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The relevance of state law in the context of international migration: a case study of child adoption in Tanzania

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A. Introduction

The current debate on the weak and further diminishing role of the state in Africa tends to overlook the existing or even growing relevance of state law in a number of crucial situations in people's lives. Under contemporary conditions of life in a globalized world, certain options and benefits depend on the existence of formal legal relationships established under state law. For instance, immigration laws often allow a person to take a child along, who is not legally an 'own' child, only if additional, more rigid requirements are fulfilled, thus excluding a mere foster child, a younger sibling, a niece, nephew or grandchild. In African cultures, however, including those of Tanzania, children are looked after not only by their parents but also by other persons as a rule. In many cases, where a child's parents have died, relatives care for him or her. It is not common, and not necessary, that they upgrade such relationships of factual foster care into child adoption under state law. However, once the foster parents want to take the child abroad because they are living and working in a foreign country, the scenario changes completely. They cannot get the necessary visa, residence permit etc. for the child unless they formally adopt the child and thereby make him or her their 'own' child in the sense of both the Tanzanian state law and the foreign immigration law.

Formal child adoption under state law used to be quite uncommon among the Tanzanian population until recently. However, with increasing international mobility, the numbers of child adoptions by Tanzanians have risen. In the specific situation of international migration of families, public norms of child adoption have thus gained a relevance which they did not have before and which they do not have in other contexts.

The paper discusses some cases of child adoption in Tanzania in the situation of international migration, using research data collected in the summer of 2006.¹

It looks particularly at the relationship between local cultural norms relating to the care for children based on the concept of the extended family and norms of state law based on a preference for the concept of the nuclear family. The paper analyzes situations in which these two sets of norms encounter each other and the need arises to take a decision within one system (that of state law) that takes care of the concerns of the other system as well (that of customary law). The question raised here is whether the cases analyzed are apt to contribute to generating trust in, and acceptance of, state law relating to child adoption in Tanzania in the context of international migration.

B. Care for children within the extended family

Under African customary laws including those of Tanzania, children are considered a collective responsibility of the extended family.² This means that apart from the parents, relatives, such as especially grandparents,³ but also aunts, uncles, brothers and sisters are held, and feel, responsible for the children of the extended family.⁴ It is therefore quite common in the various Tanzanian communities that children grow up with, and are looked after by, relatives other than their parents.⁵ This is often the practice even where the parents themselves are quite able to care for the child.⁶ The reason for this practice may be for instance

our research assistants Tulinave Willilo, Neema Mugassa and Steven Biko, and to many others in Tanzania for their valuable assistance.

² Kreager 1980, 7 ff.; Wanitzek 1986, 122 ff.; Rwezaura/Wanitzek 1988, 159; Armstrong 1995, 333 ff., as cited in Rwezaura 2000, 333; Ncube 1998, 1 ff.; see also Rigby 1969, 247 ff on the relevance of kinship among the Chaga and Abrahams 1981, 111 ff. among the Nyamwezi.

³ See e.g. Raum 1940/1996, 156 ff. on the Chaga.

⁴ See e.g. Cory/Hartnoll 1945/1971, 30, on the Haya.

⁵ Rwezaura/Wanitzek 1988, 155 f.

⁶ Rwezaura/Wanitzek 1988, 156. In a study conducted in a West African community (i.e. the Baatombu of Northern Benin) Alber found that according to the general views held within that community, relatives are in a better position than parents to educate a child properly and to apply the adequate measures of discipline, Alber 2003, 487 ff. Goody 1982, 8 ff., distinguishes between five "parent roles" which may be performed by different persons but not necessarily all of them

¹ The research was conducted together with Prof. Bart Rwezaura, University of Hong Kong. A full account of the research and its results is contained in Rwezaura/Wanitzek forthcoming. We are grateful to Ms. Eliamani Mbise for her generous support, to Naelija Mrutu and Kennedy Gastom, to

that elderly grandparents ask for a grandchild to be given to them to assist them in their everyday chores in the household or on the farm, or that an aunt with young children requires a niece to help her look after them. Contemporary parents who are concerned about their children's education may however want to make sure that the education has priority over such other concerns and rather not send the child to relatives for such reasons. The parents' poverty may on the other side be a cause for sending a child away to wealthier members of the extended family who can provide better education for the child than the parents would be able to provide.

In a situation in which parents are not available to care for their children, as in the case of one or both parents' death, it is common too that the child is taken over by one of the relatives. Also in situations such as the parents' separation, divorce, and remarriage, child birth out of wedlock, child birth by teenage mothers, abandonment of a child by a parent, serious illness of one or both parents, and other kinds of "family crises",⁷ foster care provided by relatives is considered the rule. Two qualifications must however be made in presenting this system of the extended family's responsibility for children under African customary laws in Tanzania. First, such practices of foster care provided by members of the extended family should not be idealized. In various cases members of the extended family either are unwilling to fulfil their customary obligation towards the children of the extended family,⁸ or they do not fulfil this obligation properly. Empirical studies on the situation of foster children in Tanzania have shown numerous instances and forms of abuse and discrimination of foster children.⁹ For instance, children have been exploited by relatives as housegirls often at the cost of their education or with inadequate provision of food and health care, while the relatives' own children have been enjoying better food, health care and education.¹⁰ The "risks of child fosterage"¹¹ thus include the possibility of marginalization and discrimination of foster children as compared to 'own' children.

Second, under contemporary conditions of life, some relatives are not able to take over responsibility for the children of the extended family because of their poverty. In other cases there are no adult relatives alive any more, or those who are left are ill and therefore not able to look after their relatives' children. In some extended families all, or nearly all, the members of the parents' generation have died, or are seriously ill, due to the HIV/AIDS pandemic.¹² In such cases, grandpar-

by the parents themselves: (1) bearing and begetting, (2) status entitlements, (3) rearing and nurturance, (4) training, and (5) sponsorship.

⁷ Rwezaura 2000, 326, 330.

⁸ Waniitsek 1986, 211 ff.

⁹ Rwezaura 2000, 326 ff. with further references.

¹⁰ *Ib.*, 332.

¹¹ *Ib.*, 330.

