

**INTERCOUNTRY ADOPTION IN KENYA: A CRITIQUE ON THE ROLE OF  
GOVERNMENT REGARDING THE MODERN DAY HUMAN TRAFFICKING**

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**DECLARATION**

I, WANGUSI SHIRLEY SHITAWA, do hereby declare that do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

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

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Harrison Mbori

## ABSTRACT

*Intercountry adoption is the process by which one takes a child from one country to their own through permanent legal means, bringing the child into their family, treating them as their own and giving them all the rights and duties of their own children.<sup>1</sup> The process ought to be carried out in a manner that would give priority to protecting the child's best interests as provided by the Constitution of Kenya 2010.<sup>2</sup> Unfortunately, intercountry adoption has increased vulnerability of children to human trafficking;<sup>3</sup> a term defined as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>4</sup> Since the matter involves the violation of human rights,<sup>5</sup> it is the duty of the government to protect the rights of the children involved.<sup>6</sup> To this end, the research seeks to assess the role of government in upholding the child's best interests.*

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<sup>1</sup> Kundu A, 'An overview of intercountry adoption with special focus on India' *Bharati Law Review*, 2013, 42.

<sup>2</sup> Article 53, *Constitution of Kenya* (2010).

<sup>3</sup> National Crime Research Centre, '*Human trafficking in Kenya*', June 2015, 39.

<sup>4</sup> United Nations, Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Art. III (2000).

<sup>5</sup> Article 53, *Constitution of Kenya* (2010).

<sup>6</sup> *OHCHR General Comment No 2, Recommended principles and guidelines on human rights and human trafficking*, 2010, 75.

## **LIST OF ABBREVIATIONS**

ICA- Intercountry Adoption

CCI- Charitable Children Institution

UN- United Nations

UNCRC- United Nations Convention on the Rights of the Child

UNICEF- United Nations Children's Fund

OHCHR- Office of the United Nations High Commissioner for Human Rights

UNGA- United Nations General Assembly

## **LIST OF INTERNATIONAL INSTRUMENTS**

*United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 7.*

*African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9.49.*

*Hague Convention on Protection of Children and Co-operation Report of Intercountry Adoption, 29 May 1993.*

## **LIST OF NATIONAL INSTRUMENTS**

*Constitution of Kenya (2010).*

*Children Act (Act No. 8 of 2001).*

*Children (Adoption) Regulations of 2005.*

*Counter-Trafficking Act ( Act No. 8 of 2010).*

## **LIST OF CASES**

*In the matter of baby KR (2015) eKLR.*

*In the matter of baby RWB (2016) eKLR.*

*In the matter of baby PM (2017) eKLR.*

*Roe v Wade (1973), The Supreme Court of the United States.*

*Mathews v Eldridge (1976), The Supreme Court of the United States.*

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## CHAPTER 1

### INTRODUCTION

#### Background

The family is the basic unit in society.<sup>7</sup> Owing to the fact that man is a political animal, human dignity embedded in his nature gives him the sense that he is entitled to belong to one.<sup>8</sup> Unfortunately, some children for one reason or another have lost their families.<sup>9</sup> In an attempt to look out for their best interests, the government has facilitated the adoption process.<sup>10</sup> This has been done both locally and at international level through adoption agencies, as a juridical act of putting orphans and abandoned children into adoptive homes.<sup>11</sup>

Kenya has put in place the Constitution of Kenya 2010 which looks out for the child's best interests.<sup>12</sup> It has also enacted various pieces of legislation including the Children Act 2001 and the Children (Adoption) Regulations of 2005 to serve the same purpose. The same has been extended to international laws by the United Nations to ensure all matters are done in the best interest of the child.<sup>13</sup> All this has been aimed at ensuring that the child lives in the best environment where they can flourish to their maximum potential.

Unfortunately, this form of adoption has been commercialized and is no longer aimed at achieving the best interest principle.<sup>14</sup> These allegations were first raised when Kenya was cited

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<sup>7</sup> Ogormegbunem D, 'The changing nature of the family and its duty as foundation for morals and sustenance of core societal value' 2 *Journal of Scientology and Social Work* 1, 2014, 195-202. See also Nam C, 'The concept of the family: Demographic and genealogical perspectives' *Sociation Today*, 2004, 1.

<sup>8</sup> Theodore T, 'Perfect friendship in Aristotle's 'Nicomachean ethics' ', University of Illinois Press, 1979, 66. See also Hughes G, 'The concept of dignity in the universal declaration of human rights' 39 *The Journal of Religious Ethics* 1, 2011.

<sup>9</sup> National Crime Research Centre, '*Human trafficking in Kenya*', June 2015, 39.

<sup>10</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective,' 307.

<sup>11</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective,' 307.

<sup>12</sup> Article 53(2), *Constitution of Kenya* (2010).

<sup>13</sup> UNGA, *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*, UN A/Res/41/85 3 December 1986. See also United Nations, *Convention of the rights of the child*, Art. III (1989). See also African Charter on the Rights and Welfare of the Child, 1990.

<sup>14</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September- <<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

by the Global Report on Trafficking of Persons, where it was found to be “a source, transit and destination country for men, women and children subjected to forced labour and sexual exploitation, violence and human trafficking.” Intercountry child adoption had become a loophole for child trafficking.<sup>15</sup> This emerging issue necessitated the 2014 moratorium on all adoption processes within the country in an attempt to address the matter.<sup>16</sup> However, the number of “lost” children right after they are adopted keeps rising as days go by.<sup>17</sup>

Contrary to its initial aim, the adoption process has been used to create market for illegal transnational adoptions.<sup>18</sup> Despite the 2014 moratorium, Kenya remains one of the leading sources for children, who have unfortunately been commoditized and are being offered to the highest bidder.<sup>19</sup> All this is guised as formal intercountry adoption processes with the help of fraudulent documents by state agents out to earn a few extra coins from the adoptive parents.<sup>20</sup>

## STATEMENT OF THE PROBLEM

Intercountry child adoption has become a loophole for child trafficking.<sup>21</sup> The government of Kenya has improved on its endeavours in combatting human trafficking, basing on the 2018 Trafficking Report by the United States. From the report, however, the government is yet to meet the minimum standards provided in the Trafficking in Persons protocol,<sup>22</sup> which are meant to aid

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<sup>15</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>16</sup> Reporter N, ‘Maraga to receive report on abuse of adoption process’ Daily Nation, 22 July 2018-  
<https://www.nation.co.ke/news/Maraga-to-receive-report-on-abuse-of-adoption-process/1056-4675346-v4c3lrz/index.html>>- on 24 November 2018.

<sup>17</sup> Reporter N, ‘Maraga to receive report on abuse of adoption process’ Daily Nation, 22 July 2018-  
<https://www.nation.co.ke/news/Maraga-to-receive-report-on-abuse-of-adoption-process/1056-4675346-v4c3lrz/index.html>>- on 24 November 2018.

<sup>18</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>19</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>20</sup> Reporter N, ‘Experts want tough laws on lucrative adoption business’ Daily Nation, 23 September 2018-<  
<https://www.pressreader.com/>>- on 24 November 2018.

<sup>21</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>22</sup> UNGA, *Protocol to prevent, suppress and punish trafficking in persons especially women and children, supplementing the United Nations convention against transnational organised crime*, UN A/Res/55/25 15 November 2000.

in the elimination of human trafficking.<sup>23</sup> Kenya acceded to this protocol on 5 January 2005 and is therefore bound by its provisions. Article 9, to be precise, demands that all parties to the protocol take sufficient measures to combat human trafficking. Kenya's insufficient effort to adhere to the protocol is evidenced by emerging cases in the child adoption sector.

The government, through authorised institutions such as the Charitable Children Institutions and adoption agencies, has the responsibility of overseeing adoption processes and looking into the welfare of the child throughout the process. The citizens have a legitimate expectation that the process is juridical to the unfortunate children, giving them new families and a place to call home; an act that restores their human dignity as political animals.<sup>24</sup> In as much as Kenya is said to have improved in its fight against human trafficking, many innocent lives remain at stake as perpetrators use, to their advantage, the loopholes in law and generally the adoption process.<sup>25</sup>

## **HYPOTHESIS OF THE STUDY**

This research is based on the following hypothesis:

Intercountry adoptions have increased vulnerability of the children involved to trafficking, and the government of Kenya has failed in its duty to uphold their best interests.

## **RESEARCH QUESTIONS**

This study seeks to answer the following questions:

- i. What are the mechanisms set up by the Kenyan government in order to curb child trafficking through intercountry adoptions?
- ii. Have these mechanisms been effective in upholding the best interest of the child principle?
- iii. What loopholes in adoption laws are perpetrators using to promote child trafficking in Kenya through intercountry adoptions?

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<sup>23</sup> Kakah M, 'Yatani pushes for adoption law review to curb child trafficking' Daily Nation, 11 November 2018- <https://www.nation.co.ke/news/Yatani-calls-for-law-review-to-curb-child-trafficking/1056-4846092-er1m3ez/index.html> on 1 December 2018.

<sup>24</sup> Theodore T, 'Perfect friendship in Aristotle's 'Nicomachean ethics' ', University of Illinois Press, 1979, 66. See also Hughes G, 'The concept of dignity in the universal declaration of human rights' 39 *The Journal of Religious Ethics* 1, 2011.

<sup>25</sup> Kakah M, 'Yatani pushes for adoption law review to curb child trafficking' Daily Nation, 11 November 2018- <https://www.nation.co.ke/news/Yatani-calls-for-law-review-to-curb-child-trafficking/1056-4846092-er1m3ez/index.html> on 1 December 2018.

- iv. What strategies should the government of Kenya put in place to enforce the set mechanisms to combat child trafficking through intercountry adoptions?

## **OBJECTIVES OF THE STUDY**

The general objective of the study is to examine the role played by government in addressing the problem of child trafficking through intercountry adoptions and provide recommendations to improve mechanisms set to address the matter, in order to promote the welfare of the child.<sup>26</sup>

The specific objectives of this research are:

- i. To analyse the mechanisms set up by the government of Kenya in the execution of intercountry adoptions with regards to upholding the welfare of the child.
- ii. To assess the effectiveness of the Constitution of Kenya 2010, the Children Act 2001, the Child (Adoption) Regulations of 2005 and other legislations applicable in Kenya that are aimed at upholding the child's best interests.
- iii. To identify loopholes in the adoption process that perpetrators use to promote child trafficking through intercountry adoptions.
- iv. To recommend appropriate strategies that would help improve mechanisms set by government in combatting child trafficking.

