption. There is need to make the public aware about adoption laws and the benefits that accrue when they adopt a child, as no one will ever claim him/her once the adoption is official and final. Every child needs to grow in a family that gives him/her love, care and support.

International adoption was also referred to in this paper and has worked quite well in some countries in giving a second chance to children in need of a home. The countries in the western world are in the forefront of adopting from poor countries. This should be encouraged to give our orphans a home and a family so long this is done legally to avoid cases of child trafficking. The government should be more proactive to ensure that these orphans are adopted by people who will give them a better life when they leave the orphanages.

If adoption has worked in some parts of the world, it should be able to work even in this country, but the will must be there from the government to put enabling law in place. Zambia needs the law on child adoption as the traditional way of absorbing the orphans into family homes has collapsed. I do not think the Adoption Act is irrelevant, the traditional way of dealing with orphans has failed to work in the modern era as people are more concerned with caring for their immediate families.
5.1 RECOMMENDATIONS

The Adoption Act is little understood or known by most people in Zambia. This is because of the entrenchment of customary values that children are best looked after by their own kith and kin. The government can do a lot more to ensure that this mindset on adoption is changed. This can be done by sensitizing the community on the number of orphans that are in orphanages. When the communities are made aware of these numbers, it might just make people realize the magnitude of the problem. The sensitisation can be done through the press, that is, in the print and electronic media. It would also be a good idea if the government could consider printing the Act in the vernacular languages so that people can better understand what it is all about and dispel some of the myths they have heard. At the moment very few people know what it entails to adopt a child as most people are of the view that only rich people can adopt, which is not the case.

The Ministry of Community Development and Social Services should initiate a review of laws relating to adoption and children in general. These laws have changed very little since they were brought in this country during the colonial period. The Adoption Act was first enacted in this country in 1956 and has remained almost the same to date with minor changes. The change should be in conformity with the needs of the current era. It should be drafted in such a way that it makes it easier for those who would like to adopt to do so, within the law, but without too much problem. An example is Ethiopia where the laws do not hinder adoption as we have seen from the statistics. More and more children are being adopted from there through international adoption than in any other African country.
The Department of Social Welfare should establish and maintain database on all adoptions in the county. At the moment it is so difficult to get statistics on adoption in the country. The database should at least be clear on the number of domestic and international adoptions. The database should be made readily available to those interested as this will give the community an idea of how grave the situation is.

The Ministry should provide and facilitate training in professional practice to the social workers. Adoption is a very sensitive issue and it needs to be handled in a professional and efficient manner. Looking at their records it takes unnecessarily long to complete the process of adoption which can be quite taxing emotionally on the adopter and the adoptee.

The Ministry needs to encourage good traditional and cultural values and practices of the extended families and communities caring for orphans. The government can come up with a deliberate policy to support all those who are looking after orphans. The support could be in monetary terms or in form of food provisions to the families which they could get on a monthly basis. In this case they will be need to keep a comprehensible database on the number of orphans and the details of those who are taking care of them to avoid abuse of the programme.

There is need to strengthen the laws that will compel the social worker from the Department of Social Welfare to supervise relationships between the care giver of the child to ensure that the child is well taken care of. The social worker should be able to intervene in the extended family for the orphan’s sake should need arise.
Since it takes a long time to change a mind set, it is advisable to let the adoption law to continue being in existence, we need order for those who want to adopt. As for those who do not want to consider adoption as an alternative, these can be sensitized through educational campaigns which should be vigorously put in place. Workshops, seminars and church meetings can be arranged for various sectors. If this was pursed vigorously, we would see a change of the mind set.

Finally all laws concerning the welfare of children must be put in one Act. This way there will be certainty and the law will be easier to identify than the current piece meal legislation. There is no single statute that deals with the totality of child rights in Zambia.

Zambian law does not have a uniform definition of who is a child. For example, under article 24(2) of the Constitution, young person means any person under the age of fifteen years. Under section 33 of the Marriage Act, the minimum age for marriage is fixed at sixteen years unless a judge gives consent for a person who is below that age to get married. Section 52 of the Adoption Act defines an infant as a person who has not attained the age of twenty one years, but does not include a person who has been married. The Employment of Young Persons and Children Act defines a child as a person under the age of fourteen years.

We need the law on adoption as a nation, as the traditional way of absorbing the orphans into family homes has collapsed.

103 Cap. 1
104 Cap. 50
105 Cap. 54
106 Cap. 274
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