¹² Kajjage 1997, as cited in Rwezaura 2000, 331, 333.

ents may look after the children but may be handicapped by their old age;¹³ or elder siblings look after their younger brothers and sisters in so-called 'children-headed households'.

Those remaining children whom nobody cares for, who have no place to stay, or who are neglected or badly treated by relatives, end up as children living and working on the street, unless they find a place in a children's home or a similar institution.¹⁴

Despite such cases, the customary law obligation to care for children of the extended family if necessary¹⁵ is still widely accepted among the population. Studies conducted in Tanzania have shown that "[i]n recent years the HIV/AIDS pandemic and the rising rate of divorce and marital separations account for large numbers of children being brought up by persons other than their two parents."¹⁶

This is usually done within an informal arrangement agreed upon within the extended family. Involvement of state authorities, such as the social welfare office, the courts and other authorities, is the exception rather than the rule. The numbers of cases both of formal foster care under the supervision of the social welfare office and of adoption orders by the High Court are extremely low.

In conclusion it can be stated that informal foster care by relatives is the common solution where an arrangement is to be made for a child to be cared for by relatives other than his or her parents. Formal child fosterage or child adoption under state law are the exception. The state law has little or no influence on the manner in which such situations are handled by the parties concerned.

C. The need for adoption in cases of international migration

A different situation arises however where a member of the extended family who has taken over responsibility for a child other than his or her own immigrates to a foreign country. In this case the problem may be that the necessary visa and residence permits for the child cannot be obtained because the relative is not a legal parent of the child. For instance, where leave to enter the United Kingdom is sought for a child, entry clearance from abroad is first required.¹⁷ The child must be

¹³ Le Vine/Le Vine 1980, 40.

¹⁴ Rwezaura 2000, 332.

¹⁵ See e.g. for the Sukuma Cory 1953/1970, 102 ff.

¹⁶ Rwezaura 2000, 326, 331, referring to: UNICEF, AIDS and Orphans in Africa, Report of a Meeting, Florence 1991.

¹⁷ Lowe/Douglas 2007, 336, with some distinction as between indefinite and limited leave, see below. On British immigration law see also Rosenblatt/Lewis 1997; Bank/Grote 2001; Rawlings 2004. Immigration control falls under the responsibility of the Secretary of State for the Home Department, usually acting through delegated officers. Rosenblatt/Lewis 1997, 1; see Bank/Grote 2001, 330 and Riedel 2004, 30 f. on the significance of this system. The principal piece of primary

below the age of 18 years and must not be leading an independent life; he or she must not be married and must not have formed an independent family unit; and he/she must be able to be maintained without recourse to public funds in suitable accommodation.¹⁸

If *indefinite* leave is sought, the child must be seeking to enter in order to accompany or join either one or both *parents*, or a *relative*, who are settled, or who are entering to settle. 'Parent' is defined to include (1) a step-parent in cases in which the birth parent is dead; (2) an adoptive parent if the adoption order is recognised in the UK;¹⁹ and (3) an unmarried father whose paternity has been proved. If the child seeks to enter in order to accompany or join a *relative*, there must be serious and compelling family or other considerations making exclusion of the child undesirable and suitable arrangements must have been made for the child's care."²⁰

For children seeking *limited* leave to enter or remain as dependants, the Statement of Changes in Immigration Rules, as amended (HC 395), does not provide for the possibility to join *relatives* who are not parents. For instance, paras 197-199 of HC 395 as amended, which apply for employees, do not mention relatives but only parents as the persons to be joined by the child. But if a parent (or parents) is (are) seeking leave to enter or remain in any of the capacities mentioned, then, as a general rule, any child or children will be permitted to enter or remain in accordance with the parent or parents.²¹

Similar provisions exist in other countries' immigration laws. For instance in Germany, children including

adopted children may join their parents according to § 32 Aufenthaltsgesetz. But other members of the extended family, such as nieces and nephews, sisters and brothers, or foster children are permitted to join their relatives or foster parents who live in Germany only in cases of exceptional hardship.²²

These examples show that under British and other immigration laws²³ it is more difficult to take a child of the extended family along to the foreign country than an own child. Although a child may join a relative other than a parent in Britain under certain conditions, the requirements are more demanding.

For the immigrating foster parents to leave the child behind in the home country is no solution either. Social security benefits in the foreign country are often granted only for those family members who are within the territory of the state providing the social security system.²⁴ Therefore a child who stays back home would not benefit. Thus the foster parents may not be able to afford to send sufficient money back home regularly, even if they found somebody to take over the everyday care for the child in the home country.

A number of Tanzanian foster parents thus seem to have encountered such difficulties or have otherwise been advised that they need to become legal parents of the child in order to be granted leave for the child to enter the foreign country of destination. The only legal tool available to formalize the relationship of foster parent so that it becomes a relationship of legal parent is the adoption of the child under state law. It is by being adopted by the immigrant that the child acquires the status of an 'own' child of that immigrant and is thus entitled to enter the host state as the immigrant's

legislation is the Immigration Act 1971 as amended, printed in Rosenblatt/Lewis 1997, Appendix I, 47 ff. The principal piece of secondary legislation is the Statement of Changes in Immigration Rules (HC 395), as amended, pursuant to section 3 (2) Immigration Act 1971, printed in Rosenblatt/Lewis 1997, Appendix II, 233 ff. These important rules contain all the requirements which applicants must satisfy to obtain entry into the United Kingdom, Rosenblatt/Lewis 1997, 1. On the relevance of European directives and regulations pursuant to the Treaty of Rome of 1959, and of the Treaty itself, in the United Kingdom see Rosenblatt/Lewis 1997, 2.

¹⁸ For children of persons with limited leave to enter or remain under paras 128-193 of the Statement of Changes in Immigration Rules (HC 395), see paras 197-199 of HC 395 (Rosenblatt/Lewis 1997, 283 f.); for indefinite leave see paras 297-300 of HC 395 (Rosenblatt/Lewis 1997, 312-314).

¹⁹ Certain immigration rules govern applications for leave to enter or remain as an adopted child, see paras 310-16 of HC 395 as amended; Rosenblatt/Lewis 1997, 21 ff.