## **JUSTIFICATION OF THE RESEARCH**

Despite extensive research having been done on human trafficking generally, this research narrows down specifically to child trafficking through intercountry adoption processes in Kenya. Even after the 2014 moratorium and the setting up of a committee to look into the matter, cases of child trafficking are still trending through adoption.<sup>27</sup> Citizens, adoption agencies and other agents of the government are still carrying out illegal adoptions. Due to the high demand for children to be adopted, and the now booming business, adoption institutions are under pressure to keep producing adoptees, incentivised by the tones of money prospective parents are willing

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<sup>26</sup> UNGA, *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*, UN A/Res/41/85 3 December 1986.

<sup>27</sup> Reporter N, "Maraga to receive report on abuse of adoption process" Daily Nation, 22 July 2018- <https://www.nation.co.ke/news/Maraga-to-receive-report-on-abuse-of-adoption-process/1056-4675346-v4c3lrz/index.html>>- on 24 November 2018.

to pay.<sup>28</sup> The matter becomes even worse as the agents barely take time to carry out background research on the children before declaring that they have no family and are therefore available for adoption.<sup>29</sup> Furthermore, the perpetrators are willing to part with a lot of money to hasten and skip some procedural requirements, using forged documents and other illegal means of child adoption.<sup>30</sup>

This research is relevant as it calls out the perpetrators involved in the syndicate, most of whom, unfortunately, work in government-authorized institutions.<sup>31</sup> The paper draws a link between intercountry adoption and child trafficking, going further to point out the loopholes in adoption laws that criminals use to promote child trafficking.<sup>32</sup> The research will be helpful to judicial officers since it highlights the rogue institutions and government officers that ought to be investigated regarding the matter. Furthermore, the paper provides recommendations that would help the government of Kenya to efficiently combat child trafficking.

## THEORETICAL FRAMEWORK

This research is premised upon three supporting theories. The dignitary legal theory brings to the fore the necessity of intercountry child adoption as an alternative mode of family care.<sup>33</sup> The research hypothesis, on the other hand, is backed by the social contract theory<sup>34</sup> and the philosophy of African communitarianism,<sup>35</sup> both of which explain the role of the government of Kenya in upholding the best interest of the child principle.

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<sup>28</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September- <<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

<sup>29</sup> Kamau J and Gitau G, 'How fake child adoption syndicate steals babies from desperate mums' 1 April 2019- <<https://www.nation.co.ke/news/How-fake-child-adoption-syndicate-steals-babies-/1056-5050496-k9lhrm/index.html>>- on 24 May 2019.

<sup>30</sup> Kakah M, 'Yatani pushes for adoption law review to curb child trafficking' Daily Nation, 11 November 2018- <<https://www.nation.co.ke/news/Yatani-calls-for-law-review-to-curb-child-trafficking/1056-4846092-er1m3ez/index.html>> on 1 December 2018.

<sup>31</sup> Kamau J and Gitau G, 'How fake child adoption syndicate steals babies from desperate mums' 1 April 2019- <<https://www.nation.co.ke/news/How-fake-child-adoption-syndicate-steals-babies-/1056-5050496-k9lhrm/index.html>>- on 24 May 2019.

<sup>32</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective,' 314-319.

<sup>33</sup> Mathews v Eldridge: Three Factors in Search of a 'Theory of Value', (1976).

<sup>34</sup> B. Bix, *Jurisprudence: Theory and Context*, 5 ed, Sweet and Maxwell, London, 2009, 142 -143.

<sup>35</sup> Chemhuru M, 'Gleaning the social contract theory from the African communitarian philosophy' 36 *South African Journal of Philosophy* 4, 2017.

## LITERATURE REVIEW

Judith Schachter, in her article, gives a history of the family and how intercountry child adoption came into place.<sup>36</sup> This is closely related to another article by David Smolin, who goes on to explain how, over time, intercountry child adoption became a form of child trafficking.<sup>37</sup> Both articles draw the link between intercountry adoption and child trafficking in detail, which is an essential part of research in providing historical context to the reader.

The link between intercountry adoption and child trafficking is, however, best brought out by Mary Ann Davis. She explains the history of how these adoptions came about in what she terms as the four waves of intercountry adoption. The first wave is referred to as ‘families for children’, where she talks about the push and pull factors in sending and receiving factors respectively.<sup>38</sup> Push factors were those which prompted parents to give up their children to foreign countries, for example, due to economic, social or political constraints.<sup>39</sup> Pull factors on the other hand were the added advantage developed countries had over developing countries, which increased their suitability to receive adoptees.<sup>40</sup> Such advantages would be factors such as political stability and a thriving economy.<sup>41</sup>

With the example of the United States as a receiving country, Davis explains the first wave. Her article explains how between 1948 and 1962, war was a push factor in Europe and Asia.<sup>42</sup> Due to the loss of numerous lives, many children were orphaned and needed families to take care of them. Since the economy in the US was thriving at the time, most of the children orphaned after

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<sup>36</sup> Schachter J, ‘Intercountry adoption/ Global migration: A Pacific perspective.’

<sup>37</sup> Smolin D, ‘Intercountry adoption as child trafficking’ 39 *Valparaiso University Law Review* 2, 2004, 281-325.

<sup>38</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 786.

<sup>39</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 785.

<sup>40</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 785.

<sup>41</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 785.

<sup>42</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 785.

the war were adopted into the country.<sup>43</sup> The entire time, these adoptions were being managed by privatised non-governmental agencies, which brought great risk of ‘baby selling.’<sup>44</sup>

Davis calls the second wave ‘supply driven adoptions.’<sup>45</sup> By this time, the demand for adoptees was increasing at an alarming rate in the US. From 50,000 adoptions in 1944, the trend had risen to 175,000 adoptions per year by 1970.<sup>46</sup> However, supply in the baby market dropped following various societal changes. For one, the case of *Roe v Wade* legalised abortions and therefore unwanted pregnancies could legally be terminated as opposed to mothers having to give birth then go on to give the children up for adoption as it was done in the past.<sup>47</sup> Additionally, single parenthood was slowly being embraced which reduced the number of children being offered for adoption.<sup>48</sup> To add on to that, the economy of the sending countries had stabilised after the war so there were minimal push factors.<sup>49</sup> By 1990, intercountry adoption rates in the US had dropped to 118, 138 per year.<sup>50</sup> The alternative sending countries then became those in Central and South America which stabilised the supply of adoptees, the syndicate still being driven by privatised non-governmental agencies.<sup>51</sup> Adoptive parents would pay up to \$60, 000 per child at the time, an amount which was enough to exploit the impoverished citizens of the two American regions.<sup>52</sup> The high demand proved intercountry adoption to be a booming business thus

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<sup>43</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 785.

<sup>44</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 786.

<sup>45</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 786.

<sup>46</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 786.

<sup>47</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 786.

<sup>48</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 786.

<sup>49</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 786.

<sup>50</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 786.

<sup>51</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 787.

<sup>52</sup> Davis M, ‘Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?’ 45 *The International Migration Review* 4, 2011, 787.

prompting lawyers, in collusion with doctors and nurses, to begin unduly influencing mothers to give up their children for adoption.<sup>53</sup>

In the third wave, sending countries in Europe were transitioning from communism to capitalism in the 1980s and 1990s.<sup>54</sup> This destabilised them both economically and politically, especially in Eastern Europe. Adoptions were being highly influenced by the media which broadcast the poor living conditions of children in the European countries. Upon adoption, however, the adoptees would be exploited once they reached the US.<sup>55</sup> This exploitation was a result of the institutionalised care of vulnerable children.<sup>56</sup> By the fourth wave, more sending countries such as China were being brought into the syndicate. With time, China also embraced capitalism and instituted the one-child policy, with a preference to male children. The female children were therefore given out for adoption into the US.<sup>57</sup>

Towards the end, the article points out the possibility of a fifth wave being in existence, sending countries being based in Africa this time. From a study between 1996 to 2009, research showed the percentage of intercountry adoption from African countries to the US as follows: Ethiopia 67%, Liberia 12%, Nigeria 5%, Ghana 3%, Sierra Leone, Kenya and Uganda each 2%, South Africa and Cameroon each 1% and the other countries producing the remaining 4%.<sup>58</sup> The pushing factors in these countries included high birth rates, economic constraints, demographic factors and also the media, which overly portrayed African children living in impoverished conditions.<sup>59</sup> The white man then came in as a 'saviour' to improve the living conditions of the broadcast vulnerable children.<sup>60</sup> This saviour mentality is quite similar to Makau Mutua's 'savage, victim and saviour' metaphor, as we see the white man coming to 'rescue' the African

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<sup>53</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 786.

<sup>54</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 788.

<sup>55</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 788.

<sup>56</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 788.

<sup>57</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 789.

<sup>58</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 795.

<sup>59</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 796.

<sup>60</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 804.

child from immense poverty in this case.<sup>61</sup> States are seen to be vessels of savagery against the victims of a naive society, where citizens are led to believe that intercountry adoption will salvage the children and help restore their dignity.<sup>62</sup> In real sense, the process is being used as a guise for child trafficking; a cultural deviation from human rights.<sup>63</sup>

Davis' article is important to this research as it brings out the link between intercountry adoption and child trafficking. She brings out the fact that there is indeed a possibility of the syndicate being carried out in Africa, what she terms as the fifth wave. This part is essential as it acts as a whistle blower, this research coming in to then prove Davis' allegations. This research goes on to prove that the fifth wave of intercountry adoption exists in Kenya and is an ongoing business that continues to be a threat on the best interests of the child principle.

Additionally, Innocenti Research Centre provides an insight on the legal situation regarding trafficking in persons in Africa through one of its reports.<sup>64</sup> The report raises the loopholes in law that increase vulnerability to child trafficking; that when defining child trafficking, the Trafficking Protocol only deems a child to have been trafficked when exploitation occurs.<sup>65</sup> From this, it is inferred that a child illegally adopted from one country to another cannot be said to have been trafficked unless they are being exploited for sex, labour or other reasons in the receiving country. In addition to that, the report finds that only 3 African countries had at the time ratified The Hague Convention on Protection of Children and Co-operation Report of Intercountry Adoption.<sup>66</sup> This demonstrates the inadequacy of information on intercountry adoptions and the dangers they pose to the children involved.<sup>67</sup> To date, Kenya is still not a party

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<sup>61</sup> Mutua M, 'Savages, victims and saviours: The metaphor of human rights' 42 *Harvard International Law Journal* 1, 2001.

