

CODIFYING THE BEST INTERESTS OF THE CHILD IN POST-DIVORCE
CUSTODY CASES WITH REGARD TO LEGAL CERTAINTY.

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

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June 2020

Word count (11,410)

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ACKNOWLEDGMENTS

I wish to express my sincere gratitude to my supervisor, Mr. Humphrey Sipalla, for his insight, encouragement and guidance. I would also like to thank my parents and colleagues for their input and support during the duration of my research and writing

DECLARATION

I, PERMINUS KARUBIU KABURU, 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 degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

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

Signed:.....

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ABSTRACT

The Children Act of 2001 can be considered to be the most important legal source in Kenya as it is the pioneering statute that introduced the concept of the best interests of the child. The concept was later buttressed by the Constitution of Kenya 2010, Article 53. The concept demands that the child's best interests be given priority in all matters concerning it. Regardless, it is yet to be defined in law and its contents are yet to be firmly established. It is, therefore, left to the discretion of judges to determine what it entails, a role which has been actively undertaken by judges.

This paper shall demonstrate the reason which necessitate the creation of the concept of the best interests of the child. This shall be grounded on the argument that certain legal concepts need to be reduced to formal law. This paper shall then aim to consider the best interests are. In this regard, this paper shall establish the factors that have influenced the creation of the concept as well as its content. This paper shall then discuss the factors that have and continue to influence custody decisions in the different communities in Kenya. The aim shall be to determine where uncertainties may crop up which the formal law seeks to reduce and possibly eradicate. Finally, the paper shall discuss whether the inclusion in the formal law of the factors that shape a decision that is in a child's best interests will facilitate legal certainty and make custody battle outcomes more predictable.

List of Abbreviations

ACRWC- African Charter on the Rights and Welfare of the Child

BIC- Best Interest of the Child CRC- Convention of the Rights of the Child

List of Cases

AIDS Law Project v Attorney General and 3 others, Judgement of 18 March 2015, High Court of Kenya, eKLR.

Balaguer Santacana v Spain, Judgement of 9 July 1990, Human Rights Committee.

Bronda v Italy, Judgement of 9 June 1998, European Court of Human Rights.

C K v T K M, Judgement of 30 September 2016, Court of Appeal, eKLR.

Connecticut National Bank v Germain, Judgement of 9 March 1992, United States Court of Appeal.

Council of County Council Governors v the Attorney General and another, Judgement of 25 April 2017, High Court of Kenya, eKLR.

County Government of Kiambu and another v Senate and others, Judgement of 1 February 2017, High Court of Kenya, eKLR.

Director of Public Prosecution Transvaal v Minister of Justice and Constitutional Development, Judgement of 1 April 2009, Constitutional Court of South Africa.

Deutsche Milchkontor GmbH v Federal Republic of Germany, Judgement of 21 September 1983, European Union Court of Justice.

H G G v G G G G, Judgement of 12 November 2018, Kadhi's Court, eKLR.

Hendriks v The Netherlands, Judgement of 29 July 1988, Human Rights Committee.

In re RLB (child), Judgement of 29 September 2017, High Court of Kenya, eKLR..

M A A v A B S, Judgement of 2 February 2018, High Court of Kenya, eKLR.

M A v R O O, Judgement of 27 June 2013, High Court of Kenya, eKLR.

Manjit Singh Amrit V Papinder Kaur Atwal, Judgement of 3 July 2009, High Court of Kenya, eKLR.

McCall v McCall, Judgement of 14 January 1994, High Court of South Africa.

Minister of Welfare and Population Development v Sarah Jane Fitzpatrick and Benedict Paul Fitzpatrick, Judgement of 31 May 2000, Constitutional Court of South Africa.

N M M v J O W, Judgement of 27 September 2016, High Court of Kenya, eKLR

Nordally v The Attorney General and the Director of Public Prosecutions, Judgement of 1 January 1986, the Supreme Court of Mauritius.

O K v M E, Judgement of 24 October 2017, High Court of Kenya, eKLR.

Refugee Consortium Kenya and another v Attorney General and two others (2015) eKLR.

Regina v Matthew Barry James Offen, Peter Wilson McGilliard, Darren McKeown, Kristova Okwuegbunam and Stephen Peter S, Judgement of 9 November 2000, Court of Appeal of England and Wales.

Republic v Lucas M Maitha chairman Betting Control and Licensing Board and 2 others ex parte Interactive Gaming and Lotteries Limited, Ruling of 16 February 2015, eKLR.

Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others (1995) High Court of Calcutta.

Vallejo et al v Wheeler, Judgement of 10 November 1774, Court of King's Bench of the United Kingdom.

List of Legal Instruments

African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49.

Children Act, (Cap 141 of 2012).

Constitution of Kenya (2010).

Convention on the Elimination of all forms of Discrimination Against women, 18 December 1979, 1249 UNTS.

Convention on the Rights of the Child, 2 September 1990, 1577 UNTS 3.

French Code Civile (1803).

Geneva Declaration of the Rights of the Child, 26 November 1924.

Guardianship of Infants Act (Cap 144).

Marriage Act (No 4 of 2014).

The Children Bill, Kenya (2017).

UN Declaration on the Rights of the Child, 10 September 1959.

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

The protection of the child's best interests is the primary principle that guides child custody arrangements. The procedure involved in determining such matters is of material importance to children and their parents. Being highly dependent on the nature and quality of parenthood afforded during their childhood, it is very important that the child should have the best possible upbringing after a divorce.¹

The topic on the best interest rule has been fairly well studied and a two-pronged comprehension is evident. On the one hand, it appears that the rule as provided in legislation is rather wide thus the need for further expounding.² The contrary opinion argues that retaining the *status quo* is preferable since it allows for flexibility in application in different case scenarios.³

1.2 Statement of the problem

The concept of the best interests of the child has been applied by judges while relying on their individual comprehension of the concept. As such, the outcomes of cases have varied. This can be attributed to how oblique its representation is in the formal law. In that regard, would codification of those interests bring about certainty and make it easier for judges to reach decisions that are predictable?

1.3 Hypothesis

The codification of a clear legal definition of the concept of 'the best interests of the child' will facilitate legal certainty and impede unpredictability in child custody cases.

¹ Joan B Kelly, 'The determination of child custody' 4(1) *The future of children*, 1994, 1.

² Alice Dieci, 'Balancing the principle of the best interest of the child with the right to be heard: an ongoing challenge from an international perspective', 13(2) *Rivista di filosofia del diritto internazionale e della politica global*, 7.

³ *Minister of Welfare and Population Development v Sarah Jane Fitzpatrick and Benedict Paul Fitzpatrick*, Judgement of 31 May 2000, Constitutional Court of South Africa.

1.4 Statement of objectives

This paper seeks to interrogate:

1. what the interests of the child are,
2. Whether there is a need to reform section 4 (3) of the Children Act to specify what the 'best interests' of the child are,
3. Whether codifying the best interests will in effect promote certainty in the outcomes of custody battles.

1.5 Research questions

1. What are the best interests of the child?
2. Are the general interests or are they all specific?
3. Will the codification of the best interests facilitate legal certainty and foreseeability of custody battle outcomes?

1.6 Justification of the study

The best interests concept has its purpose as ensuring that children receive the highest level of consideration and that their interests override all other competing ones when decisions concerning them are made. Such a determination is left to the discernment of judges and it is thus important to interrogate the concept. This reasoning derives from the uncertainty on whether leaving such matters to the complete discretion of judges is the most efficient way to ensure that the interests are protected. There is no judicial approach that aids in creating certainty with regard to determining the best interests of a child. Therefore, the findings of this research may progress the understanding of the concept, its content and possible definitions that might afford the much needed clarity.