²⁰ Para 297 of HC 395 (Rosenblatt/Lewis 1997, 312); see also Lowe/Douglas 2007, 336 f. "There is no guidance in the immigration rules as to the approach to such considerations, and accordingly applications are dealt with on a case-by-case basis. The court decisions in *Secretary of State for the Home Department v Campbell* [1972] Imm AR 115, and *Rudolph v Entry Clearance Officer, Colombo* [1984] Imm AR 84 provide some broad principles of approach to what is essentially a subjective area", Rosenblatt/Lewis 1997, 8.

²¹ Rosenblatt/Lewis 1997, 13.

²² "Außergewöhnliche Härte". According to § 27 Aufenthaltsgesetz, family members are permitted to join the family under the protection of article 6 Grundgesetz (GG, i.e. the German Basic Law). 'Children' in the sense of article 6 GG include foster children (Jarass/Pieroth 2006, Art. 6 GG Rn. 4). § 32 Aufenthaltsgesetz deals with own children (including adoptive children) while § 36 Aufenthaltsgesetz, which grants entrance only in cases of exceptional hardship, concerns other family members (i.e. other than spouses and own children). According to Renner 2005, § 36 Aufenthaltsgesetz Rn. 5, 'family' is to be understood here in the sense of the extended family and therefore includes, among others, nieces and nephews, sisters and brothers in law (not mentioned by Renner are sisters and brothers but it is assumed that they would also fall into the category of family members if sisters and brothers in law do so), and foster children.

²³ On the immigration laws of a number of other states see Giegerich/Wolfrum 2001; on Dutch immigration law see also Koens 1996; for the USA see also Riedel 2004, 96, 119; for a general overview of the immigration laws of various European countries see Riedel 2004, 29-37; on the relevance of European community law see Raible 2001; on visas and European community law see Guild 2001, 274 ff.; on the relevance of the European Convention on Human Rights see Giegerich/Wolfrum 2001, 24 f.

²⁴ With varying interpretation and implementation in the member states of the European Community, Apap 2002, 94.

child. The 'informal' foster care relationship is thus upgraded into a 'formal' parent-child-relationship.

State law is of central importance in the specific case of a foster parent emigrating with the child to a foreign country because the formal parent-child-status required by immigration laws can be created between two persons who are not parent and child only through the adoption of the one by the other under state law.

What must now be examined under these circumstances is the concept of adoption under state law in comparison to the customary law concept of adoption or foster care for children of the extended family.

D. The concept of adoption

Adoption is usually understood to mean "the creation of partial or full kinship relations by agreement and law instead of blood".²⁵ This involves the voluntary assumption of parental obligations by an individual who is usually²⁶ not the biological parent of the person adopted.

1. Roman law

Numerous contemporary European laws relating to adoption have developed on the basis of Roman adoption law. Adoption under Roman law was intended primarily to provide a family with an heir and thus secure the survival of the family, including ancestor worship to be conducted by the heir. This function explains why, under Roman law, the adopted son obtained the full position of a legitimate son of the family in the case of *arrogatio* (meaning the adoption of a person who was not under parental authority) and *adoptio plena* (meaning the full transfer of parental authority from the holder to another person). Under Roman emperor Justinian (482-565), another variation was developed, i.e. *adoptio minus plena* (which meant partial transfer of rights and duties flowing from a parent-child-relationship).²⁷ When adopted, he assumed the family name of the adopter, acquired inheritance rights from the adopter, but nevertheless retained inheritance rights in his natural family.²⁸

2. European state laws

The Roman law models of *adoptio plena* and *adoptio minus plena* served in various countries as a basis to shape their contemporary adoption laws. Until today, adoption exists, as far as its legal effect is concerned, mainly in these two variations: 'Strong' or 'full' adoption (cf. *adoptio plena*) causes the creation of new, full kinship relations and completely severs the existing

kinship relations. 'Weak' or 'partial' adoption (cf. *adoptio minus plena*) maintains elements of the existing relationship to some extent.²⁹ As for child adoption, some legal systems have chosen either of these two forms,³⁰ while others provide for both of them to exist side by side.³¹

Until 1914, adoption had no significant practical relevance in Europe. In numerous countries, such as England, adoption was not recognized as such at that time. In other countries, such as Germany or France, it was legally provided but not practised much.³² But when the large numbers of orphans following the First World War led to a considerable increase in *de facto* adoptions, with the growing need to formalize them,³³ states, which had had no law governing child adoption, at that moment introduced it into their laws. For instance, adoption statutes were enacted in the Scandinavian countries during the First World War, and in England soon thereafter in 1926.³⁴ Under English law, adoption had not been available until then because English common law held parental rights and duties to be inalienable.³⁵ The numbers of adoptions in Europe went up tremendously from 1920 onwards. Subsequently, many more countries have enacted adoption legislation³⁶ such that it can now be said that "[t]oday adoption is recognized all but universally".³⁷ It can also be seen from this development that from the First World War onwards, the function of adoption had

²⁹ This may concern rights evolving out of the kinship relationship, such as inheritance rights. It may also concern the relationship with relatives other than the parents.

³⁰ Strong adoption: e.g. England, Finland, Germany, Greece, Hungary, Romania, Switzerland; weak adoption: e.g. Italy
Sources: www.bundeszentralregister.de/bzaa/adop_pdf/adoptionsform.pdf; Bergmann/Ferid/Henrich. In Germany, for instance, during the medieval period of 'reception' of Roman law, the various forms of adoption developed under Roman law were replaced by one single legal institute following the example of the *adoptio minus plena* of the law of Justinian. This remained the law until the adoption law reform of 1976 which replaced this form of weak adoption with strong adoption in the case of children. As for adult adoption, weak adoption has been maintained.

³¹ Such as Belgium, Bulgaria, France, Poland, Czech Republic. Source: www.bundeszentralregister.de/bzaa/adop_pdf/adoptionsform-.pdf. In France, for instance, the contemporary law provides for two types of adoption, i.e. 'full adoption' which involves the transfer of parentage, and 'simple adoption' which does not break all links with the birth family, see Ferid 1987, 407 f.; Hausser 1993, 660 ff.; Sonnenberger/Autexier 2000, 166 f.; Chaussade-Klein/Henrich 2005, 50.