<sup>62</sup> Mutua M, 'Savages, victims and saviours: The metaphor of human rights' 42 *Harvard International Law Journal* 1, 2001, 201-209.

<sup>63</sup> Mutua M, 'Savages, victims and saviours: The metaphor of human rights' 42 *Harvard International Law Journal* 1, 2001.

<sup>64</sup> UNICEF Innocenti Research Centre, '*Trafficking in human beings, especially women and children in Africa*', 2005.

<sup>65</sup> UNICEF Innocenti Research Centre, '*Trafficking in human beings, especially women and children in Africa*', 2005, 3.

<sup>66</sup> UNICEF Innocenti Research Centre, '*Trafficking in human beings, especially women and children in Africa*', 2005, 7.

<sup>67</sup> UNICEF Innocenti Research Centre, '*Trafficking in human beings, especially women and children in Africa*', 2005, 7.

to the Hague Convention.<sup>68</sup> The report generally addresses human trafficking in Africa and merely defines illegal adoptions.<sup>69</sup> It does not discuss the legal situation of intercountry adoptions in depth, which is one of the objectives of this research.

The National Crime Research Centre's Report of 2015 generally explains the legal situation of human trafficking in Kenya, pointing out that child trafficking is the most prevalent form of trafficking at 39%.<sup>70</sup> The report goes on to explain that the country has an outstanding 60.4% rate of external trafficking (meaning the trafficking of persons from Kenya to other countries) and 33.8% rate of internal trafficking (meaning the trafficking of persons from one county to another within the country).<sup>71</sup> With information provided by the report, one of the objectives of this study is to investigate how the issue can be addressed by the government of Kenya in a way that would give priority to the best interests of the child.

Furthermore, Ethan Kapstein's work explains how corruption has allowed cartels to buy and, at times, abduct children from their impoverished biological parents and eventually selling them off to prospective adoptive parents.<sup>72</sup> In analysing mechanisms set up by countries to curb child trafficking, Kapstein assesses their effectiveness. For instance, Cambodia and Romania instituted moratoriums on adoptions, an act that did not solve the problem but instead shifted the baby market to other countries such as Russia and China, who became the new sending countries.<sup>73</sup> In the end, orphaned children in Cambodia and Romania ended up being disadvantaged as their chance at finding new families was lost as a result of the moratoriums.<sup>74</sup> This discussion is important as a similar matter is handled in Chapter 4 on the analysis of Kenya's 2014 moratorium on resident and intercountry adoptions; Kapstein brings to the fore the ineffectiveness of the moratorium in upholding the best interests of the child as its primary aim. In a different vein, the article points out other matters discussed in this research such as the falsification of documents, kidnapping, buying and selling of children among other criminal

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<sup>68</sup> <https://www.hcch.net/en/states/hcch-members> on 18 February 2019.

<sup>69</sup> UNICEF Innocenti Research Centre, *Trafficking in human beings, especially women and children in Africa*, 2005, 2.

<sup>70</sup> National Crime Research Centre, *Human trafficking in Kenya*, June 2015, 27.

<sup>71</sup> National Crime Research Centre, *Human trafficking in Kenya*, June 2015, 29.

<sup>72</sup> Kapstein E, 'The baby trade' 82 *Council of Foreign Affairs* 6, 2003, 115.

<sup>73</sup> Kapstein E, 'The baby trade' 82 *Council of Foreign Affairs* 6, 2003, 115.

<sup>74</sup> Kapstein E, 'The baby trade' 82 *Council of Foreign Affairs* 6, 2003, 115.

offences which are mirrored in the discussion of Kenya's legal situation regarding intercountry adoption.<sup>75</sup>

A more recent article on human trafficking in Ethiopia adds gender discrimination to the push factors initially outlined by Davis and the demand for cheap labour as a pull factor.<sup>76</sup> Like Davis, the authors reiterate commercial exploitation, where parents feel they cannot sustain the livelihood of their children and subsequently opt to give them up for adoption.<sup>77</sup> Most do this with the hope that the adoptive parents will provide a better life for their children but that is often not the case. The article brings out a major discussion regarding the loopholes in law promoting child trafficking through intercountry adoptions; the legal uncertainty behind the definition of human trafficking is raised, bringing the question of whether intercountry adoption meets that definition, considering the aspect of exploitation for commercial gain is not always proven in such adoptions.<sup>78</sup> This benefits the research as it partly answers to the research question regarding the loopholes in adoption laws promoting child trafficking. This research moves further to highlight more loopholes at national level being used to the advantage of the perpetrators.

## RESEARCH METHODOLOGY

The research relied on a qualitative analysis of intercountry child adoption in Kenya. In assessing the legal situation of child trafficking, a deductive approach was taken; involving the use of a theoretical framework in assessing case studies and thereafter drawing a conclusion. Information collection mainly entailed desktop research, including institutional reports, published scholarly articles, journals, theses and highlighted case studies from online newspapers. For enhanced reliability of these sources, it was essential to include a wide variety of the online sources. This also helped provide deeper insights on the issue at hand.

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<sup>75</sup> Kapstein E, 'The baby trade' 82 *Council of Foreign Affairs* 6, 2003, 119.

<sup>76</sup> Beck D, Choi K, Munro-Kramer M and Lori J, 'Human trafficking in Ethiopia: A scoping review to identifying gaps in service delivery, research and policy' 18 *Sage Journals* 5, 2017, 532.

<sup>77</sup> Beck D, Choi K, Munro-Kramer M and Lori J, 'Human trafficking in Ethiopia: A scoping review to identifying gaps in service delivery, research and policy' 18 *Sage Journals* 5, 2017, 533.

<sup>78</sup> Beck D, Choi K, Munro-Kramer M and Lori J, 'Human trafficking in Ethiopia: A scoping review to identifying gaps in service delivery, research and policy' 18 *Sage Journals* 5, 2017, 540.

## **LIMITATIONS OF THE STUDY**

Majority of the case studies were reported in newspaper articles and not officially-filed court cases. This was a big challenge during the research especially with regards to their credibility. To counter this, it was necessary that a wide variety of resources be included to provide deeper insights and a better understanding of the problem at hand. Other than this, the research had no limitations.

## **CONCLUSION**

This chapter serves an introductory role to the research; it provides a background and statement of the problem, going on to list the research questions and objectives to be tackled extensively in subsequent chapters. Moreover, chapter one illustrates the approach taken in conducting the research, giving reasons for the choice of research methodology. It also gives a highlight of the theoretical framework upon which the hypothesis is based, thereafter providing a substantive literature review relied on during the research. This research gives additional information that may have not been dealt with by the quoted authors, by answering the four research questions throughout the chapters.

## CHAPTER 2

### THEORETICAL AND CONCEPTUAL FRAMEWORK

#### INTRODUCTION

Having given a brief introduction of the research in chapter 1, this chapter goes into supporting theories regarding the issue at hand. The first theory vividly explains why children's right to have their best interests upheld is attributable to them, with a focus on human dignity. The second and third theories then go on to explain the origin of government responsibility; showing how the government has a role in protecting the best interests of the child in the adoption process. The two theories further illustrate how and why Kenyan citizens have a legitimate expectation of the government to uphold this duty.

#### DIGNITARY LEGAL THEORY

This research will be backed up by the dignitary legal theory, which aims at the preservation of human dignity. The theory was discussed by Professor Jerry Marshaw with reference to the case of *Mathews v Eldridge*.<sup>79</sup> In this case, Eldridge had been recognised as a person with disability due to chronic anxiety and back strain. Because of this he used to receive certain benefits, which were, however, terminated on short notice. This was done contrary to the Social Security Administration requirements, which demanded that a determination be made only after an evidentiary hearing.<sup>80</sup>

Criticising this decision by the Supreme Court, Marshaw provides that administrative law ought to look out for the dignity of the law's subjects as opposed to merely upholding the interests of the State. This is to mean that in Eldridge's case for instance, his dignity as a person with disability should be considered despite the court's decision to look out for the country's financial welfare. This theory is appropriate for the research as it addresses the main issue which is the government's responsibility to look out for the child's best interests during the adoption process as a way of preserving their dignity.<sup>81</sup>

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<sup>79</sup> *Mathews v Eldridge* (1976), The Supreme Court of the United States.

<sup>80</sup> *Mathews v Eldridge: Three Factors in Search of a 'Theory of Value'*, (1976), 28-44.

<sup>81</sup> *Mathews v Eldridge: Three Factors in Search of a 'Theory of Value'*, (1976), 44.

## **SOCIAL CONTRACT THEORY**

Thomas Hobbes defines the social contract theory as ‘the mutual transfer of rights’<sup>82</sup>, in that the citizens surrendered their rights to protect themselves and their property to the ruling government, which on its part would protect these rights from breach by third parties. This was all done for the sake of maintaining peace and order, as Hobbes believed that all men were equal in terms of skills and strength such that ‘the weakest has strength to kill the strongest, either by secret machination or by confederacy with others’. Due to the possibility of anarchy in the state of nature, there was need to enter the contract.<sup>83</sup> The government therefore had to take up responsibility over the rights and fundamental freedoms of its citizens on their behalf, with the aim of preserving individual human liberties and private property, which were by John Locke considered inalienable.

This theory is relevant to the research as the citizens of Kenya have the legitimate expectation that it is the government’s responsibility to uphold their rights and fundamental freedoms. In relation to the adoption process, set legislations provide that in all undertakings concerning a child, first priority is to be given to the child’s best interests; that even as the government carries out adoption procedures through its elected agencies and institutions, the welfare of the child should be protected at all times.

Backed by this theory, the study will show the role of the State in combatting child trafficking disguised in transnational adoption processes. The theory explains the application of the social contract theory between the relation of the State and its subjects regarding the issue at hand, that is, the rights of the child that are to be protected by the State with the aim of preserving social order. With this theory, the research explains why citizens have a legitimate expectation that the State should uphold the child’s best interests throughout the adoption process.