1.7 Literature review

The influencing factors in child custody cases have changed over time from the paternal preference rule which was widely accepted in the United States; to the maternal preference rule owing to change in societal norms; and finally to the child's best interests rule which has become the standard yardstick in child custody arrangements

internationally.⁴ This trend is discernible in Kenyan jurisprudence where fathers initially were granted sole custody.⁵ Later the rights of mothers to custody of the children were recognised and protected under the Guardianship of Infants Act and finally the best interest principle was adopted in Kenya as a provision under the Children Act and later in the Constitution of Kenya, under Article 53(2).⁶

The ACRWC captures the best interest principle, providing that in actions concerning children, the children's best interests are *the* primary consideration.⁷ The Convention on the Rights of Children, on the other hand, sets a lower standard than the ACRWC by providing that the BIC is *a* primary consideration in custody arrangements.⁸ This principle is also enshrined within our domestic context in the Constitution⁹ and the Children Act.¹⁰

The laws of Kenya do not give a definition of the BIC. However, certain courts have made an attempt at identifying the interests both directly and indirectly. An instance where a court gave an example of an interest of a child, happiness as was the case, is in *Manjit Singh* case.¹¹ Principal Kadhi Abdulhalim also, however obliquely, identified the interests of the child as their overall well-being, that is, physical, emotional and educational needs.¹² A similar position was taken in *N M v J O W* where Justice Kariuki stated that focusing on the best interest means that the decisions made are aimed at protecting and promoting the "...happiness, security, mental health and emotional development..." of the child.¹³ Further, Kadhi Abdulhalim opined that continued

⁴ Article 3(1), *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3.

⁵ Parental rights and duties over children, Kenya Legal Resources-
<http://www.kenyalawresourcecenter.org/2011/07/parental-rights-and-duties-over.html>, 3 January 2019.

⁶Parental rights and duties over children, Kenya Legal Resources-
<http://www.kenyalawresourcecenter.org/2011/07/parental-rights-and-duties-over.html>, 3 January 2019.

⁷ Article 3, *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3.

⁸ Article 4(1), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49.

⁹ Article 53, *Constitution of Kenya* (2010).

¹⁰ Section 4 (3), *Children Act* (Cap 141 of 2012).

¹¹ *Manjit Singh Amrit V Papinder Kaur Atwal*, Judgement of 3 July 2009, High Court of Kenya, eKLR.

¹² *H G G v G G G G*, Judgement of 12 November 2018, Kadhi's Court, eKLR.

¹³ *N M M v J O W*, Judgement of 27 September 2016, High Court of Kenya, eKLR.

stability in the life of the child is an interest of the child. This interest is also protected under Section 84 the Children Act.

The Kenyan statutes contain certain rights of the child whose protection and promotion would guarantee their welfare. For instance, Justice Onyiego opined that the provisions of Section 4(3) of the Children Act ensured that the rights and welfare of the child were protected.¹⁴ These rights are cast in the Constitution and include: the rights to education, nutrition, healthcare and shelter.¹⁵ In *NMM v JOW*, Kariuki J held that the Constitution under Articles 53, 159 and 70 give a number of rights which if promoted constitute looking out for the best interest of the child.¹⁶ The rights are, *inter alia*, the right to a name and nationality, right to education, shelter and healthcare, a right to a clean and healthy environment, and the right to access justice. Hand in glove with this, Thande J held that court decisions in matters concerning the child must be calculated to guarantee the protection of the welfare of the child.¹⁷ He terms the provision as the ‘paramountcy principle’.¹⁸

Patrick Kiage asserts that a number of factors are considered when determining the BIC. They include: the relationship between the parent/ caregiver and the child, the parents’ or caregivers’ ability to provide for the child’s needs, the likely effect a change in circumstances would have on the child.¹⁹ The proposed amended bill of 2017 also espoused similar factors which when considered would facilitate the BIC.²⁰ However, this bill was never passed.

In spite of the codification of the most basic rights of the child which are calculated to promote their interests, it still remains unclear whether their existence necessarily results in *certainty* in custody outcomes. For instance, in *OK v ME*, the judge held that the mother of the child take custody despite her assertion of her inability to provide for

¹⁴ *In re RLB (child)*, Judgement of 29 September 2017, High Court of Kenya, eKLR.

¹⁵ Article 53, *Constitution of Kenya* (2010).

¹⁶ *N M M v J O W*, Judgement of 27 September 2016, High Court of Kenya, eKLR.

¹⁷ Section 4 (3) (b), *Children Act* (Cap 141 of 2012).

¹⁸ *M A A v A B S*, Judgement of 2 February 2018, High Court of Kenya, eKLR.

¹⁹ Patrick Kiage, *Family law in Kenya: marriage, divorce and children*, m Law Africa, Nairobi, 2016, 281.

²⁰ Eighth schedule, The Children Bill (2017).

the child.²¹ In the matter, the mother had taken the daughter from her residence in Nairobi to Kericho where the girl stayed with the sickly grandmother, an uncle and a househelp. Prior to moving to Kericho, the daughter had stayed with the mother in Nairobi for fourteen years. The mother alleged that she was acting in line with advice given by her brother. She demanded that the father of the child provide her and the child with an abode in Kericho and take responsibility to provide for the child. She asserted that she and the father had a joint responsibility in raising the child.

Mumbi Ngugi J in her decision averred that the mother should repossess custody of the child, return her to Nairobi and enroll her in the same school she had been in or another suitable institution. Her claim of inability to provide for the child on her own was overlooked as the judge ordered that she commence a claim against the father for maintenance.

In respect of the compelling capability of precedence in ascertaining the best interest of the child, Justices Ouko and Minoti said,

ordinary precedent is of limited assistance when determining what is in the best interest of the child because these types of cases must notoriously hinge on the peculiar circumstances of each case'.²²

Owing to the distinctness of each case and the inability to draw precise predictions of the outcomes based on the rights of the child, a question arises on whether the codification of the interests will facilitate certainty.

Robert F Cochran argues that due to the lack of a clear definition conflicts arise such as: increased uncertainty and a reduced bargaining power on the side of the mothers who are perceived to be the primary caregivers; inability to determine the best interest standard and consequently unexpected outcomes in courts.²³ Robert Mnookin, who is a

²¹ *O K v M E*, Judgement of 24 October 2017, High Court of Kenya, eKLR.

²² *C K v T K M*, Judgement of 30 September 2016, Court of Appeal, eKLR.

²³ Robert F Cochran, 'The search for guidance in determining the best interests of the child at divorce', 15.

critic of the rule, posits that the vagueness of the rule subsequently causes the judge in a custody matter to face difficulty in weighing the competing interests of the child.²⁴

While it is true that the rule lacks a clear definition of what it encompasses, its obliqueness of it has been hailed as being very important. Due to the vagueness the rule has been considered flexible and thus ensuring that individual interests of different children are catered for.²⁵ Joan B Kelly highlights the same as a key advantage of its flexibility.²⁶ A similar position was taken by Leanne LaFave, that the BIC are those that ensure their proper development.²⁷ She went ahead to propose rules that would make it easier to comprehend what the best interest of the child are, the most important of which would be to identify the needs and interests of children in general.

This study shall discuss the current status regarding the understanding of the best interest concept and shall endeavour to provide a clear definition of the concept with the aim of curbing judicial discretion in custody matters.

1.8 Limitations

This study shall be limited to the best interest of the child in post-divorce custody matters solely. The accuracy of the study is limited to the data sources used owing to its qualitative nature.

1.9 Chapter breakdown

Chapter 2: This chapter will contain the theoretical framework

Chapter 3: This chapter will interrogate the contemporary understanding of the meaning of the best interests.