³² The numbers reported, for instance, for France before 1900 were less than 50 adoptions per year, and not many more were reported for Germany, Dölle 1965, 564.

³³ Lowe/Douglas 2007, 818.

³⁴ By comparison, in the United States the first adoption statute came into force already in 1851, Krause 1976, 12.

³⁵ Lowe/Douglas 2007, 817.

³⁶ The Netherlands (1956) and Portugal (1966) being among the last.

³⁷ Krause 1976, 12.

²⁵ Krause 1976, 5.

²⁶ There are cases however in which an illegitimate child may be adopted by his or her natural parent, Krause 1976, 5, 12.

²⁷ Dölle 1965, 563 f.

²⁸ Krause 1976, 12.

changed. While adoption was formerly seen mainly as an instrument to get male heirs in order to transmit property, family names or titles to them, it later came to be viewed as a device to provide children who had no parents, such as the war orphans, with parents, and at the same time childless couples with children.³⁸

It was at the time when this function characterized numerous European adoption laws, that these laws were exported by the European colonial powers to their African territories within the process of 'reception' of European laws during the colonial period.³⁹

3. African state laws: The Tanzanian example

Both Tanzania mainland and Tanzania Zanzibar, the two partners to the United Republic of Tanzania, inherited their statutory adoption laws from England. After the short period of German colonial power over what was then German East Africa (1891-1918),⁴⁰ Tanzania mainland (then known as Tanganyika Territory) was under British rule from 1920 to 1961,⁴¹ when Tanganyika attained independence. Exactly one year later Tanganyika became a Republic. Zanzibar, which had been a Sultanate of Oman since the 17th century, was a British Protectorate since 1890 and became independent on the 10th December, 1963. About a month later, on 12th January, 1964, a revolution by the Afro-Shirazi party led to the founding of the People's Republic of Zanzibar. On the 22nd April, 1964 Tanganyika and Zanzibar came together to found the Union, which became known as the United Republic of Tanzania.⁴²

The British colonial power first introduced legislation on child adoption in Tanganyika in 1942⁴³ and in Zanzibar in 1951,⁴⁴ modelled after England's own adoption law.⁴⁵ In 1953 the Tanganyika adoption law was amended, and the result, the Adoption Ordinance of 1953,⁴⁶ has remained in force in Tanzania mainland

since then with only minor amendments,⁴⁷ recently renamed the Adoption of Children Act under the Revised Laws of 2002.⁴⁸

It is necessary, in order to understand the functioning and the practical relevance of these adoption statutes, to be aware of the element of legal pluralism which is a major characteristic of the family law of the United Republic of Tanzania and which exists at various levels of the law.

The first level at which legal pluralism is in operation is at the level of the Union. Child adoption is not listed as a 'union matter' in the Constitution,⁴⁹ hence there are separate adoption statutes for Tanzania mainland and for Tanzania Zanzibar.

The second level of legal pluralism is the internal law of each partner to the Union. The family laws of both Tanzania mainland and Tanzania Zanzibar are plural systems, with (1) English-based statutory law *cum* common law, (2) African customary laws and (3) Islamic law being the major sub-systems.

The majority of the people in Zanzibar are Muslims, and therefore Islamic law governs their family relationships. In other cases statutory law and common law apply depending on individual cases and circumstances. Because of the predominance of Islamic law, child adoption under statutory law is not common. Islamic law does not recognize legal adoption,⁵⁰ although it has developed various substitute forms.⁵¹

In Tanzania mainland, where about one third of the population are Muslims, it is the various African customary laws which govern the family relationships of the majority of people in the country, in some cases in combination with Islamic law.⁵²

Both Tanganyika and Zanzibar, as in the case of other African countries which had been under British colonial government, took over the English concept of strong adoption.⁵³ The legal effect of the adoption order is to

³⁸ Krause 1976, 12. Adoption also came to be viewed, and used, as a device to take over illegitimate children of unmarried mothers who were stigmatized by the fact of birth out of wedlock, Dölle 1965, 564.

³⁹ On the reception of laws see Twining 2004 with further references.

⁴⁰ Consisting of the areas of what is now Rwanda, Burundi and mainland Tanzania.

⁴¹ First as a British Trust Territory under the League of Nations (article 22 Covenant of the League of Nations) and later as a British Mandate under the United Nations (article 77 UN Charter; Trusteeship Agreement, Imperial Laws 1920-1957).

⁴² On the relationship between the two partners to the union see Mvungi 2003.

⁴³ Adoption of Infants Ordinance 1942, No. 5 of 1942, Cap. 14, Laws of Tanganyika, in force since 8.5.1942; and the Adoption of Infants Rules, GN 321 of 1942.

⁴⁴ The Adoption of Children Decree, Cap. 55, Laws of Zanzibar; and the Adoption of Children Rules, GN 28 of 1956.

⁴⁵ Adoption of Children Act, 1926, see above.

⁴⁶ No. 42 of 1953, Cap. 335, in force since 1.1.1955.

⁴⁷ G.N. 478 of 1962 and Act No. 4 of 1968. As for subsidiary legislation, see the Adoption of Infants Rules, GN 321 of 1942, still in force according to sec. 5 of the Second Schedule to the Adoption of Children Act.

⁴⁸ Laws of Tanzania. The Revised Edition of 2002 (R.E. 2002).

⁴⁹ See article 4 (3) and First Schedule to the Constitution of the United Republic of Tanzania of 1977 as amended. In addition to the Union Constitution, there is, for Zanzibar, its own Constitution (1984).

⁵⁰ Nasir 2002, 153 f.; Pearl 1979, 82.

⁵¹ On the practice of *kafalah* in Morocco, for instance, see Bargach 2002.

⁵² See Juma 2004, 184.