## **AFRICAN COMMUNITARIAN PHILOSOPHY**

Closer to home is the African communitarian philosophy. This theory is closely related to Hobbes’ social contract theory, but is in the context of the African child. The theory provides for the creation of a communitarian structure of existence, with the aim of promoting the common

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<sup>82</sup> Bix B, *Jurisprudence: Theory and Context*, 5 ed, Sweet and Maxwell, London, 2009, 142- 143.

<sup>83</sup> Chemhuru M, ‘Gleaning the social contract theory from the African communitarian philosophy’ 36 *South African Journal of Philosophy* 4, 2017, 506.

good and human welfare.<sup>84</sup> This is to mean that the rights of individuals in a societal context were held by the community as a whole, and that every member of the said society had the responsibility of upholding these rights with the help of elected authorities such as the council of elders. Other than giving an individual a sense of belonging, the society guaranteed the protection of his or her rights and fundamental freedoms.<sup>85</sup> As stated by Kwame Gyekye, a Ghanaian philosopher, “because the tortoise has no clan, he has already made his casket”.<sup>86</sup>

The theory proposes an Ubuntu style of government; a humane style of government based on collective solidarity and communality rather than individualism and particularity.<sup>87</sup> The term Ubuntu, originally derived from a Nguni aphorism ‘*Umntu ngumuntu ngabantu*’, basically means that a person is a person through other persons.<sup>88</sup> The notion is integrated in the Africans’ socio-cultural life, members of the community believing in group solidarity, humanity and togetherness.<sup>89</sup> Being a social contract of mutual responsibility and accountability, the individuals all have a responsibility towards each other.<sup>90</sup>

The philosophy of Ubuntu is expressed all around Africa, locally referred to as ‘*utu*’ in Kenya; a Swahili term meaning ‘humanness’.<sup>91</sup> This communitarian way of thinking is, among other ways, expressed in the country’s national anthem. Going by the third stanza:

*Natujenge taifa letu*

*Ee, ndio wajibu wetu*

*Kenya istahili heshima*

*Tuungane mikono*

*Pamoja kazini*

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<sup>84</sup> Chemhuru M, ‘Gleaning the social contract theory from the African communitarian philosophy’ 36 *South African Journal of Philosophy* 4, 2017, 506.

<sup>85</sup> Chemhuru M, ‘Gleaning the social contract theory from the African communitarian philosophy’ 36 *South African Journal of Philosophy* 4, 2017, 514.

<sup>86</sup> Chemhuru M, ‘Gleaning the social contract theory from the African communitarian philosophy’ 36 *South African Journal of Philosophy* 4, 2017, 509.

<sup>87</sup> Nzimakwe T, ‘Practising Ubuntu and leadership for good governance: The South African and continental dialogue’ 7 *African Journal of Public Affairs* 4, 2014, 30.

<sup>88</sup> Oppenheim C, ‘Nelson Mandela and the power of Ubuntu’ 3 *Religions* 2, 2012, 369.

<sup>89</sup> Oppenheim C, ‘Nelson Mandel and the power of Ubuntu,’ 370.

<sup>90</sup> Oppenheim C, ‘Nelson Mandela and the power of Ubuntu,’ 370.

<sup>91</sup> Oppenheim C, ‘Nelson Mandel and the power of Ubuntu,’ 370.

*Kila siku tuwe na shukrani.*<sup>92</sup>

The anthem encourages the citizens to work together towards building a greater nation, that it is the duty of each and every individual to work towards the achievement of this goal. This is a communitarian way of thinking, that every individual in society be held accountable, which in Kenya's context includes the citizens and also those elected in power to uphold their rights. The government of Kenya is not an inanimate body. It is controlled by Kenya's very own citizens, elected or appointed by its very own people.

Furthermore, since the communitarian philosophy is intertwined with social and political thinking, the citizens as well as the government make up society and both therefore have a role to play.<sup>93</sup> The theory is relevant to this research as it explains a humanist performance kind of system that is expected of the government.<sup>94</sup> In other words, it explains the government's innate duty to uphold the child's best interests in overseeing and facilitating intercountry adoption processes.<sup>95</sup>

## CONCLUSION

From the three listed theories, children in the adoption process are entitled to the protection of their best interests. Bearing in mind the fact that they are human beings with dignity naturally embedded in their nature, having their rights abused would demean their human dignity. As part of the society, the government has a duty to uphold their best interests as it is expected of them by each and every citizen, drawing from the spirit of Ubuntu as expressed in African communities.

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<sup>92</sup> <http://www.kenyabrussels.com/index.php?menu=2&leftmenu=23&page=41> on 2 February 2019.

<sup>93</sup> Chemhuru M, 'Gleaning the social contract theory from the African communitarian philosophy' 36 *South African Journal of Philosophy* 4, 2017, 511.

<sup>94</sup> Khomba J, 'Redesigning the balanced scorecard model: An African perspective' Published, University of Pretoria, Pretoria, 2011, 126.

<sup>95</sup> Oppenheim C, 'Nelson Mandela and the power of Ubuntu,' 370.

## CHAPTER 3

### CHILD TRAFFICKING GUISED BEHIND INTERCOUNTRY ADOPTION

#### INTRODUCTION

Through the review and analysis of written works, this chapter shows the link between intercountry adoption and child trafficking. With examples of other countries such as the United States and the Pacific Island countries as written by Judith Schachter, the chapter illustrates how intercountry adoption moved from being a virtuous process to a form of child trade that has created market for child trafficking in the first section.<sup>96</sup> This part regards the dignitary legal theory, showing how falsified adoptions have a negative impact on the dignity of the child; losing ties with their biological families and also at the point where they are exploited to the benefit of the transactors.<sup>97</sup> The second part takes an economic approach of the same using Richard Posner's article on the adoption market.<sup>98</sup> The chapter goes on to give examples of the same in the Kenyan context, answering the second research question by showing the ineffectiveness of mechanisms set to protect the best interests of the child.<sup>99</sup> The third section then draws a conclusion of the chapter.

#### INTERCOUNTRY ADOPTION AS THE MODERN DAY CHILD TRAFFICKING

Smolin, in his article, explains how intercountry adoption is a form of child trafficking.<sup>100</sup> He does this by assessing the vice from an ethical point of view where he describes intercountry adoption as a conditional good.<sup>101</sup> This is so basing on the initial intentions that led to the introduction of the aforementioned form of adoption; in that it was introduced to transfer children from poor nations to rich nations.<sup>102</sup> This act was aimed at protecting the child's best interests, since in the receiving country the child would be able to grow in more favourable living conditions as compared to their countries of origin.<sup>103</sup> However, over time, intercountry

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<sup>96</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective,' 314-319.

<sup>97</sup> Kapstein E, 'The body trade' 82 *Council on Foreign Affairs* 6, 2003, 119.

<sup>98</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987.

<sup>99</sup> Thiong'o M and Otieno R, 'Kenyan government bans adoption of children by foreigners' Standard Digital, 29 November 2014 -<<https://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners>>- on 24 November 2018.

<sup>100</sup> Smolin D, 'Intercountry adoption as child trafficking' 39 *Valparaiso University Law Review* 2, 2004, 281-325.

<sup>101</sup> Smolin D, 'Intercountry adoption as child trafficking' 39 *Valparaiso University Law Review* 2, 2004, 286.

<sup>102</sup> Smolin D, 'Intercountry adoption as child trafficking' 39 *Valparaiso University Law Review* 2, 2004, 283.

<sup>103</sup> Smolin D, 'Intercountry adoption as child trafficking' 39 *Valparaiso University Law Review* 2, 2004, 283.

adoption has degenerated into illicit child trafficking with the increase in demand for children by receiving countries, reducing the act to merely a form of transaction, thus lending itself to abuse.<sup>104</sup>

Like Smolin,<sup>105</sup> Judith Schachter explains the history behind intercountry adoptions and how they came into place.<sup>106</sup> With the example of Pacific Islander Migration into the United States of America, she explains how children would migrate into the US, separated from their parents in order to find better living conditions.<sup>107</sup> In the receiving country, they would get adopted into new families and an agreement would be made between their biological and adoptive parents. This form of migration was eventually formalized into what is now intercountry adoption.<sup>108</sup> Over time, the process was commercialized by adoptive parents paying nearly \$14,000 per child thus creating a demand for more and more children from the Pacific.<sup>109</sup> Schachter's article is relevant to this research as it demonstrates how intercountry adoptions turn from being acts of justice to mere commoditization of children. The article also helps in explaining the dangers posed by this form of adoption to the welfare of the children involved.<sup>110</sup>

Moving closer to home, the fifth wave of intercountry adoption as explained by Mary Ann Davis, highlights the existence of external child trafficking in African countries.<sup>111</sup> She mentions several countries such as Ethiopia, Liberia, Nigeria, Ghana and Kenya, only to mention but a few.<sup>112</sup> Her article takes a demographic approach in explaining some of the pushing factors promoting the syndicate in the quoted countries, which is important in this chapter's discussion as read with Chapter one's extensive literature review on the same.<sup>113</sup>

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<sup>104</sup> Smolin D, 'Intercountry adoption as child trafficking' 39 *Valparaiso University Law Review* 2, 2004, 325.

<sup>105</sup> Smolin D, 'Intercountry adoption as child trafficking' 39 *Valparaiso University Law Review* 2, 2004.

<sup>106</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective' 18 *The Asia Pacific Journal of Anthropology* 4, 2017, 307.

<sup>107</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective,' 307-315.

<sup>108</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective,' 316.

<sup>109</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective,' 314.

<sup>110</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective,' 314-319.

<sup>111</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011.

<sup>112</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 795.

<sup>113</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011, 796.