²⁴ Robert H Mnookin, 'Child custody adjudication, judicial functions in the face of indeterminacy' 39 *Children and the law*, 1975, 1.

²⁵ *Minister of Welfare and Population Development v Fitzpatrick* (2000) Constitutional Court of South Africa.

²⁶ Kelly, 'The determination of child custody', 121-142.

²⁷ Leann Larson Lafave, 'Origins and evolution of the 'Best interests of the child' standard' 34 *South Dakota Law Review*, 1989.

Chapter 4: This chapter will be dedicated to analysing whether codifying the best interests of the child will have any positive effects of certainty of custody battle outcomes.

Chapter 5: This chapter shall constitute the recommendations and conclusion based on the analysis in the previous chapters.

CHAPTER TWO

JUDICIAL INTERVENTION IN MAKING AND EXPANDING THE LAW

2.1 Introduction

“The court interprets the constitution and how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters.”²⁸

Justice John M. Mativo

Article 53 (2) of the Constitution²⁹ and the Children Act³⁰ are provisions which can be considered to be rather vague. This provision on the best interest of the child has been to the interpretation of the courts. This essentially means that the courts are allowed room for discretion to determine the scope of the concept, its content and application. There is a need to create legal certainty regarding the provision as this shall prove helpful in guiding the courts when applying the provision.

This chapter shall seek to interrogate two issues with regards to the Judiciary’s role in interpreting and making law. The two issues are: why the Judiciary takes up the policy-making role and the benefits and drawbacks of having such a function.

2.2 The gaps in the law and the remedying framework

Muthomi Thiankolu has argued that a parliament, while drafting the law, cannot possibly foresee all the possible scenarios that would occur unless by divine prescience.³¹ Singh and Bhero state that virtue of this imperfect nature of the drafting

²⁸ *County Government of Kiambu and another v Senate and others*, Judgement of 1 February 2017, High Court of Kenya, eKLR.

²⁹ Article 53 (2), *Constitution of Kenya* (2010).

³⁰ Section 4 (3)(b), *Children Act* (Cap 141 of 2012).

³¹ Muthomi Thiankolu, ‘The constitutional review cases: Emerging issues in Kenyan jurisprudence’ 2 *East African Law Journal*, 2005, 2.

process, some established legal principles may be overlooked by Parliament.³² As such, courts are tasked with adapting the law to suit the new and unforeseen circumstances.³³

In order to fill the gaps left in the law, Thiankolu presents two options. First is by the Constitution providing mechanisms to correct the gaps.³⁴ Second is by the Constitution availing avenues through which the law can be extended to cover new ideas, information or circumstances not previously anticipated at the drafting stage.³⁵ Of the latter option, one such mechanism, as preferred by Boukema, is the Constitution empowering judges to expound on the law and give it a much clearer definition.³⁶ This is done by unveiling: what the drafter bore in mind while creating the text, what the literal meaning of the text is, what the purpose of the rule is.³⁷ These three form the basis of the role of the Judiciary as a body that interprets the law.

The common law is a judge-made law. Such law is constructed from facts and circumstances of the case presented before the court.³⁸ These unanticipated scenarios, as earlier stated, create a situation where the court has two options. One, it may decide to avoid taking action since the circumstance has not been captured in the law and two, the court may decide to take action and fill the crevice in the law by using the case to develop or advance principles not captured in the formal law.³⁹ This decision would create a precedent which would be relied on by the court or other courts in future similar cases. Virtue of this, it is clear that judge-made law supplements the formal law.⁴⁰

³² Annie Singh and Moreblessing Zaryl Bhero, 'Judicial law-making: unlocking the creative powers of judges in terms of section 39(2) of the Constitution' 19(1), *Potchefstroomse Elektroniese Regsblad*, 3.

³³ *County Government of Kiambu and another v Senate and others* (2017) eKLR.

³⁴ Thiankolu, 'The constitutional review cases', 2.

³⁵ Thiankolu, 'The constitutional review cases', 2.

³⁶ H J M Boukema, 'Legal realism and legal certainty' 66 (4) *Archives for Philosophy of Law and Social Philosophy*, 1950, 476.

³⁷ H J M Boukema, 'Legal realism and legal certainty', 476.

³⁸ Jackton Boma Ojwang', *The common law, judges' law*, Strathmore University Press, Nairobi, 2014, 5.

³⁹ Ojwang', *The common law, judges' law*, 5. Citing *Donoghue v Stevenson* (1932), The United Kingdom House of Lords.

⁴⁰ Ojwang', *The common law, judges' law*, 37.

This power to create law is, however, not purely discretionary as it is subject to certain limitations.⁴¹ It is important to note that the power can only be exercised within the confines of the Constitution. In this regard, the judge-made law has to uphold the national values and principles of good governance encapsulated in the Constitution.⁴² In the same vein, the court has to promote the spirit, purpose and object of the Bill of Rights.⁴³ These limitations ensure that the decision arrived at by a judge, after adopting common law principles into the law, conforms to the tenets of the society in question and that no injustice or disorder is occasioned as a result of the law created by the judge.

2.3 Pros and cons of judicial law-making

While Nwabueze may be appreciative of such a system, where judges make law others have been critical of it. For instance, Thiankolu argues that such a system is dangerous as it allows judges to import their subjective value judgement into the law thereby defeating the purpose of the rule of law.⁴⁴ Boukema, shares quite similar sentiments as he opines that judicial innovation is a hindrance to legal certainty and predictability of judicial decisions.⁴⁵ Another noted drawback of judicial law making is that it creates a situation whereby the Judiciary may overstep its boundaries as a policy-making body and in effect inhibit the executive and legislature from performing their functions effectively.⁴⁶ Regardless, a solution has been provided by Yash Pal Ghai who asserted that if a judge gives reasons or the methodology they used in deciding the case such fears are unnecessary.⁴⁷ Such reasons, he continues, are mandatory lest the courts ends

⁴¹ Michael Dafel, 'The constitutional rebuilding of the South African private law: a choice between judicial and legislative law making', Unpublished degree in Philosophy dissertation, University of Cambridge, England, 2018, 94.

⁴² Article 10, *Constitution of Kenya* (2010).

⁴³ Article 20 (4) (b), *Constitution of Kenya* (2010).

⁴⁴ Muthomi Thiankolu, 'The constitutional review cases' 2 *East African Law Journal*, 2005, 27.

⁴⁵ H J M Boukema, 'Legal realism and legal certainty', 473.

⁴⁶ Annie Singh and Moreblessing Zaryl Bhero, 'Judicial law making', 17.

⁴⁷ Thiankolu, 'The constitutional review cases', 27. Citing YP Ghai, 'An analysis of the decision in *Re: Constitution of Kenya, Njoya v Attorney General*', 2 April 2014, 3.

up with too much power and control over public life than is constitutionally permissible.⁴⁸

2.4 Conclusion

The Judiciary plays a critical role in ensuring the administration of justice in the society. As long as crevices exist in the law, the judiciary will have to develop the law to remedy the lacuna. This role necessitates interpreting the law and as discussed and extending the law where formal law is lacking. Since this role may adversely affect the society if left unchecked, the judiciary is obligated to limit its innovation to the values of the society as required by the Constitution.⁴⁹ As such, the general principles etched in the Constitution form the basis of judicial law-making. From there the judiciary can build onto the legal template, in effect strengthening the desired clarity in the law.

⁴⁸ Thiankolu, 'The constitutional review cases', 27. citing YP Ghai, 'An analysis of the decision in *Re: Constitution of Kenya, Njoya v Attorney General*', 2 April 2014, 3.