⁵³ As did also, for instance, Ghana, Kenya, Nigeria, South Africa, Uganda, Zambia and Zimbabwe. In addition, several African countries which were not under British colonial government also introduced strong adoption, such as Gabun, Mozambique, Sierra Leone, Togo and Tunisia. Weak adoption has been introduced e.g. in Burundi, Congo (Brazzaville), Eritrea and Ethiopia. Both strong and weak adoption is possible e.g. in Benin, Burkina Faso, Cameroon, Cote d'Ivoire, Lesotho, Madagascar and Mali. Source:

completely sever the existing legal relationship between the child and his or her birth parents and create a new legal relationship between child and adoptive parents with all ensuing rights and duties.⁵⁴

This form of adoption under statutory law, as inherited from the former colonial power and maintained in the statute book until today, has remained strange to the majority of the Tanzanian population. They preferred, and continue to prefer, other forms to provide alternative care for children without parents and to provide children for childless couples.

4. Customary laws

As far as the childlessness of a particular couple or spouse is concerned, African customary laws contain various solutions to this problem. Polygyny serves as the key to some of them. A husband may marry another wife in case the first wife does not bear a child. Some customary laws such as that of the Swazi people provided, under certain circumstances, for the possibility of a junior wife's son to be transferred to the sonless senior wife to become her own son.⁵⁵ The legal institution of 'woman-to-woman marriage' known in various African societies⁵⁶ is another means of providing a childless woman with a child.⁵⁷

As for the provision of a substitute family for a child in need, it has been shown above⁵⁸ that as a rule such children have been, and continue to be, cared for in many cases by the members of their extended family. This form of child adoption under the customary laws of the African communities,⁵⁹ on the basis of the extended family's responsibility and care for their members' children, follows a different logic than the European concepts. The common practice, i.e. that relatives take over the parents' role so that children grow up with relatives instead of their parents, may fall partly under the above broad understanding of the

www.bundeszentralregister.de/bzaa/adop_pdf/adoptionsform.pdf.

⁵⁴ Sec. 12 (1) Adoption of Children Act (Tanzania mainland); Sec. 13 (1) Adoption of Children Decree (Tanzania Zanzibar). Rwezaura/Wanitzek 1988, 133.

⁵⁵ Kuper 1950, 89 on the Swazi.

⁵⁶ See Akpangbo 1977, 87; Krige 1974, 14; Rwezaura 1985, 160 f.; Tietmeyer 1985.

⁵⁷ Rwezaura/Wanitzek 1988, 154: „This arrangement [of the Kuria people of Tanzania] ... may be described as a relationship between a sonless house represented by an elderly married woman or widow, commonly referred to as a mother-in-law, and a young woman who stands as a daughter-in-law to the elderly woman. The main object of this relationship is for the young woman to provide a son to the house of the older woman. Traditionally, a co-wife's son or an agnatic male relative of the elder woman's husband was selected to cohabit with the young woman and assist her to bear children but he was not legally recognised to be the father of those children.”

⁵⁸ See above B. and fns. 2 ff.

⁵⁹ See Kreager 1980.

concept of adoption: Adoption, according to Krause, “involves the voluntary assumption of parental obligations by an individual who is usually not the biological parent of the person adopted”.⁶⁰

But if adoption is also generally understood to mean “the creation of partial or full kinship relations by agreement and law instead of blood”,⁶¹ this understanding does not fit in the case of relatives' care for children of the extended family because the existing kinship relationship is not removed and replaced by any other kinship relationship, but, to the contrary, it is the existing relationship which provides the basis for the relatives to care for the child.

On the other hand, African communities have undergone a degree of change as far as their family structures and practices are concerned.⁶² The nuclear family has gradually gained weight, particularly among the more educated population so that it is not only the status of belonging to the kinship group which matters but also, in some cases, and increasingly so, the notion of belonging to the nuclear family.

The relationship between these two family and adoption concepts in the contemporary practice of child adoption in Tanzania are considered next.

E. The adoption practice in Tanzania mainland

The growing international mobility of the Tanzanian population has led to an increase in the numbers of child adoptions by Tanzanians. A large number of those Tanzanians who applied for adoption were working or studying, and living, abroad. Some selected examples of applications for child adoption involving international migration will be discussed below.⁶³

1. Care for children whose parents have died

In the first group of cases, the death of the children's birth parents presented the cause for action. The first case to be discussed is that of an aunt, Victoria (51), who adopted two nieces and a nephew, namely Anna (17), Peter (16) and Maria (13).⁶⁴ Anna was Victoria's late sister's child while Peter and Maria were her late brother's children, who had different mothers.

Soon after Anna was born in 1989, and Peter in 1990, Peter's mother died in 1990. Maria was born in 1993. In 1994, Anna's father died when she was five. In 1996, Maria's mother died when the child was three. Peter's and Maria's father died in 2001 when they were

⁶⁰ Krause 1976, 5, 12.

⁶¹ Krause 1976, 5.

⁶² Chirwa 2002, 157, 167 f.

⁶³ In all cases presented below the names have been changed and no indications have been made as for the ethnic group, foreign nationality etc. of the persons involved in order to protect their anonymity and make sure that confidentiality is fully secured.

⁶⁴ Dar es Salaam High Court, Misc. Civil Cause No. 62 of 2006.

eleven and eight, respectively. By then, all the three children's parents had died except for Anna's mother who was however very ill. For this reason, Victoria "adopted the three infants in August 2002 under the mutual agreement among the family members."⁶⁵ Since then all the three children were under her care. In January 2006, Anna's mother died. The only surviving members of the children's parents' generation were Victoria and another sister of hers. Victoria was a senior officer at one of the Ministries in Dar es Salaam and was currently pursuing her PhD programme abroad. She was divorced from her husband who had died in the meantime, and had one adult son (26) who also lived and studied in the same foreign country. In 2006, Victoria applied before the High Court for the formal adoption of the three children. The children's grandmother and their other surviving maternal aunt gave their consent to the adoption. Equally, Victoria's son stated that he "has no objection for his mother to adopt the infants as he knows that she is the only caregiver of the infants".⁶⁶ The adoption order was granted by the High Court at Dar es Salaam in June 2006.

In the second case, two paternal uncles applied for the adoption of six orphaned siblings.⁶⁷ The children's father died in 1996, and the mother in 1997, when the children were between three and thirteen years old. In a clan meeting of the children's paternal family, which took place in June 1997 immediately after the mother's death, it was agreed that the elder brother of the children's father, Lawrence (54), should take over the care for the four elder children while the two younger children should be cared for by their younger paternal uncle Stephen (43).