## AN ECONOMIC ANALYSIS OF THE ADOPTION PROCESS

Having shown the link between intercountry adoption and child trafficking, the research goes further to demonstrate the dangers posed on the child's personal life. This is by use of Richard Posner's response to critics on his first article regarding the market approach.<sup>114</sup> Posner uses the analytical tools of economics to discuss intercountry adoption as a conditional good.<sup>115</sup> His approach is relevant to this research in the instances where he explains the principle of Pareto superiority.<sup>116</sup> The concept, though taking an economic approach in analysing intercountry adoption, demonstrates the dangers posed on the child's best interests.<sup>117</sup>

From an ethical point of view as illustrated by Schachter and Smolin, intercountry adoption is a conditional good depending on its end result.<sup>118</sup> In the case where a child is adopted in a transparent legal process and ends up living in better conditions than their birth family could provide, the end result is an inherent good. This is so, since the child is in a better position to flourish to their maximum potential thanks to their adoptive families. Furthermore, the adoption process in this case adheres to the requirements set by the law and is therefore legitimate. On the other side of the coin, intercountry adoption can become an evil in itself, in the case where the process of adoption is not as per the law, or in the case where the interests of the child are subsequently not met.<sup>119</sup>

Now from an economic point of view, the juridical nature of intercountry adoption is measured by looking at it from the scale of Pareto improvement.<sup>120</sup> In Posner's discussion on the concept of Pareto superiority, a transaction that makes at least one person better off and no one worse off increases social welfare and is therefore efficient.<sup>121</sup> The whole concept is some sort of beam balance whereby on one side of the scale lies the child's welfare while on the other side lies the transactor's welfare.<sup>122</sup> Pareto improvement can only be said to have been achieved where a state

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<sup>114</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987.

<sup>115</sup> Smolin D, 'Intercountry adoption as child trafficking' 39 *Valparaiso University Law Review* 2, 2004, 286.

<sup>116</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

<sup>117</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 59-72.

<sup>118</sup> Smolin D, 'Intercountry adoption as child trafficking' 39 *Valparaiso University Law Review* 2, 2004, 286.

<sup>119</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 59-72.

<sup>120</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

<sup>121</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

<sup>122</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

of equilibrium is achieved between the two scales.<sup>123</sup> However, where the transaction is not balanced, it is deemed to be inefficient as it is not Pareto superior.<sup>124</sup>

Giving the example of cases where children are trafficked and exploited through intercountry adoption, the children's welfare is diminished by more than it increases the transactors' welfare. The transactors- those having a hand in the kidnap schemes- benefit monetarily by selling off the children. The children involved, on the other hand, are eventually affected negatively since some are exploited or tortured. From the illustration, the scale tends to lean on the transactors' side, therefore creating an imbalance.

In his article, Ethan Kapstein gives the example of an Indian couple who sold their daughter for \$ 20.<sup>125</sup> The child was barely a month old and was eventually sold by the initial buyers to an orphanage where she was adopted by foreign nationals.<sup>126</sup> Using Posner's approach, on one side of the scale we have the welfare of the child. On the other side we have the welfare of the transactors- the buyers who sold her off to the orphanage. Pareto superiority posits that in this instance, a state of equilibrium ought to be achieved on both sides of the scale for it to be efficient.<sup>127</sup> However, the welfare of the child was compromised since she was separated from her birth parents and therefore lost biological ties with them.<sup>128</sup> On the other hand, those who sold her to the orphanage gained a larger sum than the mere \$20 they had given to the biological parents.<sup>129</sup> The concept of Pareto superiority requires that a transaction makes at least one person better off and no one worse off.<sup>130</sup> The transaction in this example, however, leaves the child worse off and diminishes her social welfare.<sup>131</sup> Therefore, the transaction is deemed to be inefficient.<sup>132</sup>

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<sup>123</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

<sup>124</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

<sup>125</sup> Kapstein E, 'The baby trade' 82 *Council on Foreign Affairs* 6, 2003, 119.

<sup>126</sup> Kapstein E, 'The baby trade' 82 *Council on Foreign Affairs* 6, 2003, 119.

<sup>127</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

<sup>128</sup> Kapstein E, 'The baby trade' 82 *Council on Foreign Affairs* 6, 2003, 119.

<sup>129</sup> Kapstein E, 'The baby trade' 82 *Council on Foreign Affairs* 6, 2003, 119.

<sup>130</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

<sup>131</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

<sup>132</sup> Posner R, 'The regulation of the market in adoptions' 67 *Boston University Law Review* 59, 1987, 60.

## CONCLUSION

To put it briefly, intercountry adoption has unfortunately been reduced to a thriving business by child traffickers who have commoditised the children involved in the initially-judicial process.<sup>133</sup> The indefinite moratorium on intercountry and resident adoptions was a promising response by the Kenyan government in an attempt to address the matter. However, existing cases of child trafficking despite the ban are proof enough that the mechanisms set are not as effective as expected in curbing child trafficking.<sup>134</sup>

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<sup>133</sup> Schachter J, 'Intercountry adoption/ Global migration: A Pacific perspective,' 314-319.

<sup>134</sup> Kamau J and Gitau G, 'How fake child adoption syndicate steals babies from desperate mums' 1 April 2019-<  
<https://www.nation.co.ke/news/How-fake-child-adoption-syndicate-steals-babies-/1056-5050496-k9lhrm/index.html>>- on 24 May 2019.

## CHAPTER 4

### A CRITIQUE ON THE ROLE OF THE KENYAN GOVERNMENT IN UPHOLDING THE CHILD'S BEST INTERESTS

#### INTRODUCTION

Having illustrated how intercountry adoption is being used as a loophole by perpetrators for child trafficking in Chapter 3, this part of the research goes on to give real life cases of falsified adoptions in Kenya. The chapter tackles the second and third research questions, illustrating how the government has fallen short in upholding the best interests of the child principle.<sup>135</sup> It emphasises on state responsibility, referring to the social contract theory and the philosophy of African communism.<sup>136</sup> While the government of Kenya is expected to protect its citizens, Chapter 4 shows how this has not been achieved. The chapter is divided into five sections, the first three being case studies in Kenya. The second section discusses the ineffectiveness of the 2014 moratorium while the last part draws a conclusion of the chapter.

#### KAYOLE SYNDICATE

Barely a year after the institution of the moratorium, cases of child trafficking were on the rise in Kayole.<sup>137</sup> The business was steered by kidnappers, prospective buyers and even health workers. In some instances, kidnappers would sell the children to infertile women, the whole process masked under falsified adoption documents.<sup>138</sup> In other cases, doctors and nurses would falsely lead mothers in maternity wards to believe that their newly born babies had died, only for them to be sold to the highest bidder.<sup>139</sup> The buyers, mostly couples, would go to the extent of placing

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<sup>135</sup> Article 53, *Constitution of Kenya* (2010).

<sup>136</sup> Chemhuru M, 'Gleaning the social contract theory from the African communitarian philosophy' 36 *South African Journal of Philosophy* 4, 2017.

<sup>137</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015- <<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>138</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015- <<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>139</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015- <<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

orders prior to the children being born.<sup>140</sup> This increasing demand for children led to the rise of costs per child, the entire business thriving day by day.<sup>141</sup>

These examples may not necessarily demonstrate child trafficking through intercountry adoptions in a vivid and sufficient way. However, a statement by an attorney with the Cradle Children Foundation helped shed some light on the matter.<sup>142</sup> She pointed out how poverty within the area promoted child trafficking through wrongful adoptions. Due to the high number of mothers living below the poverty line, most opted to sell their children to well off couples who could afford to raise them.<sup>143</sup> From one angle, this simply appears to be a case of a mother looking out for the best interests of her child, even if it means losing custody over them. Unfortunately, most of them, as put by the attorney, lacked knowledge on child trafficking.<sup>144</sup> The couples that often posed as well wishers ended up exploiting the children, girls being sold off as prostitutes on more than one occasion.<sup>145</sup>

## **PUMWANI BABIES IN BOXES**

Four years down the line, another case of health workers taking part in child trafficking at Pumwani Maternity Hospital was reported.<sup>146</sup> A surprise visit by Nairobi Governor shockingly led to the unearthing of some sort of ‘baby bank’ within the hospital.<sup>147</sup> Twelve bodies of newly born babies were discovered within the premises, wrapped in plastic bags and some packed in

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<sup>140</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>141</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>142</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>143</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>144</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>145</sup> Onyulo T, ‘Baby trafficking is a lucrative business in Kenya’ USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>146</sup> Wanjama P, ‘Alleged cost of baby swap at Pumwani Maternity Hospital’ 18 September 2018-<  
<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

<sup>147</sup> Wanjama P, ‘Alleged cost of baby swap at Pumwani Maternity Hospital’ 18 September 2018-<  
<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

carton boxes.<sup>148</sup> Further investigations revealed that the corpses were part of the baby swap business, whereby a mother would be told by midwives and doctors that her child had passed away; either due to still birth or death right after being born.<sup>149</sup>

As a way of selling the story, the body of a dead infant would be shown to her, leading the mother to believe that she had indeed lost her child.<sup>150</sup> What the mother was unaware of was the fact that her child had fallen victim of child trafficking, after being swapped with the corpses, the babies would be sold off to the prospective parents, boys going for approximately 10,000 Kenyan shillings while girls were sold for as much as 50,000 Kenyan shillings.<sup>151</sup> The whole scheme was hatched by doctors, nurses and midwives within the maternity wards.<sup>152</sup>

## THE BABY MARKET

In addition to that, another report in the same year revealed how intercountry adoption was being used to promote child trafficking.<sup>153</sup> Though similar to the case of Pumwani Hospital, the fingers were this time pointed, not at the medical profession, but at the legal profession. A news article by the Daily Nation showed how Charitable Children Institutions colluded with lawyers and the Judiciary at large in the child theft syndicate.<sup>154</sup>

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<sup>148</sup> Wanjama P, 'Alleged cost of baby swap at Pumwani Maternity Hospital' 18 September 2018-<  
<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

<sup>149</sup> Wanjama P, 'Alleged cost of baby swap at Pumwani Maternity Hospital' 18 September 2018-<  
<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

<sup>150</sup> Wanjama P, 'Alleged cost of baby swap at Pumwani Maternity Hospital' 18 September 2018-<  
<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

<sup>151</sup> Wanjama P, 'Alleged cost of baby swap at Pumwani Maternity Hospital' 18 September 2018-<  
<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

<sup>152</sup> Wanjama P, 'Alleged cost of baby swap at Pumwani Maternity Hospital' 18 September 2018-<  
<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

<sup>153</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September-<  
<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

<sup>154</sup> Kamau J and Gitau G, 'How fake child adoption syndicate steals babies from desperate mums' 1 April 2019-<  
<https://www.nation.co.ke/news/How-fake-child-adoption-syndicate-steals-babies-/1056-5050496-k9lhrm/index.html>>- on 24 May 2019.