⁴⁹ See Article 159, Constitution of Kenya (2010) under which courts are obligated to ensure they protect and promote the principles and values encapsulated in the Constitution.

CHAPTER THREE

DETERMINING THE BEST INTERESTS OF THE CHILD

3.1 Introduction

The previous chapter was a deliberation of the courts' involvement in the policy-making process in instances where the formal law has gaps. The chapter also discussed role of courts of law as interpretive bodies with regards to expounding the law based on the intent of the draftsman, the literal meaning of the text and the purpose of the text. The courts have the power to extend the law but this has to be done in compliance with the values of the Constitution.

This chapter shall canvass the best interest standard as cast in section 4(3) of the Children Act and Article 53((2) of the Constitution of Kenya. Both of these legislations put the BIC at the forefront of the considerations taken into account in all matters concerning children. It, however, does not give the scope of the best interests or its contents. As such this chapter shall canvass the scope of the concept including how some attempted definitions that have been afforded, the court's interpretation of the same as well as the guiding factors that help in determining what should be considered as the BIC. The aim of this chapter shall be to attempt to define what the BIC are.

3.2 History of the fundamental deciding factors in child custody cases

The BIC doctrine is broadly known and accepted globally in the protection of the rights of children. Initially the doctrine had a narrow application as it was merely a guarantee that in divorce and custody matters the interests of the child were taken into account.⁵⁰ This use has, however, evolved over time to apply in all matters concerning children.⁵¹ In early times, during divorce a father would be granted custody of the child.⁵² An example is in feudal Europe where children were considered to be part of patrimony

⁵⁰ Philip Alston, 'The best interest principle: towards a reconciliation of culture and human rights, reconciling culture and human rights' 8(1) *International Journal of Law, Policy and the Family*, 2004, 4.

⁵¹ Aron Degol and Shimelis Dinku, 'Notes on the principle "best interest of the child": meaning, history and its place under Ethiopian law' 5(2) *Mizan Law Review*, 2011, 321.

⁵² Degol and Dinku, 'Notes on the principle "best interest of the child"', 321.

thus the father had paramount right to their custody.⁵³ During this period the father had a right to have custody of the children unless the wife proved him unfit of the right which would require her to prove that the father is insane or is for another reason incapable of taking care of the child.⁵⁴ This paternal preference rule was modified by the British parliament in 1839 to the ‘tender years doctrine’.⁵⁵ The new doctrine held that mothers were to have primary custody rights to children aged seven and below and was based on the premise that mothers have special natural bonds with younger children.

The courts in Kenya adopted the tender years doctrine which is the equivalent of the maternal preference rule. For instance, in *Karanu v Karanu* the Court of Appeal asserted that the general rule regarding custody of children was that custody of children of tender age was to be granted to the mother unless the court deemed her incapable of ensuring the protection and promotion of the welfare of the child.⁵⁶ As regards this rule, the courts compare which parent is better placed to provide the better quality of basic needs and upbringing before making a decision but they gave primary preference to the mother of the child if the child was ten years or less.⁵⁷

The tender years doctrine remained in place for years even during the interlude between the Guardianship of Infants Act and the Children Act. The Guardianship of Infants Act provided that the welfare of children was to be given paramount consideration in all matters affecting them.⁵⁸ Nevertheless, the tender years doctrine still held precedence with the courts, which averred that the best interests of a child of tender age would best be served if the child resided with the mother.⁵⁹

⁵³ M B Melina, “Louisiana family law: the visitation of the non-custodian parent” 59 *Tulane Law Review*, 1985, 489.

⁵⁴ Degol and Dinku, ‘Notes on the principle “best interest of the child”’, 321.

⁵⁵ Lenore J Weitzman, *The divorce revolution: the unexpected social and economic consequences for women*, Free Press, New York, 1987, 219.

⁵⁶ *Karanu v Karanu*, Judgement of 1975, East African Court of Appeal.

⁵⁷ Patricia Kameri Mbote, ‘Custody and the rights of children’ in Kibwana K and Mute L (eds), *Law and the quest for gender equality in Kenya*, Claripress, Nairobi, 2000, 5.

⁵⁸ Section 17, *Guardianship of Infants Act* (Cap 144).

⁵⁹ Kiage, *Family law in Kenya: marriage, divorce and children*, 282. He referred to this as the ‘doctrine of tender years’. He goes on to argue that the maternal preference rule and the best interest standard produce more or less similar results as there is a confluence of considerations to be examined with either.

The Guardianship of Infants Act was repealed by the Children Act which brought with it the formalisation of the concept of “best interests”. The concept demands that custody issues be guided by the consideration of the interests of the child.⁶⁰ This provision came into being by reason of compliance with international law on the rights of the child. The standard has been lauded for being gender neutral and has received recognition in both common law and civil law systems.⁶¹

3.3 The international framework on the best interest standard

The earliest organised effort towards recognising the rights of the child was in 1924 when the Geneva Declaration of the Rights of the Child was adopted by the League of Nations. The rights encompassed measures against “...slavery, child labour, child trafficking and prostitution of children.” The Declaration stressed on the material needs of children and proclaimed that children must have the necessary means for their development.⁶²

The Declaration was succeeded by the United Nations 1959 Declaration of the Rights of the Child and the 1989 Convention on the Rights of the Child (CRC). These two legal instruments have laid the foundation for national legislation with regard to the rights of children.

The UN Declaration on the Rights of the Child affirmed the principle in the preamble of the Geneva Convention on the Declaration of Rights that, “mankind owes to the child the best it can offer”. The UN Declaration also underscored the importance of protecting children’s best interests owing to their vulnerable nature.⁶³ The concept of the best interest of the child is also provided under Article 7 of the Declaration affirming it to be the guiding principle in decisions made affecting a child.

The Convention on the Rights of the Child provides for matter on child survival, protection and development.⁶⁴ The best interests concept is seen as a basis for other general standards, in the idea of survival and development since every action needs to

⁶⁰ Section 4 (3), *Children Act* (Cap 141 of 2012).

⁶¹ Weitzman L J, *The divorce revolution*, 221.

⁶² Articles 1, 2, 3, *Geneva Declaration of the Rights of the Child*, 26 November 1924.

⁶³ Article 2, *UN Declaration on the Rights of the Child*, 10 September 1959.

⁶⁴ Patricia Kameri Mbote, ‘Custody and the rights of children’, 1.

guarantee the child can survive and develop with minimum impediment. In that regard the Convention underscores the importance of giving primacy to the interests of the child in matters concerning them.⁶⁵ The same is also evident in the ACRWC on the Rights and Welfare of the Child.⁶⁶

Kenya ratified the two foundational conventions (the CRC and ACRWC) in 1990 and 2000 respectively. Following this, the succeeding laws touching on children matters were made in compliance with the conventions. As such, the Children Act (2001, 2012) and the Constitution (2010) obligated persons and institutions taking actions concerning children to ensure the consideration of their best interests in priority over other parties.

3.4 Defining “the best interests of the child”

3.4.1 Problem of definition

Inasmuch as the concept is universally recognised, defining it is still a problem. Phillip Alston argues that this is because of the different understanding of the concept in different regions.⁶⁷ He compares it to the values and social norms that differ everywhere. Other cited causes of the variances in understanding have been attributed to the forces at play such as poverty and conflict, legal and ethical concerns about the manipulation of human genes using technology.⁶⁸

Further, the concept is subjective and its interpretation is left to the individual, institution or organisation that is applying it.⁶⁹ Mnookin also supports this and argues that society does not have a consensus regarding the values that should be used to determine what is best for the child.⁷⁰ The most potent challenge towards defining the

⁶⁵ Article 3 (1), *Convention on the Rights of the Child*.