By the end of November 2000, Stephen and his wife Magdalena (36) applied for the adoption of the two younger children Joyce (9) and Willis (7). In a 'certificate of urgency' it was stated by the applicants' advocate that "the applicants are to leave the country for [a foreign country] on 20th December 2000 for a long period; [and that] the applicants cannot get travel documents for the infant children in the absence of a court decision on the pending application."

Soon thereafter in early December 2000, Lawrence and his wife Desdemona (50) also applied for the adoption of the four elder children Laetitia (17), Fortunata (16), Devota (15) and Happiness (12). A 'certificate of urgency' stated, similar to the one just quoted,

⁶⁵ According to the guardian ad litem's report. The court shall appoint a guardian ad litem in order to safeguard the child's interests. He or she has to investigate, and report to the court on, the circumstances of the child and the petitioner and other matters relevant for an assessment whether the adoption order will serve the child's best interest, sec. 11 (2) Adoption of Children Act; rule 13 Adoption of Infants Rules; see Rwezaura/Wanitzek 1988, 131-132.

⁶⁶ According to the guardian ad litem's report.

⁶⁷ Arusha High Court, Misc. Civil Causes Nos. 08 and 09 of 2000.

that "The petitioners are to leave the country for [a neighbouring African country] on 29th December 2000 for a long period; [that] the infants are scheduled to start schooling in [that country] in early January 2001; [and that] the petitioners cannot get valid travel documents for the infants in the absence of the Honourable Court's decision on this pending miscellaneous civil cause."

Lawrence held a PhD in management and Desdemona, a citizen of a neighbouring African country, a degree in education. Both were self-employed and were living in Desdemona's home country. They married in 1974 and had three own, adult children, two of them still pursuing their university education.

Stephen was an engineer and Magdalena a medical assistant. They married in 1992 and had three own children who were still attending primary school and nursery school, respectively.

The children's paternal grandfather consented to the adoption of all six children.

The court records did not contain any adoption orders.

Cases of parents' deaths such as the above, in which minor orphaned children stay behind, are common events in contemporary Tanzania.⁶⁸ HIV/AIDS is nowadays the major cause although other causes of death are indicated in a number of cases.⁶⁹ In both cases, the customary law obligation of the surviving members of the parents' generation to care for the orphaned children was put forward to them by other remaining members of the extended family ("mutual agreement among family members"; decision within a "clan meeting").

The HIV/AIDS pandemic has actually increased the number of cases in which children need to be looked after by relatives other than their parents for the most serious reason, i.e. that of the parents' death and not for other, less existential, reasons as mentioned above.⁷⁰ Therefore there is an increasing demand for aunts and uncles to perform the roles of 'mother' and 'father' in the way of fully and permanently replacing the orphans' late parents. This is a responsibility quite different from that of a relative who performs a parent's role while one or both of the child's parents are still alive and may be approached, if need arises, at any time for any matter. Furthermore, not only are both parents unavailable in many cases, but also the whole generation of the parents, and thus of potential alternative caregivers, is reduced in numbers by the pandemic, in many cases to the extent of being nearly or fully extinguished. This is of considerable impact on

⁶⁸ See for instance Rwezaura 2000, 348.

⁶⁹ E.g. in the first case, Dar es Salaam High Court, Misc. Civil Cause No. 62 of 2006, three death certificates indicate other causes of death, while only the fourth death certificate refers to HIV/AIDS. It is however not possible to rely on the indications of causes of death in the certificates because for various reasons they do not always reflect the actual causes.

⁷⁰ See above, B.

the situation of, as Victoria's son put it, "the only caregiver of the infants", who cannot resort to other members of the extended family for their assistance but, on the contrary, may even have to look after additional sets of orphaned children of the extended family in the future.

The behaviour of persons appointed by the extended family to look after the orphans showed their acceptance of the obligation. They were all living abroad and had to take the children along in order to fulfil their customary law obligation to care for the children. For immigration purposes under the foreign laws concerned, they had to adopt the children to have them assigned as their own children so that they could be taken along. This could only be achieved under the state law relating to child adoption. State law was thus used as an instrument to fulfil the customary law obligation under the specific circumstances of international migration.

It is very rare for Tanzanians to adopt if there is no immediate need for a formal adoption, such as the immigration requirements of a foreign law. Such need arises, however, in the situation of international migration. The *de facto* care by members of the extended family for their relatives' children, in fulfilment of their customary law obligation to take over the parental role for these children, does not count legally as a parent-child-relationship in the eyes of foreign immigration laws. Numerous immigration laws distinguish between own children and relatives' children. It is not that they ignore the extended family but they distinguish between the nuclear family and the extended family, and privilege members of the former over the latter.

This creates a difficult situation for international migrants looking after relatives' children. If they want to continue caring for these children, they are forced to use a legal institute, that of child adoption under state law, only for the purpose of satisfying the demands of the foreign immigration laws. In the eyes of the foreign immigration law, this may even be a misuse of the law. They are thus caught in a sort of trap between the family concepts of two legal systems, i.e. the customary law concept which requires inclusion of relatives' children, and the foreign state law concept which provides for their exclusion. The Tanzanian state law relating to child adoption has to face the challenge to mediate between these two concepts.

The potential connecting point between the two concepts is the principle of the best interest of the child. Under the Adoption of Children Act, the court must examine whether the adoption order would be in the best interest of the child.⁷¹ Depending on the individual case and circumstances, it is, on the one hand, quite probably in the best interest of orphans to be cared for by close relatives whom they know well, who are able and willing to care for them, and who care for them on

the basis of the extended family's consent. The answer to the question whether this appears in a different light in cases in which these relatives go abroad depends again on the individual case and the individual circumstances.

On the other hand, one has to distinguish between the mere customary foster care for such children, and adoption as understood by Tanzanian state law. Even where it is in the children's best interest to be cared for by their relatives under such circumstances, the question is still whether it is also in their best interest to be adopted by them. As shown above, Tanzanian adoption law follows the concept of strong adoption which means a change of legal status of the child in the sense that the existing parent-child-relationship (and all other family relationships based on it) is (are) replaced by a new parent-child-relationship between the children and the relatives who have adopted them. After having been adopted, these children are no longer their parents' children but their aunts' and uncles'. This is however not the idea of the customary law concept of care for children by members of the extended family. As a consequence, and contradictorily, in cases of international migration, the customary care for relatives' children can only be secured by using a legal instrument (adoption under state law) which denies the legal relevance of the very same customary care.