The article brought to the fore the lucrative returns earned by lawyers who facilitated foreign adoptions. As legal fees, a lawyer would earn up to 700,000 Kenyan shillings.<sup>155</sup> This obviously being a well-paying business, some lawyers, driven by greed to bag as much money as possible, would go to great extents to earn an extra coin. This was done by them working together with Charitable Children's Institutions, each party having a role to play.<sup>156</sup> The institutions had the role of producing children while lawyers took care of the legal part of the process. The children in this case were those branded as 'lost' or 'abandoned'.<sup>157</sup>

The truth of the matter, however, was that very little was done by the Department of Children Services in tracing the families of these children.<sup>158</sup> Normally, adoption agencies are given a six - month window before they can declare them free for adoption.<sup>159</sup> The vicious children merchants, however, crudely justify the unsatisfactory searches with help from the judiciary.<sup>160</sup> Guising the whole trade under falsified documents and doctored adoption processes, the children are eventually trafficked.<sup>161</sup>

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<sup>155</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September-<  
<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

<sup>156</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September-<  
<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

<sup>157</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September-<  
<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

<sup>158</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September-<  
<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

<sup>159</sup> Kamau J and Gitau G, 'How fake child adoption syndicate steals babies from desperate mums' 1 April 2019-<  
<https://www.nation.co.ke/news/How-fake-child-adoption-syndicate-steals-babies-/1056-5050496-k9lhrm/index.html>>- on 24 May 2019.

<sup>160</sup> Kamau J and Gitau G, 'How fake child adoption syndicate steals babies from desperate mums' 1 April 2019-<  
<https://www.nation.co.ke/news/How-fake-child-adoption-syndicate-steals-babies-/1056-5050496-k9lhrm/index.html>>- on 24 May 2019.

<sup>161</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September-<  
<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

## THE MORATORIUM

An illustration of the vice pointed out in Smolin, Schachter and Posner's articles came to light when Kenya was found to be a "source, transit and destination country for men, women and children subjected to forced labour and sexual exploitation, violence and human trafficking" as put by the Global Report on Trafficking of Persons.<sup>162</sup> These findings are backed up by another report by the National Crime Research Centre, which goes on to explain the legal situation of human trafficking in Kenya. The report points out that child trafficking is the most prevalent form of trafficking at 39%.<sup>163</sup> It goes on to explain that the country has an outstanding 60.4% rate of external trafficking (meaning the trafficking of persons from Kenya to other countries) and 33.8% rate of internal trafficking (meaning the trafficking of persons from one county to another within the country).<sup>164</sup>

In response to the increasing cases of child trafficking through intercountry adoptions, the government in 2014 instated an indefinite moratorium on intercountry and resident adoptions.<sup>165</sup> In a letter by the then Labour Cabinet Secretary to all adoption agencies, the moratorium involved the revocation of licences to conduct intercountry adoptions.<sup>166</sup> Furthermore, the agencies were instructed to hand in the lists of all pending adoption applications and were also prohibited from placing any of the children under adoption. This would provide time for the government to review the adoption process, looking into the loopholes used by perpetrators in conducting the crime.<sup>167</sup> In addition to that, the moratorium was generally aimed at improving the adoption process in a way that would best safeguard the child's best interests.<sup>168</sup>

Almost a decade before the institution of the ban on adoption processes in Kenya, an insight was provided on the legal situation regarding trafficking in persons in Africa by Innocenti Research

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<sup>162</sup> Migiro K, 'Kenya launches committee to tackle human trafficking' Thomson Reuters Foundation, 10 July 2014-<<http://news.trust.org/item/20140710162342-gy3m7/>> on 24 November 2018.

<sup>163</sup> National Crime Research Centre, 'Human trafficking in Kenya', June 2015, 27.

<sup>164</sup> National Crime Research Centre, 'Human trafficking in Kenya', June 2015, 29.

<sup>165</sup> Thiong'o M and Otieno R, 'Kenyan government bans adoption of children by foreigners' Standard Digital, 29 November 2014 -<<https://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners>>- on 24 November 2018.

<sup>166</sup> *In the matter of baby RWB* (2017) eKLR.

<sup>167</sup> Thiong'o M and Otieno R, 'Kenyan government bans adoption of children by foreigners' Standard Digital, 29 November 2014 -<<https://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners>>- on 24 November 2018.

<sup>168</sup> *In the matter of baby RWB* (2017) eKLR.

Centre.<sup>169</sup> The report raised the loopholes in law that increase vulnerability to child trafficking; that when defining child trafficking, the Trafficking Protocol only deemed a child to have been trafficked when exploitation occurred.<sup>170</sup> From this, it was inferred that a child illegally adopted from one country to another could not be said to have been trafficked unless they were being exploited for sex, labour or other reasons in the receiving country. In addition to that, the report found that only 3 African countries had at the time ratified The Hague Convention on Protection of Children and Co-operation Report of Intercountry Adoption.<sup>171</sup> This demonstrated the inadequacy of information on intercountry adoptions and the dangers they posed to the children involved.<sup>172</sup> Presently, Burkina Faso, Egypt, Mauritius, Morocco, Tunisia and Zambia have ratified The Hague Convention but Kenya is yet to do so.<sup>173</sup>

The fact that the set laws are yet to be amended despite this report being issued over a decade ago is proof enough of some of the areas where the government has fallen short in curbing child trafficking through intercountry adoptions.<sup>174</sup> Moreover, despite the moratorium, cases of child trafficking are still on the rise which then leads one to wonder whether the ban was merely theoretical as it is yet to be effectively put to practice.

The ambiguity in the application of the moratorium was raised in several cases in Kenyan courts, a matter that brought out the fact that the Expert Committee established to provide guidelines on its application and implementation had fallen short in playing its role.<sup>175</sup> In Adoption Cause 73 of 2017, the courts were faced with an issue of kinship adoption, whereby one of the adoptive parents was the minor's aunt.<sup>176</sup> However, there was an aspect of intercountry adoption as that

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<sup>169</sup> UNICEF Innocenti Research Centre, '*Trafficking in human beings, especially women and children in Africa*', 2005.

<sup>170</sup> UNICEF Innocenti Research Centre, '*Trafficking in human beings, especially women and children in Africa*', 2005, 3.

<sup>171</sup> UNICEF Innocenti Research Centre, '*Trafficking in human beings, especially women and children in Africa*', 2005, 7.

<sup>172</sup> UNICEF Innocenti Research Centre, '*Trafficking in human beings, especially women and children in Africa*', 2005, 7.

<sup>173</sup> <https://www.hcch.net/en/states/hcch-members> on 18 February 2019.

<sup>174</sup> Thiong'o M and Otieno R, 'Kenyan government bans adoption of children by foreigners' Standard Digital, 29 November 2014 -<<https://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners>>- on 24 November 2018.

<sup>175</sup> *In the matter of baby RWB* (2016) eKLR.

<sup>176</sup> *In the matter of baby RWB* (2016) eKLR.

male applicant was of German nationality.<sup>177</sup> The case quoted Judge Muchelule's decision in Adoption Case 123 of 2015 where she determined that the moratorium is inferior to the provisions of the Constitution of Kenya 2010 and the Children Act 2001; the best interests of the child override the moratorium.<sup>178</sup> Judge Amin's decision in Re P.M. 2017 was also quoted, providing that in the face of the moratorium, an adoption order would be justified where the court's intention was to look out for the best interests of the child.<sup>179</sup> In all these cases, the adoptions were allowed despite the instituted moratorium.<sup>180</sup> The courts, due to the legal uncertainty, had to practise discretion in determining when to disregard the ban in order to protect the welfare of the child.<sup>181</sup> Further from the first case, it was unclear as to whether the moratorium on intercountry adoptions encompassed persons of foreign nationality or those living in foreign countries, regardless of their nationality.<sup>182</sup> The ambiguity and legal uncertainty is clearly brought out in these examples. They also demonstrate the failure of the established Expert Committee, which was to issue guidelines on the ban application during the transitional period.<sup>183</sup>

Another instance where application proved to be a problem came out in the Mazzoncini case, a situation where an American couple who had been granted guardianship over baby Kiano, had their house invaded and the baby taken from them.<sup>184</sup> Due to health complications, the couple had seen it fit to refer the baby abroad for advanced medical attention.<sup>185</sup> However, when the baby was taken from them, the parties involved claimed that the baby was at risk of being trafficked and their action was to protect his best interests.<sup>186</sup> Here, there is the matter of balancing between two rights. On one hand, the child might have indeed been at risk of being

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<sup>177</sup> *In the matter of baby RWB* (2016) eKLR.

<sup>178</sup> *In the matter of baby KR* (2015) eKLR.

<sup>179</sup> *In the matter of baby PM* (2017) eKLR.

<sup>180</sup> *In the matter of baby PM* (2017) eKLR.

<sup>181</sup> *In the matter of baby PM* (2017) eKLR.

<sup>182</sup> *In the matter of baby PM* (2017) eKLR.

<sup>183</sup> *In the matter of baby PM* (2017) eKLR.

<sup>184</sup> Jessup J, 'Falsely accused of trafficking, Christian couple anxiously awaits information about their stolen son' CBN News, 5 September 2019 -< <https://www1.cbn.com/cbnnews/cwn/2019/may/falsely-accused-of-trafficking-christian-couple-anxiously-awaits-information-about-their-stolen-son>>- on 20 September 2019.

<sup>185</sup> Clarke P, 'The heart-breaking story of the toddler abducted in Kenya' The Handbook, 1 May 2019 -< <https://www.thehandbook.com/blog/2019/05/the-heartbreaking-story-of-the-toddler-abducted-in-kenya/>>- on 24 May 2019.