⁶⁶ Article 4 (1), *African Charter on the Rights and Welfare of the Child*. Also see article 5, *Convention on the Elimination of all forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS, 13.

⁶⁷ Alston, ‘The best interest principle’, 10.

⁶⁸ Degol and Dinku, ‘Notes on the principle “best interest of the child”’, 324.

⁶⁹ Philip Alston, ‘The best interest principle’, 12.

⁷⁰ Robert H Mnookin, *In the interest of the child: Advocacy, law reform and public policy*, W H Freeman and Co, New York, 1985, 17.

concept is the difficulty of identifying criteria that can be used to determine which of the available options will ensure the promotion of the BIC.⁷¹

Alston gives a good illustration of the difficulty of having a definite meaning for the concept using highly industrialised countries and more traditional ones. The former will tend to favour an approach that emphasises a child's individuality and autonomy while the latter will be more inclined towards sublimation of the child's interests in favour of the family as family and community ties may be considered to be more important.⁷²

In essence, while there is wide recognition of the concept, it lacks binding content. As such it is rather difficult to come up with a definite meaning or definition of it. It is thus left to the particular realities of each state to develop a meaning suitable to that state.

3.4.2 Understanding the scope of the best interests of the child

3.4.2.1 Attempts at defining the concept

Seeing as the Children Act and the Constitution fail to give a definition of the best interests concept, it has been left to courts and scholars and institutions to create a definition. The standard approach has been to consider the child's rights as well as its welfare in order to determine what its best interests are. For instance, the African Child Policy Forum presents that the BIC encompasses all the rights of the child as well as everything that is of advantage to a child which includes the moral, mental, physical and material well-being of the child.⁷³ The UNHCR Guidelines on Determining the Best Interest of the Child provides that the concept broadly describes the well-being of the child.⁷⁴

The requirements endorsed by ACPF can also be seen in Schwalynk's list of conditions that should inform a decision regarding a child's best interests. The list he gives

⁷¹ Degol and Dinku, 'Notes on the principle "best interest of the child"', 324.

⁷² Alston, 'The best interest principle', 11.

⁷³ ACPF, *In the best interest of children: harmonising laws on children in West and Central Africa*, Addis Ababa, 2011, 82.

⁷⁴ United Nations High Commission for Refugees *Guidelines on determining the best interests of the child*, 2008, 14.

demands the ‘...consideration of the child’s relationship with its parents, the attitude of the parent towards the child, the capability of the parents to provide materially, emotionally and intellectually for the child, the probable consequence of a change in the circumstances of the child, the child’s age, maturity and stage of development.’⁷⁵

Other attempts at defining the concept have been made such as by Yvonne Dausab who defines it as ‘considering the child before a decision affecting the child’s life is made’.⁷⁶ These definitions are, however, rather broad since they do not give more insight into the contents of the best interests. Bosman and Van Zyl have defined it as considering the needs of the child while making determinations affecting the child implying that it is a process in itself.⁷⁷ This definition is better as it gives an idea into what the courts take into account during custody trials.

Dinku and Degol, prefer taking a rights-based approach towards the concept. They argue that the concept should be viewed in light of the other rights of the child, quite similar to what the ACPF proposes.⁷⁸ According to the two, the rights of the child are part of the ‘best interest’ concept and are instrumental in its realisation.⁷⁹ Hand in glove with this, they assert that over and above considering the rights of the child the decision should also take into account the general social welfare of the child and the moral, religious and cultural leaning of the parents that may compete with the child’s rights.⁸⁰ Owing to the possibility of a compromise of the child’s rights due to the inclinations of the parents, the different values that may be put into consideration when determining the best interest of the child have to be checked to ensure that they comply with the rights of the child.⁸¹ In determining the content of the rights, they continue, particular

⁷⁵ Kiage, *Family law in Kenya*, 281-282.

⁷⁶ Yvonne Dausab, ‘The best interests of the child’ in Ruppel O C (ed), *Children’s rights in Namibia*, Macmillan Education Namibia, Windhoek, 2009, 147.

⁷⁷ P P M Matiea, ‘The best interests of the child in cases of deprivation of post-divorce parental contact’, Unpublished LLM Thesis, North-West University, 2016, 16. Citing Bosman F J and Van Z G, ‘Children, young persons and their parents’ in Robinson J A (ed), *The Law of children and young persons in South Africa*, Butterworths, 1997.

⁷⁸ Degol and Dinku, ‘Notes on the principle “best interest of the child”’, 325

⁷⁹ Degol and Dinku, ‘Notes on the principle “best interest of the child”’, 325.

⁸⁰ Degol and Dinku, ‘Notes on the principle “best interest of the child”’, 325.

⁸¹ Degol and Dinku, ‘Notes on the principle “best interest of the child”’, 325.

attention has to be paid to the socio-economic factors and other factors involved.⁸² The child's rights are thus, according to them, the benchmark in searching for the content of the concept of the 'best interest of the child'.

The question of determining what the best interest of the child is has also been argued to be one of fact, to be determined by the circumstances of each case.⁸³ This has been the approach taken by courts as they primarily determine the best interests of specific children rather than the whole multitude of them. The approach of courts shall be discussed in the following sub-section.

3.4.2.2 The best interests standard from the courts' lens

The concept of 'the best interest of the child' has been recognised and applied both internationally and nationally and courts have generally adopted a somewhat similar criterion to determine what it is. The European Court of Human Rights opined that when considering the best interest of the child the court places great weight on the child's right to expression as well as its wishes.⁸⁴ In *Hendriks v The Netherlands*, when a father's rights under the International Covenant on Civil and Political Rights with regards to access to his child post-divorce was raised, the Human Rights Committee highlighted the importance of the institution of the family, the rights of the father and the child's best interest. It went on to highlight that in case of a conflict between the rights of the parent and the concept of the best interest of the child, the latter shall take priority.⁸⁵ A similar disposition is portrayed in *Santacana v Spain* where the Committee espoused the importance of the concept especially since it is gender neutral, that is, it does not favour either of the parents based on their sex. It further asserted that taking

⁸² Degol and Dinku, 'Notes on the principle "best interest of the child"', 325.

⁸³ Bernard Bekink and Mildred Bekink, 'Defining the standard of the best interest of the child', 23. See also Matiea, 'The best interests of the child in cases of deprivation of post-divorce parental contact', LLM Thesis, North-West University, 2016, 18.

⁸⁴ *Bronda v Italy*, Judgement of 9 June 1998, European Court of Human Rights, para. 33, 60, 62.

⁸⁵ *Hendriks v The Netherlands*, Judgement of 29 July 1988, Human Rights Committee, para. 8.3.

the child's views and wishes into consideration was an important element of the best interest concept if the child was 12 years or older.⁸⁶

On the possible definition of the best interests, Justice Kimaru opined that it depends on the different circumstances of each case.⁸⁷ As such there can be no clear definition. Regardless, he went on to state that there are certain universal requirements that constitute the best interest. He highlighted them as the rights of the child including the right to education, the child's welfare, parental guidance and having a favourable environment to live in.⁸⁸ Courts are cognisant of the fact that the best interest standard is applied differently in each case as each child is unique with special needs and interests.⁸⁹ As such, factors such as their personal situations, immediate needs, age, gender, disability, level of maturity have to be taken into account.⁹⁰

The Court in *McCall v McCall* listed criteria which would later be used by courts as a reference when assessing the BIC.⁹¹ The criteria afforded by the court has been adopted by various courts in the attempt to determine the BIC in different circumstances, particularly where the parental rights and the interests of the child are to be weighed against each other.⁹² The court opined that a judge must decide which parent is better equipped to promote the physical, emotional, spiritual and moral needs of the child ensuring that they are adequately met.⁹³

Similarly, Principal Kadhi Abdulhalim posited that children have general needs which the courts should consider and protect. The needs fall under physical, emotional and educational needs and comfort of the child and any disruptions to the enjoyment of

⁸⁶ *Balaguer Santacana v Spain*, Judgement of 9 July 1990, Human Rights Committee, para. 7.4.