This contradiction between the motivation for child adoption in actual practice (i.e. to enable the applicants to provide customary care for relatives' children) and the effect of the adoption itself (turning relatives' children into own children) is even more relevant and disturbing in cases in which an adopted child's parents are still alive, a constellation to which we now turn.

2. Care for children whose parents are still alive

The first case in this group of cases concerned the adoption by a paternal aunt, Nadou (45), of her nephew Nathan (3).⁷² Nadou was the elder sister of the boy's father who was 32. She held a university degree in education and worked as a high-ranking officer of an international organization in another African country, after having worked, with the same organization, in various other African countries. Nadou was married but separated from her husband and had a daughter of 22 years. During one of her stays abroad, Nathan's father, then 17 years old, had lived with Nadou for some time and was under her guardianship.

In July 1998, Nadou applied for Nathan's adoption. Nathan's parents were both alive and married to each other. Both of them were 'unemployed'. In the 'certificate of urgency' Nadou stated that "I ... must shortly travel with [Nathan] to [another African country] where I

⁷¹ Sec. 7 (1) (b) Adoption of Children Act. See Rwezaura/Wanitzek 1988, 130-132.

⁷² Arusha High Court, Misc. Civil Cause No. 97 of 1998.

work and currently reside, and his legal adoption would facilitate travel and other opportunities.” Nathan’s parents consented to the adoption. The adoption order was granted in September 1998.

In the second case of this group of cases, a father, Daudi (37), attempted to adopt his premarital daughter Prisca (7).⁷³ Some time after Prisca’s birth he married her mother. When he was about to go abroad to train for a job, he decided to take Prisca along so that she could attend school in the foreign country. According to the ‘certificate of urgency’, “this cause is of utmost urgency for the following reasons: 1. That I have already secured a school for the child in [a foreign country]; 2. that I’ll be leaving very soon to [that foreign country] where I am also studying and I want to leave with the child.” His wife, Prisca’s mother, consented to the adoption because she could not take care of the child herself due to her poverty.⁷⁴

In both cases, the children’s birth parents were alive, healthy, and available but they seem to have to have assumed by them that better education could be provided for the children abroad than in Tanzania.

In Nathan’s case, the court records do not contain any outspoken statement by the parties about the motives for the adoption but since Nadou was obviously economically far better off than Nathan’s parents, the better economic position may have been the major motive for the adoption. Nadou also had a special relationship with Nathan’s father, because she had looked after him during his adolescence. Moreover, since she had a daughter but no son, it is also possible that she had an interest in raising Nathan in order to have a ‘son’ as well.

Therefore the decision that Nathan should be cared for by his aunt instead of his parents appears to have been based on a bundle of several motives, including to further the child’s best interest. The family members seem to have assumed that it served the best interest of the child, especially in terms of better education and a safe economic situation, if the child was cared for by a relative or relatives. Under customary law this care did not affect the existing legal parent-child-relationship. Under state law, in contrast, this relationship is extinguished by an adoption order. Here the ‘prize’ for the care by a well-to-do aunt living abroad consists of the loss of the legal relationship between the child and his parents. This poses the question of the child’s best interest in a different light.

In Prisca’s case, the father’s attempt to adopt his daughter may have been due to the fear, or the information received, that the foreign immigration law would not allow him to take along his illegitimate child. He

could have legitimated his daughter under customary law.⁷⁵ But this may still not have solved the problem because it would not have been documented by a state authority. Since Tanzania state law does not provide for the legitimization of illegitimate children,⁷⁶ adoption may have seemed to be the only way out.⁷⁷ Under the Adoption of Children Act, a parent may adopt his or her own child.⁷⁸ This may serve the purpose to create a legal bond between father and illegitimate child.⁷⁹ But this would be at the cost of removing the legal bond between the child and the other parent, here the mother.⁸⁰ While the parents may have agreed that it was in the best interest of the child to accompany her father abroad in order to receive better education, they may not have taken into account the legal consequence that the child would thus lose her legal mother. In her consent to the adoption, Prisca’s mother did not express any awareness of this but mentioned only the economic side saying that she was too poor and had no means to provide Prisca with a living including education.

While in the cases discussed so far the applicants were all Africans, we now turn to a group of cases in which one spouse applying for adoption was an African and the other a European or North American.

3. Care for children in an intercultural context

Lulu, a 13 year old girl, was adopted by her maternal aunt Rehema (35), who was the girl’s mother’s younger sister, and Rehema’s husband Paul (57) who was a foreign citizen.⁸¹ Lulu was born out of wedlock. Her father was known to the family only by his first name and his whereabouts were unknown. The birth certificate indicated her maternal grandfather’s name as that of her father. Her mother died in 1991 when Lulu was still below one year. Her mother’s younger

⁷⁵ See Sheria Zinzohusu Hali ya Watu [Law of Persons], 1st Schedule, Local Customary Law (Declaration) Order, 1963, G.N. 279 of 1963.

⁷⁶ Wanitzek 1986, 394 f.

⁷⁷ Which was chosen also in previous cases, e.g. in Dar es Salaam High Court, Misc. Civil Cause No. 22 of 1979.

⁷⁸ Sec. 3 (3) Adoption of Children Act; see Rwezaura/Wanitzek 1988, 127, text at fn. 19.

⁷⁹ Or, in the case of a mother, to strengthen the legal bond between mother and illegitimate child. It is submitted that this legal position of children born out of wedlock is problematic in the light of the UN Convention on the Rights of the Child of 1989 (UNCRC) and the African Charter on the Rights and Welfare of the Child of 1990 (ACRWC) to which the United Republic of Tanzania is a state party and as such under an obligation to respect and ensure the rights set forth in the UNCRC and ACRWC to each child within its jurisdiction without discrimination of any kind, irrespective of, among other reasons, the child’s birth or other status, see article 2 (1) UNCRC and article 3 ACRWC.