<sup>186</sup> Jessup J, 'Falsely accused of trafficking, Christian couple anxiously awaits information about their stolen son' CBN News, 5 September 2019 -< <https://www1.cbn.com/cbnnews/cwn/2019/may/falsely-accused-of-trafficking-christian-couple-anxiously-awaits-information-about-their-stolen-son>>- on 20 September 2019.

trafficked and therefore his right to have every action done in his best interests was being protected. On the other hand, there is the right to health care. The child was on medication at the time suffering from epileptic seizures.<sup>187</sup> At the time he was in custody of the government, it is not known whether he was still on that medication. Furthermore, his condition had been proved to be critical and therefore advanced medical attention was necessary.<sup>188</sup> Keeping him in custody denied him the right to receive this treatment.<sup>189</sup> The case therefore raises the question of who is to determine what right is to be given priority over the other in upholding the best interests of the child. Borrowing Judge Amin's reasoning, in such an instance the government ought to have given the child necessary medical attention, perhaps offering security to prevent chances of trafficking at the time investigations were being carried out. Outrightly denying the guardians custody, in this case, denied the child of his rights. This was also the case when similar moratoriums were instituted in Cambodia and Romania.<sup>190</sup> The bans were found to, at the end of the day, be disadvantageous to the children as they were denied the chance to have a new family for better care- an act that would have best looked out for their welfare.<sup>191</sup>

## CONCLUSION

The three case studies that constitute this chapter give a number of instances where intercountry adoption has been exploited. Though explained in different contexts, all three show some of the areas where the government has failed in upholding the child's best interests in the adoption process.<sup>192</sup> Mothers are being misled into giving up their children for adoption thinking that they will be well-taken care of, only for them to be exploited. Children are being stolen from their birth families to equilibrate the increasing demand by prospective parents. Intercountry adoption has been reduced from a juridical act to a money-oriented business, subsequently victimising the

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<sup>187</sup> Jessup J, 'Falsely accused of trafficking, Christian couple anxiously awaits information about their stolen son' CBN News, 5 September 2019 -< <https://www1.cbn.com/cbnnews/cwn/2019/may/falsely-accused-of-trafficking-christian-couple-anxiously-awaits-information-about-their-stolen-son>>- on 20 September 2019.

<sup>188</sup> Clarke P, 'The heart-breaking story of the toddler abducted in Kenya' The Handbook, 1 May 2019 -< <https://www.thehandbook.com/blog/2019/05/the-heartbreaking-story-of-the-toddler-abducted-in-kenya/>>- on 24 May 2019.

<sup>189</sup> Jessup J, 'Falsely accused of trafficking, Christian couple anxiously awaits information about their stolen son' CBN News, 5 September 2019 -< <https://www1.cbn.com/cbnnews/cwn/2019/may/falsely-accused-of-trafficking-christian-couple-anxiously-awaits-information-about-their-stolen-son>>- on 20 September 2019.

<sup>190</sup> Kapstein E, 'The baby trade' 82 *Council of Foreign Affairs* 6, 2003, 120.

<sup>191</sup> Kapstein E, 'The baby trade' 82 *Council of Foreign Affairs* 6, 2003, 120.

<sup>192</sup> *In the matter of baby RWB* (2017) eKLR.

children involved instead of protecting their best interests. Not only has the government failed to efficiently perform its duty, but it has also turned out to be part of the problem.<sup>193</sup>

The case studies show how some government institutions and agents have gone rogue, working together with the criminals instead of fighting them.<sup>194</sup> Instead of creating a safe haven for children in need of a home, Charitable Children's Institutions have turned into baby markets, answering to the demands of their clients.<sup>195</sup> Police officers, nurses, doctors and midwives have been called out for stealing children from under the care of their parents.<sup>196</sup> The entire system has been compromised, which then leaves the average Kenyan citizen wondering who to turn to.<sup>197</sup>

Furthermore, the government has fallen short in its application of the moratorium.<sup>198</sup> Its vague nature still leaves courts questioning themselves on what rights of the child to give priority to. The wording of the ban is also ambiguous, which creates more loopholes to be exploited by traffickers and eventually beating the whole purpose of the ban.<sup>199</sup> This would not have been the case if only the Expert Committee had done its duty of issuing guidelines on how the moratorium should be applied.<sup>200</sup>

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<sup>193</sup> Kamau J and Gitau G, 'How fake child adoption syndicate steals babies from desperate mums' 1 April 2019-<<https://www.nation.co.ke/news/How-fake-child-adoption-syndicate-steals-babies-/1056-5050496-k9lhrm/index.html>>- on 24 May 2019.

<sup>194</sup> Kamau J and Gitau G, 'How fake child adoption syndicate steals babies from desperate mums' 1 April 2019-<<https://www.nation.co.ke/news/How-fake-child-adoption-syndicate-steals-babies-/1056-5050496-k9lhrm/index.html>>- on 24 May 2019.

<sup>195</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September-<<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

<sup>196</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September-<<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

<sup>197</sup> Kamau J and Gitau G, 'How fake child adoption syndicate steals babies from desperate mums' 1 April 2019-<<https://www.nation.co.ke/news/How-fake-child-adoption-syndicate-steals-babies-/1056-5050496-k9lhrm/index.html>>- on 24 May 2019.

<sup>198</sup> Jessup J, 'Falsely accused of trafficking, Christian couple anxiously awaits information about their stolen son' CBN News, 5 September 2019 -<<https://www1.cbn.com/cbnnews/cwn/2019/may/falsely-accused-of-trafficking-christian-couple-anxiously-awaits-information-about-their-stolen-son>>- on 20 September 2019.

<sup>199</sup> *In the matter of baby PM* (2017) eKLR.

<sup>200</sup> *In the matter of baby PM* (2017) eKLR.

Holistically, the case studies point out how poverty and lack of knowledge have contributed to the abuse of the best interests of the child principle.<sup>201</sup> Parents living in hardship have opted to give up their children with the hope that the adoptive parents will be in a better position to fend for their needs.<sup>202</sup> In a similar vein, lawyers, police officers and medical practitioners have gone rogue due to insufficient income; a factor that makes them lean towards child trafficking which is seen to attract more money.<sup>203</sup> Furthermore, most citizens lack knowledge on the ongoing baby selling syndicate and the schemes being used by traffickers, which increases their vulnerability to being deceived and eventually giving up their children for illegal adoption.<sup>204</sup> In analysing the role of government in upholding Article 53(2) of the Constitution of Kenya 2010, this chapter also brings out the lacunae in adoption laws and set mechanisms which have contributed to child trafficking. The lack of adherence to adoption rules of procedure also highlights how the government of Kenya has fallen short in carrying out its supervisory role over adoption processes.<sup>205</sup>

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<sup>201</sup> Article 53(2), *Constitution of Kenya* (2010).

<sup>202</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015- <<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>203</sup> Ochieng A, 'Experts want tough laws on lucrative adoption business' 23 September- <<https://www.nation.co.ke/news/Experts-want-tough-laws-on-adoption/1056-4772800-or9q5jz/index.html>>- on 24 May 2019.

<sup>204</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015- <<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>205</sup> Section 159, *Children Act* (No. 8 of 2001).

## CHAPTER 5

### FINDINGS, RECOMMENDATIONS AND CONCLUSION

#### INTRODUCTION

This is the final part of the research. The chapter is divided into three sections, the first providing the findings of the research. This part answers the first three research questions, showing the ineffectiveness of mechanisms instituted to protect the best interests of the child.<sup>206</sup> The findings put emphasis on state responsibility with reference to Chapter 2's social contract theory and the philosophy of African communism.<sup>207</sup> Contrary to the notion of *Ubuntu*, research provides proof of government workers being a part of the baby selling syndicate, a fact that shows how the two theories are yet to be realised in Kenya.<sup>208</sup> The second section then answers the fourth research question, giving recommendations that would help curb child trafficking through intercountry adoption. To sum it up, the third section gives a conclusion of the entire research.

#### FINDINGS

From the discussions of Chapter 3 and 4, numerous cases are brought up of how the baby selling syndicate is being carried out in Kenya and other countries.<sup>209</sup> Research reveals how intercountry adoption has been curved to suit the interests of perpetrators through deceitful means such as the falsification of adoption documents, doctored adoption orders, kidnapping and unduly influencing of biological parents into giving up their children for adoption.<sup>210</sup> Unfortunately, the research exposes various workers of the government as being part of the scheme despite their

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<sup>206</sup> Article 53, *Constitution of Kenya* (2010).

<sup>207</sup> Chemhuru M, 'Gleaning the social contract theory from the African communitarian philosophy' 36 *South African Journal of Philosophy* 4, 2017.

<sup>208</sup> Kakah M, 'Yatani pushes for adoption law review to curb child trafficking' Daily Nation, 11 November 2018- <https://www.nation.co.ke/news/Yatani-calls-for-law-review-to-curb-child-trafficking/1056-4846092-er1m3ez/index.html> on 1 December 2018.

<sup>209</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015- <https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>- on 24 May 2019.

<sup>210</sup> Reporter N, 'Maraga to receive report on abuse of adoption process' Daily Nation, 22 July 2018- <https://www.nation.co.ke/news/Maraga-to-receive-report-on-abuse-of-adoption-process/1056-4675346-v4c3lrz/index.html>- on 24 November 2018.

duty to uphold the best interests of the child.<sup>211</sup> Chapter 4 shows how lawyers are now colluding with doctors and nurses, turning hospitals into baby banks for monetary benefit.<sup>212</sup> Additionally, legal practitioners are seen to also work with Charitable Children's Institutions in doctoring the entire adoption process by making insufficient effort when carrying out background checks before declaring children free for adoption.<sup>213</sup> Moreover, some of the mechanisms set up by the government of Kenya have proved to be ineffective, with the example of laws on adoption as well as the 2014 moratorium on intercountry and resident adoptions.<sup>214</sup> In as much as the primary intention of the ban was to protect the welfare of the child, the government, through the established Expert Committee, has failed to provide guidelines on how to go about the moratorium.<sup>215</sup> This has given rise to legal uncertainty in its interpretation and implementation, which is another problem on its own.<sup>216</sup>

In analysing the above causes of child trafficking through intercountry adoption, the research looked into the main reasons as to why these abuses are occurring.<sup>217</sup> This involved a holistic approach of assessing the socio-economic conditions of involved parties in the syndicate, including the victims as well as the perpetrators.<sup>218</sup> In summary, they are as follows:

#### Poverty

The Kayole syndicate in Chapter 4 brought out how poverty is a root cause for the violation of Article 53(2) of the Constitution of Kenya 2010. To begin with, most mothers in the said area were found to be living far below the poverty line, a factor which prompted them to give up their children for adoption as they could not afford to comfortably provide for their basic needs.<sup>219</sup> On the side of the perpetrators, it was also found that most lawyers, nurses, doctors and CCIs at large

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<sup>211</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>212</sup> Kakah M, 'Yatani pushes for adoption law review to curb child trafficking' Daily Nation, 11 November 2018-  
<https://www.nation.co.ke/news/Yatani-calls-for-law-review-to-curb-child-trafficking/1056-4846092-er1m3ez/index.html> on 1 December 2018.