⁸⁷ *MA v ROO*, Judgement of 27 June 2013, High Court of Kenya, eKLR.

⁸⁸ *MA v ROO*, Judgement of 27 June 2013, High Court of Kenya, eKLR.

⁸⁹ *Director of Public Prosecution Transvaal v Minister of Justice and Constitutional Development*, Judgement of 1 April 2009, Constitutional Court of South Africa.

⁹⁰ *Director of Public Prosecution Transvaal v Minister of Justice and Constitutional Development*, Judgement of 1 April 2009, Constitutional Court of South Africa.

⁹¹ *McCall v McCall*, Judgement of 14 January 1994, High Court of South Africa.

⁹² Matiea, 'The best interests of the child in cases of deprivation of post-divorce parental contact', Unpublished LLM Thesis, North-West University, 2016, 16.

⁹³ *McCall v McCall*, Judgement of 14 January 1994, High Court of South Africa.

these needs should be shunned.⁹⁴ Factors that may cause a disruption have been highlighted to include arbitrary and unproportional punishment, abasement or insults, threats and lack of educational guidance.⁹⁵ A similar position was also taken by Justice Kariuki who opined that focusing on the BIC means the ultimate goal of the decisions made by a court are aimed at fostering and encouraging the child's '...happiness, security, mental health and emotional development'.⁹⁶

The courts in Kenya stand guided by the rights of the child as encapsulated in the Constitution when reaching determinations.⁹⁷ Over and above the rights of the child, the courts also adapt the different cases to the factors they are expected to take into consideration as cast in the Children Act.⁹⁸ It is by applying these rights and taking the factors into consideration that the courts are able to promote the BIC in each case.⁹⁹ These rights and factors thus serve as the departure point for the determination of the child's best interests.

3.4.2.3 The African Child Policy Forum on the best interest of the child

In two reports by the organization dated 2007 and 2011, the organization considers the concept to be a principle. The 2007 report on the harmonisation of laws on children in Eastern and Southern Africa, it is repeatedly stated that the BIC is a guiding principle in laws and policies relating to children.¹⁰⁰ This angle of approach is taken as it is posited in the earlier report that the concept is one of the four cardinal principles in the CRC and the ACRWC.¹⁰¹ The rationale adopted by the organization for taking such an

⁹⁴ *H G G v G G G G*, Judgement of 12 November 2018, Kadhi's Court, eKLR.

⁹⁵ *O K v M E*, Judgement of 24 October 2017, High Court of Kenya, eKLR.

⁹⁶ *N M M v J O W*, Judgement of 27 September 2016, High Court of Kenya, eKLR.

⁹⁷ Articles 53, 70, 159, *Constitution of Kenya* (2010).

⁹⁸ Section 83(1), *Children Act* (Cap 141 of 2012).

⁹⁹ *M A A v A B S*, Judgement of 2 February 2018, High Court of Kenya, eKLR.

¹⁰⁰ African Child Policy Forum, *In the best interests of the child; Harmonising laws on children in Eastern and Southern Africa*, 2007, 6, 32, 108.

¹⁰¹ African Child Policy Forum, *In the best interests of the child; Harmonising laws on children in West and Central Africa*, 2011, 7.

approach is that as a principle it ensures the full realization of the rights of children.¹⁰² As such, it overarches all rights related to children.

3.4.2.4 The best interest of the child model in the UN CRC General Comment Number 14

The content of the best interests is rather broad necessitating a regime with no definite definition since this would limit its application. The clarification of the concept is premised on the correct interpretation of it based on the guiding factors presented in law that are to be employed in determining what the best interests are. The UN Child Rights Committee in its General Comment 14 presents that the BIC should be approached and determined from either an individual basis or the collective basis.¹⁰³ From General Comment Number 14, it follows that an assessment and determination of the best interests of a child should follow a two-step process. First, the relevant elements for the assessment should be drawn from the facts of each case and they shall be assigned content and weighed against each other.¹⁰⁴ Second, in order to actuate the first step, a process that safeguards legal guarantees and appropriate application of the rights of the child should be followed.¹⁰⁵

The collective basis is addressed in the formal law by the decisions of the legislators when drafting laws that have an impact on the welfare of children.¹⁰⁶ Such laws would include the Constitution and other statutes related to the welfare of the child, for instance, the Children Act. This approach is hinged on the idea that the legislator may not be able to formulate laws that cover all the interests of the different children and their differing circumstances. As such, the laws it makes are tuned such that their application to different cases would require interpretation and adaptation by courts and other parties making decisions on matters affecting children. The individual basis approach is quite similar to the collective only that in this instance the elements so

¹⁰² African Child Policy Forum, *In the best interests of the child; Harmonising laws on children in West and Central Africa*, 2011, 31.

¹⁰³ Committee on the Rights of the Children, *The right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), General Comment No. 14, 29 May 2013, para 9.

¹⁰⁴ Committee on the Rights of the Children, General Comment No, 14, para 6.

¹⁰⁵ Committee on the Rights of the Children, General Comment No, 14, para 6.

¹⁰⁶ Committee on the Rights of the Children, General Comment No, 14, para 9.

defined by the law are applied on a case by case basis.¹⁰⁷ This allows for the best interests standard to be flexible enough to fit all manner of circumstances as presented before the courts.¹⁰⁸ Thus, the elements used to determine the best interests of the multitude of children in general are the same ones used to determine those of the individual child.¹⁰⁹ However, owing to the distinct nature of each case and the uniqueness of each child, the elements that may be employed will differ. These two factors will also determine how the interests will be weighed against each other.

The laws provide rights of the child as well as other factors which the courts have to take into account when reaching decisions. These factors and rights have been recognised as the elements that are put into consideration by any body making a decision that will affect a child. The key elements as espoused by the Child Rights Committee include: the child's views, the child's identity, preservation of the family environment and maintaining relations, care, protection and safety and protection of the child, situation of vulnerability, the child's right to health, the child's right to education.¹¹⁰

3.4.2.5 Is the best interests standard a principle or a right?

Black's Law Dictionary defines a right as 'a just and lawful claim or interest against the whole world' and a principle as 'the fundamental truths or doctrines of law or the comprehensive rules or doctrines that furnish a basis or origin for others'.¹¹¹ Dausab posits that the standard is a principle as it hails from common law.¹¹² Bonthuys takes a similar approach to Dausab's asserting that it is a principle since courts do not treat it as they do other rights in the case of an infringement.¹¹³ If it was a right, he continues, the courts would consider whether the actions or rule in question infringes on the right (best interest) following which the court would test whether the infringement is

¹⁰⁷ Committee on the Rights of the Children, General Comment No, 14, para 9.

¹⁰⁸ Committee on the Rights of the Children, General Comment No, 14, para 9.

¹⁰⁹ Committee on the Rights of the Children, General Comment No, 14, para 12.

¹¹⁰ Committee on the Rights of the Children, General Comment No, 14, para 13-17.

¹¹¹ *Black's Law Dictionary*, 2 ed.

¹¹² Yvonne Dausab, *The best interests of the child*, Macmillan Education Namibia, Windhoek, 2009, 147.