⁸⁰ Sec. 12 (1) Adoption of Children Act

⁸¹ Arusha High Court, Misc. Civil Cause No. 05 of 2003.

⁷³ Arusha High Court, Misc. Civil Cause No. 05 of 2004.

⁷⁴ More than a year later, in July 2005, the petition was withdrawn by Daudi’s advocate because “it seems the petitioner is not interested in pursuing this application as he has never contacted me since the filing of this petition.”

brother took over her custody. Lulu completed her primary school education in 2003.

In December 2003, Rehema and Paul applied for her adoption. They wanted to take Lulu along to the country in which Paul was working and the family was living, while they also had a house in Tanzania. Rehema had trained as a tailor and Paul was a technician, being employed by an international organization for which he had been working in various countries including Tanzania. Rehema and Paul married in 1989 and had one common son of 14 years while Paul had two further children aged 17 and 20 who were living in the same country in which their father was currently working.

In the 'certificate of urgency' Rehema and Paul stated that they were about to leave the country early in 2004 to return to the country where they were actually living and that Lulu was required to start secondary school there in January 2004. The adoption order was granted in January 2004.

In another case, Marceli, a 13 year old boy, was adopted by his half-sister Neema (27) and her husband David (59) who was a foreign citizen.⁸² Marceli and Neema had the same mother, but different fathers. Marceli was born out of wedlock. On the birth certificate his (and Neema's) maternal grandfather was indicated as the boy's father, similarly to Lulu's case above. His actual father was married to another woman with three children but had separated from his wife and lived alone. He had no relationship any more with Marceli's mother. The boy had been in his mother's custody since his birth. Since 1999, Neema and David supported Marceli by paying his school fees to enable him to attend a school outside Tanzania in a neighbouring African country. During school holidays he used to stay with his mother who was living in Neema's and David's house in Tanzania.

David held a PhD in engineering, and Neema had trained as a secretary. They married in 2000 and had a six year old son and a two year old daughter. They owned a house and several plots in Tanzania and ran a tourism business between the two countries. They lived in the husband's home country where they wanted Marceli to live with them and attend school there.

The application for Marceli's adoption was filed in June 2005 because Neema and David wanted Marceli to start school in David's home country in July. As stated in the 'certificate of urgency', "the infant cannot travel in the absence of the honourable court's decision on this pending application". The adoption order was granted in July 2005.

These are cases of illegitimate children whose fathers were not interested in them and not available to care for them. The maternal grandfather took over the father's role which was reflected on the birth certifi-

cates indicating the maternal grandfather as father. Under this system, which exists in various African cultures, the maternal family had to provide both 'mother' and 'father' for the children.

This may have made it more difficult to maintain the children in the cases reviewed because a second potential source of support, that of the father's extended family besides the mother's, was missing. Fortunately for them, the mothers' extended families in the cases described above acquired some additional potential to fulfil their responsibility towards the family members. In both cases one of the young women married a foreigner who was not only well to do but also ready to contribute to his in-laws' fulfilment of their customary obligations towards the children of the extended family. When they not only married a daughter but also looked after a child of the family, they expressed their acceptance of the responsibilities of a member of the extended family. So Lulu was moved from her maternal uncle's care to that of her maternal aunt and her foreign husband, and Marceli from his mother's care of that of his elder sister and her foreign husband.

The timing of the adoption was school-determined in both cases: after completion of primary school, the children were to start their secondary school education in the foreign country.

The contradiction identified above for African adoptive parents between customary foster care and adoption under state law, with the effect of removing the existing legal parent-child-relationship, did not exist for the foreign adoptive parent. His cultural background was characterized by the same family concept as the state adoption law, i.e. that of the nuclear family. As for the African family members involved, in Lulu's case no parent was alive any more who could have been affected. In Marceli's case, however, his mother lost her legal parent-child-relationship with Marceli. Instead, the adoption order turned her into her son's legal grandmother, while his sister, 14 years older than he, became his legal mother. The 'value' of the new legal father for the child depended, both in Lulu's and Marceli's cases, on the stability and quality of the marriage between him and the child's aunt or sister, respectively, who was the connecting link between father and child.

The question is however whether these changes of legal relationships within the family actually play any role within the families and communities concerned. Some Tanzanian observers of these and similar cases had the impression that the family relations within the extended family rather continued as they were before, without any visible change effected by the adoption order granted under state law. If this was the case, it would put another question mark behind the current legal position: a solution to the problem of taking the children along to a foreign country can be obtained only at the prize of new legal family relationships which are not in line with the relationships actually lived

⁸² Arusha High Court, Misc. Civil Cause No. 05 of 2005.

among, and valued by, members of the extended family.

F. Conclusion

The question raised in the introduction was whether in the cases presented it could be illustrated that they contributed to generating trust in, and acceptance of, state law relating to child adoption in Tanzania in the context of international migration. The cases reflected a highly confident and determined use of state law relating to child adoption by the applicants. State law appeared to them as the means to achieve, under circumstances of international migration, the goal set by customary law, i.e. to take care of children of the extended family: by adopting a relative's child immigration of that child to the foreign country in which the caretakers were living was expected to be facilitated. Although adoption under state law was not really fitting for the reasons explained, it seemed to serve the immediate purpose. Considering the rising numbers of applications by Tanzanians for child adoption in the context of international migration, it might be concluded that previous, successful adoptions generated sufficient trust in the state law relating to child adoption to make use of it the same way. An important role as agents of passing on the knowledge and experience of previous cases was played by the advocates advising and representing their clients in these cases. But state adoption law was used only where and when it was considered necessary for other, secondary purposes than the primary effects of adaptation (i.e. extinguishing the existing, and creating a new, legal parent-child-relationship), such as immigration; and this again was to serve the purpose of making it possible to care for the child as required by customary law while living abroad with him or her. Adoption under state law was thus not applied for only for its own sake. This shows that the question of trust in state law should not be looked at in an abstract and isolated way but in a way that takes into account the specific interaction between state law, customary laws and foreign laws in certain cases such as those examined above. The Tanzanian situation of legal pluralism, linked with the effects of globalization such as international migration, requires to keep in mind the other legal systems coexisting and interacting with state law, such as customary and religious laws on the one hand and foreign state laws on the other.

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