<sup>213</sup> Kakah M, 'Yatani pushes for adoption law review to curb child trafficking' Daily Nation, 11 November 2018-  
<https://www.nation.co.ke/news/Yatani-calls-for-law-review-to-curb-child-trafficking/1056-4846092-er1m3ez/index.html> on 1 December 2018.

<sup>214</sup> *In the matter of baby RWB* (2016) eKLR.

<sup>215</sup> *In the matter of baby KR* (2015) eKLR.

<sup>216</sup> *In the matter of baby PM* (2017) eKLR.

<sup>217</sup> Marks S, 'Human rights and root causes' 74 *Modern Law Review* 1, 2011.

<sup>218</sup> Marks S, 'Human rights and root causes' 74 *Modern Law Review* 1, 2011.

<sup>219</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015-  
<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

were pushed to take part in the syndicate as it offered more income than their normal jobs could.<sup>220</sup> Research showed that, depending on their race and gender, a child could attract between \$2000 and \$3000.<sup>221</sup> This amount is substantially more as compared to the \$1246 annual income of the average Kenyan citizen.<sup>222</sup> It is, therefore, understandable why most workers of the government would go rogue so as to earn more money to cater for their needs.

#### Lack of knowledge

The case studies also brought out the fact that most Kenyans lack knowledge, or rather are yet to be educated on the adoption process as well as child trafficking.<sup>223</sup> Most parents have given up their children without having to sign off on any legal documents. This, therefore, makes it hard to institute legal proceedings as there is no proof of adoption or their rights as the biological parents.<sup>224</sup> Other than that, they are not familiar with the rightful adoption process and how it is supposed to be carried out, which increases their vulnerability to being deceived by the perpetrators. Additionally, the general public is not aware of the ongoing child trafficking.<sup>225</sup> Many citizens do not know the schemes being used by traffickers to lure them into the trap. The lack of knowledge has proved to be a root cause for the violation of the child's best interest principle.

#### Under-investment in the adoption sector

This research goes on to show how the government of Kenya has failed to uphold its supervisory role in the adoption sector.<sup>226</sup> In terms of time and money, very little has been invested, which has prompted most government workers to opt for alternative means of

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<sup>220</sup> Wanjama P, 'Alleged cost of baby swap at Pumwani Maternity Hospital' 18 September 2018-<  
<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

<sup>221</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015-<  
<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>222</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015-<  
<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>223</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015-<  
<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>224</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015-<  
<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>225</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015-<  
<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>226</sup> Wanjama P, 'Alleged cost of baby swap at Pumwani Maternity Hospital' 18 September 2018-<  
<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

generating income.<sup>227</sup> As concerning time, proof that CCIs no longer adhere to set rules of procedure shows how the government has not been supervising adoption processes.<sup>228</sup> Before a child is declared free for adoption, it is required that background research be done over a period of six months to trace the child's next of kin.<sup>229</sup> However, this step has often been hastened right under the nose of the government.<sup>230</sup>

### Legal lacunae

Gaps in law, such as the interpretation of terms, have increased vulnerability of children to trafficking through intercountry adoption.<sup>231</sup> For instance, the Counter-Trafficking in Persons Act requires the aspect of exploitation when defining child trafficking.<sup>232</sup> This is, however, not the case in instances of doctored intercountry adoptions since most of the children end up in better living conditions in their adoptive homes, in as much as they were adopted through illegal means. The 'exploitation' requirement<sup>233</sup> has increased abuse of Article 53(2) of the Constitution as the victims lack sufficient grounds for seeking legal redress.<sup>234</sup>

## RECOMMENDATIONS

### Review of the moratorium

This research points out some of the gaps in the institution of the moratorium that are still paving way for child trafficking. One way to address this would be through reviewing the ban in its entirety, with an emphasis on the wordings and definitions such as who is considered a foreign adoptive parent. The executive directory does not explain how it should be implemented, a duty delegated to the Expert Committee.<sup>235</sup> Guidelines ought to be issued to the courts as well as registered CCIs to reduce chances of legal uncertainty and ambiguity. This will in turn reduce the

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<sup>227</sup> Wanjama P, 'Alleged cost of baby swap at Pumwani Maternity Hospital' 18 September 2018-<<https://www.kenyans.co.ke/news/33221-alleged-cost-baby-swap-pumwani-maternity-hospital>>- on 24 May 2019.

<sup>228</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015-<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>229</sup> Section 159, *Children Act* (No. 8 of 2001).

<sup>230</sup> Onyulo T, 'Baby trafficking is a lucrative business in Kenya' USA Today 28 February 2015-<<https://www.usatoday.com/story/news/world/2015/02/28/kenya-stolen-baby-trafficking/23927517/>>- on 24 May 2019.

<sup>231</sup> Section 3, *Counter-Trafficking in Persons Act* (No. 8 of 2010).

<sup>232</sup> Section 3, *Counter-Trafficking in Persons Act* (No. 8 of 2010).

<sup>233</sup> Section 3, *Counter-Trafficking in Persons Act* (No. 8 of 2010).

<sup>234</sup> Article 53(2), *Constitution of Kenya* (2010).

<sup>235</sup> *In the matter of baby RWB* (2016) eKLR.

wide discretion judges seem to have in determining what intercountry adoption orders to issue during this transitional period.

### **Review of Kenyan adoption policies**

The government of Kenya ought to look into the gaps in law that are being used to the benefit of child traffickers. The Children Act, for instance, provides that a child can be declared free for adoption at least six months after a background search has been carried out to trace their biological families.<sup>236</sup> The presumption of abandonment ought to be made only after an officer provides satisfactory proof of having done the search and showing that the families could not be traced. This will help reduce chances of rogue government workers hastening adoption processes through corrupt means in order to traffic children. Stringent measures need to be put in place against officers, doctors, lawyers and other practitioners that are part of the syndicate to serve as a deterrent mechanism in future.<sup>237</sup> Strong penalties should also be given to the defaulters of all adoption laws.

### **Strengthening state responsibility**

Looking at the highlighted root causes of child trafficking through intercountry adoptions, the government ought to come up with mechanisms that would ensure socio-economic equality among Kenya citizens, which would help counter poverty caused by sub-living wages.<sup>238</sup> In light of the Mazzoncini case, providing better healthcare facilities would reduce chances of children being trafficked in the name of seeking improved medical care abroad.<sup>239</sup>

The government should also be obligated to issue annual reports on the measures it has taken to protect the best interests of the child in intercountry adoption, going further to show their effectiveness in curbing child trafficking. For example, after the institution of the moratorium in 2014, the government ought to have issued updates on its implementation. The Expert Committee should have regularly reported on whether the ban was proving to be effective or not, giving statistics on the rate of child trafficking through intercountry adoption after the directory.

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<sup>236</sup> Section 159, *Children Act* (Act No. 8 of 2001).

<sup>237</sup> Kakah M, 'Yatani pushes for adoption law review to curb child trafficking' Daily Nation, 11 November 2018- <https://www.nation.co.ke/news/Yatani-calls-for-law-review-to-curb-child-trafficking/1056-4846092-er1m3ez/index.html> on 1 December 2018.

<sup>238</sup> Marks S, 'Human rights and root causes' 74 *Modern Law Review* 1, 2011.

<sup>239</sup> Jessup J, 'Falsely accused of trafficking, Christian couple anxiously awaits information about their stolen son' CBN News, 5 September 2019 -< <https://www1.cbn.com/cbnnews/cwn/2019/may/falsely-accused-of-trafficking-christian-couple-anxiously-awaits-information-about-their-stolen-son>>- on 20 September 2019.

Placing such a role on the government would enhance accountability and help assess the effectiveness of the moratorium as well as other set mechanisms.

### **Amendment of the Children Act, 2001**

There is need to hasten Parliament in enacting the Children Act Amendment Bill, which puts minimum standards to be met by CCIs in facilitating adoption processes. Only registered institutions would be allowed to carry out these function, a measure that will reduce the number of rogue child welfare institutions.

### **Promotion of domestic adoption**

This could be done by expediting domestic adoption processes, giving Kenyan adoptive parents first priority during adoptions. A transparent and time efficient process would motivate more citizens to opt for child adoption, without the fear of foreigners being preferred by CCIs. Furthermore, having the children within the country would make it easier for these institutions to carry out follow-up activities on the welfare of the child and on a more regular basis. This would definitely reduce child trafficking.

### **Sensitisation of the public on the adoption process and child trafficking**

Sufficient knowledge on rightful adoption processes would reduce the risk of citizens being misled by child traffickers. Creation of awareness would also alert the general public on the ongoing baby selling syndicate, informing them on the current schemes adopted by traffickers. By doing this, the government would help reduce rates of child trafficking through intercountry adoption as citizens would be less vulnerable to being deceived by perpetrators.

## **CONCLUSION**

This research began from the point of establishing the state's responsibility in protecting the best interests of the child. Chapter 3 and 4 then went on to illustrate the areas where the government of Kenya has fallen short in carrying out this duty, giving examples of cases where child trafficking has been conducted through intercountry adoption. The research shows effects of the vice on the children as well as their biological families, Chapter 5 finalising with feasible recommendations to curb the inhuman syndicate. To sum it all up, intercountry adoption remains a threat to the best interests of the child principle.<sup>240</sup> Many children have been separated from

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<sup>240</sup> Davis M, 'Intercountry adoption flows from Africa to the US: A fifth wave of intercountry adoptions?' 45 *The International Migration Review* 4, 2011.

their biological families and are being exploited by perpetrators once they leave the country.<sup>241</sup> However, this issue can be addressed accordingly. Through the review of the Kenyan legal framework and other strategies, cases of child trafficking through intercountry adoption can be minimised.

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<sup>241</sup> Kakah M, 'Yatani pushes for adoption law review to curb child trafficking' Daily Nation, 11 November 2018-  
<https://www.nation.co.ke/news/Yatani-calls-for-law-review-to-curb-child-trafficking/1056-4846092-er1m3ez/index.html> on 1 December 2018.

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