¹¹³ Elsje Bonthuys, 'The best interests of children in the South African Constitution' 20(1) *International Journal on Law, Policy and the Family*, 2006, 26.

justified.¹¹⁴ On the converse, he goes on, instead of examining and interpreting the elements of the best interests like other rights, courts only assert that a rule has infringed on the BIC. This creates an impression that it is not really a right but a guiding principle.¹¹⁵ He further asserts that there is no need to consider it as a right as there are other rights of the child more suited to apply directly to cases.¹¹⁶

Friedman and Pantazis take a different stance since they view it as both a guiding principle and a right as it entails three possible uses, that is; it aids in interpreting the rights of the child, it helps determine the scope of other fundamental rights, both of which are its characteristics as a guiding principle and finally it is used as a fundamental right in itself.¹¹⁷ As regards the last function, Bekink, citing the Constitutional Court of South Africa, argued that the mere inclusion of the principle into the South African Constitution elevated the principle into a constitutionally enforceable right as against the state and other individuals.¹¹⁸ Justice Lenaola, quoting a South African case *Sonderup v Tondelli and another* admitted that the best interest standard is both a right and a guiding principle.¹¹⁹ As a guiding principle, the standard requires the state to take action that would ensure no breakdown of family life or parental care which would in effect affect the welfare of children negatively.¹²⁰

The Committee on the Rights of the Child classified the BIC as a right, a principle and a rule of procedure.¹²¹ It is a substantive right because it creates an obligation for states, it is directly applicable and it can be invoked before a court: a fundamental legal

¹¹⁴ Bonthuys, 'The best interests of children in the South African Constitution', 2006, 27. See also *Refugee Consortium Kenya and another v Attorney General and two others* (2015) eKLR.

¹¹⁵ Bonthuys, 'The best interests of children in the South African Constitution', 2006, 27.

¹¹⁶ Bonthuys, 'The best interests of children in the South African Constitution', 2006, 26.

¹¹⁷ Adrian Friedman and Angelo Pantazis, 'Children's rights' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa*, 2 ed, Juta and Company Limited, Kenwyn, 2013, 40-42.

¹¹⁸ Bekink and Bekink, 'Defining the standard of the best interest of the child: Modern South African perspectives' 30(1) *De jure*, 2004, 22.

¹¹⁹ *Refugee Consortium Kenya and NT v Attorney General, The Cabinet Secretary Ministry of Interior and National Coordination and The Commissioner of Refugee Affairs*, Judgement of 18 December 2015, eKLR. Citing *Sonderup v Tondelli*, Judgement of 12 April 2000, Constitutional Court of South Africa.

¹²⁰ *Refugee Consortium Kenya and NT v Attorney General, The Cabinet Secretary Ministry of Interior and National Coordination and The Commissioner of Refugee Affairs*, Judgement of 18 December 2015, eKLR.

¹²¹ Committee on the Rights of the Children, General Comment No. 14, 4.

principle since it can be interpreted in various ways such that the interpretation that best suits a given set of circumstances is adopted: a rule of procedure because decision-making must involve the assessment of all possible impacts of the decision on the particular child. As such states are expected to account for how the right has been promoted while making the decision, as well as explain the basis of the criteria used by the court in reaching the decision and how the BIC have been properly weighed against other considerations.¹²²

Kiage refers to the standard as a principle throughout his discussion.¹²³ The inference to be drawn from his discourse is that as a principle it guides the courts in determining which maximum pool of rights and welfare of the child when enforced will ensure the promotion of the child's best interests.

Owing to its inclusion in the Children Act and the obligation imposed on judicial and administrative institutions to uphold and promote the interests of the child, an impression is created to the effect that the obligation seems to generate a claim on the part of the child. These claim-duty dichotomy characterises the nature of rights owing to which the interests may be considered as rights in themselves. On the other hand, the standard itself sets a threshold to be met in matters concerning children. Every circumstance and possible solutions are analysed by the court whilst using the standard as a yardstick to determine whether the child's interests will be guaranteed by the decision to be made. In that regard, the concept may be considered to be a guiding principle.

3.5 Conclusion

The ultimate goal of the best interests standard is to guarantee, protect and promote the well-being of the child. As has been discussed, the BIC encompass more than the primary rights of the child as captured in the bill of rights.¹²⁴ Other needs have to be taken into consideration even if not included in the formal law. As such, the rights of the child, its needs and its well-being are the cornerstones of the best interest concept.

¹²² Committee on the Rights of the Children, General Comment No. 14, 4.

¹²³ Kiage, *Family law in Kenya*, 280-283.

¹²⁴ Reyneke, 'Realising the child's best interests', 14.

It would, therefore, be right to say that the best interest of the child is the cumulative consideration of the three elements, that is the rights, needs and well-being of the child. This is in line with the postulation that the concept as a rule of procedure. With regard to the concept being a right, then a possible definition would be the right to have the three elements considered during trial. Lastly, as a principle, the concept lacks a clear definition as it serves as a guide as to how the rights and needs of the child are to be weighed against each other and applied. This last characteristic of the concept (as a principle) is the one that creates a lot of confusion and leads one to assume that there can be no clear definition. This is because it is difficult to give a definition to a mode of guidance as opposed to a right or a rule of procedure.

These definitions are, however, founded on the general outlook of the concept, that is, they relate to the concept as it applies to all children in general. As has been discussed, the courts mostly apply the concept in specific scenarios. Regardless, as presented in this chapter the courts have employed the use of the definitions without expressly stating them but rather considering the building elements of the concept.

CHAPTER FOUR

IS LEGAL CERTAINTY WITH RESPECT TO THE BEST INTEREST OF THE CHILD ACHIEVABLE?

4.1 Introduction

This chapter interrogates whether reducing the definitions of the best interest of the child in the previous chapter to a formal nature will have a positive impact on predicting the outcome of custody cases. In the process this chapter shall address the idea of legal certainty and whether having absolute legal certainty is possible. If it is then what are the probable compromises that will be made in order to achieve the goal of legal certainty.

4.2 Should the law be certain?

The genesis of uncertainty in the law has been attributed to various reasons, three of which have been highlighted by Justice Mativo being: that words are imperfect as symbols of communication of intention and they can therefore change meaning or be ambiguous: that new unforeseen situations will inevitably arise especially due to new technologies thus making the application of the law as it is more difficult: that uncertainties may be introduced to the law during the drafting process in cases such as where the draftsman wishes to make a compromise or wishes to cater for certain groups.¹²⁵

Justice Mativo is of the view that when interpreting the law, respect must be paid to the language of the law as well as the traditions and usages from which the meaning of the law derived.¹²⁶ An extreme approach is evident from the French code Civil of 1803 which pithily expressed that judges were not to add onto or re-interpret the law but should stick to the literal wording of the law.¹²⁷ This was after the arbitrary abuse of power by judges before the revolution.¹²⁸ This is quite different from what Justice

¹²⁵ *Council of County Council Governors v the Attorney General and another*, Judgement of 25 April 2017, High Court of Kenya, eKLR.

¹²⁶ *Council of County Council Governors v the Attorney General and another* (2017) eKLR.

¹²⁷ Article 5, *French Code Civile* (1803).

¹²⁸ Jonathan Mance, *Should the law be certain?*, 4.

Mativo prefers as he states that when the express intention of the draftsman is missing the judge should interpret the laws per the language used, that is, the literal manner of interpretation.¹²⁹ The judge terms this as the conclusive mode of statutory interpretation and quotes the United States Court of Appeal which posited that the ‘cardinal canon of construction’ is that courts must presume that the legislator means what he says and says what he means in the statute.¹³⁰

Hand in glove with this is the decision rendered by Justice Odunga wherein he averred that simply because a statute does not define a particular term does not necessarily render that term ambiguous.¹³¹

Whether law should be certain is a question answered by some judges with a resounding, yes. This follows the reason that if the law is certain it can be easily enforced and people would know how to order their lives along the lines of the law.¹³² Certainty of the law, in that regard, is expected when the draftsman makes the law and when judges expound on law. Lord Birmingham thus said that, “The law must be accessible and so far as possible intelligible, clear and predictable.”¹³³ This was the first element of certainty espoused by the judge. The second was that matters of right and liability should be settled by applying the law rather than exercising discretion. The same position is taken by Lord Mansfield who posits that rules should be certain as only then can actors know and understand what is expected of them.¹³⁴

Certainty as a principle is also recognised by the European Union Court of Justice as being part of the legal order. The court draws a link between certainty and legitimate expectation averring that citizens can properly order their lives when the law is certain

¹²⁹ *Council of County Council Governors v the Attorney General and another* (2017) eKLR.

¹³⁰ *Connecticut National Bank v Germain*, Judgement of 9 March 1992, United States Court of Appeal.

¹³¹ *Republic v Lucas M Maitha chairman Betting Control and Licensing Board and 2 others ex parte Interactive Gaming and Lotteries Limited*, Ruling of 16 February 2015, eKLR.

¹³² *Council of County Council Governors v the Attorney General and another* (2017) eKLR.

¹³³ Jonathan Mance, ‘Should the law be certain? The Oxford Sshrieval lecture’, University Church of St Mary The Virgin, Oxford 11 October 2011, 1.

¹³⁴ *Vallejo et al v Wheeler*, Judgement of 10 November 1774, Court of King’s Bench of the United Kingdom.

owing to which they would know the requirements expected of them.¹³⁵ There can, however, be instances where the law is unclear and the citizens are misled as to the content or effect of the law by for instance public bodies.¹³⁶ The citizen then relies on the law as has been presented to them rather than as it is. This role of interpreting the law in this instance is carried out by the judges.

If the law is certain it provides little room for creativity on its application.¹³⁷ Currently, the provision on the best interests of the child is considered vague and broad virtue of which courts readily interpret it in different manners suitable to the different cases. This flexibility can be considered to be the consequence of the lack of certainty in the law. In other words, judicial discretion is welcome where the law is vague in order to convey its possible meaning or its intended function.¹³⁸ The question thus arises on what the situation would be should there be a clear definition of the term. Following the argument posed by Justice Mativo, then the courts would have no reason to give further elaboration on the law.¹³⁹ As such, it would be expected of anyone reading the provision to have an understanding similar to the courts'. Therefore, its application would not fall outside the expectations of the litigants.

4.3 The drawbacks of the process of achieving certainty

Legal certainty has been at odds with the principle of flexibility since the more the law becomes certain the less flexible it becomes as little intervention by courts will be needed to adapt it to the situations presented to it. In that regard, certainty may be considered to be a probable cause of injustices. Thus, inasmuch as achieving legal certainty is appealing the pursuit of it can lead to causing injustice. For instance, Mauritius in 1986 passed a law whose effect was to withdraw bail for serious drug cases.¹⁴⁰ Certainty was achieved but at the cost of lengthy periods of remand for accused

¹³⁵ *Deutsche Milchkontor GmbH v Federal Republic of Germany*, Judgement of 21 September 1983, European Union Court of Justice, para. 3.

¹³⁶ Mance, 'Should the law be certain?', 2.

¹³⁷ *Council of County Council Governors v the Attorney General and another* (2017) eKLR.

¹³⁸ H J M Boukema, 'Legal realism and legal certainty', 476.

¹³⁹ *Council of County Council Governors v the Attorney General and another* (2017) eKLR.

¹⁴⁰ *Nordally v The Attorney General and the Director of Public Prosecutions*, Judgement of 1 January 1986, the Supreme Court of Mauritius.

persons due to the delays in trials. The court struck down the law as inconsistent with the Constitution and the principle of separation of powers.¹⁴¹ The latter was addressed since during detention owing to the presumption of innocence, an individual's freedom was considered to be a matter to be decided by the judiciary and not the executive.¹⁴²

In deciding a matter regarding the potential contradiction of article 31 of the Constitution of Kenya by section 24 of the HIV and AIDS Prevention and Control Act, Justices Lenaola, Mumbi Ngugi and Odunga were of the opinion that the latter was unconstitutional.¹⁴³ The basis of the decision was that it violated the privacy rights afforded to individuals under article 31 and that it was vague as it failed to give a clear definition of the term 'sexual contact', a term whose value is key in defining the offence captured in the section. This decision seems to have favoured legal certainty (upholding the importance of article 31 (2) of the Constitution) over the attainment of justice as the section 24 required HIV positive individuals to disclose their status to anyone with whom they intended to have sexual contact or share needles with.

A similar occurrence might have occurred in England and Wales during the introduction of the mandatory life sentence for individuals convicted the second time for a serious offence. The exception to the rule lay in the mitigating circumstances which related to the offender or the offence that could justify not imposing the sentence.¹⁴⁴ This exception, when narrowly construed, ran the risk of imposing the sentence unnecessarily.¹⁴⁵ This was, however, resolved by the court when it averred that the exceptional circumstances are where the offender could be shown to be of no serious danger to others.¹⁴⁶

¹⁴¹ *Nordally v The Attorney General and the Director of Public Prosecutions*, Judgement of 1 January 1986, the Supreme Court of Mauritius.

¹⁴² *Nordally v The Attorney General and the Director of Public Prosecutions*, Judgement of 1 January 1986, the Supreme Court of Mauritius.

¹⁴³ *AIDS Law Project v Attorney General and 3 others*, Judgement of 18 March 2015, High Court of Kenya, eKLR.

¹⁴⁴ *Regina v Matthew Barry James Offen, Peter Wilson McGilliard, Darren McKeown, Kristova Okwuegbunam and Stephen Peter S*, Judgement of 9 November 2000, Court of Appeal of England and Wales.

¹⁴⁵ Mance, *Should the law be certain?*, 10.

¹⁴⁶ *Regina v Matthew Barry James Offen, Peter Wilson McGilliard, Darren McKeown, Kristova Okwuegbunam and Stephen Peter S*, Judgement of 9 November 2000, Court of Appeal of England and Wales.

4.4 Conclusion

As put by Justice Mativo, no legislation is devoid of ambiguity and addresses all matters.¹⁴⁷ It is thus the role of the courts to interpret how the law should apply to different cases. If the law is precise with no ambiguity or gaps then the judge should not belabour using other rules of statutory interpretation.

As discussed in the previous chapter, courts are of the mind that interests of children differ subject to each child's particular needs and circumstances. This is due to differences in factors such as, religion adhered to, age, relationship with the guardian(s) or parent(s), any disability that would demand special care or attention.¹⁴⁸ As such the application of the concept should be on a case by case basis since an indifferent application of the children's rights to different children would be an error.¹⁴⁹

Absolute certainty as has been discussed is an ideal and cannot be achieved especially because of the dynamic nature of the society. As such, the introduction of the definition into law may be of significance in guiding the courts when making their decisions in custody matters. Nevertheless, the effect will be minute since as has already been evinced in the previous chapter, as courts uphold the provision in the Children Act and Constitution regarding the BIC, they have consistently applied the definitions albeit without making express reference to it. Further, the definitions proposed are also broad since it would be nearly impossible to foresee all circumstance that could arise as regards child custody matters. Such a broad approach thus ensures that courts can apply it in a flexible manner which in turn guarantees the protection of the interest of every child.

¹⁴⁷ *Council of County Council Governors v the Attorney General and another* (2017) eKLR.

¹⁴⁸ Reyneke, 'Realising the child's best interests', 14.

¹⁴⁹ Reyneke, 'Realising the child's best interests', 14.

CHAPTER FIVE

5.1 Introduction

This chapter shall briefly recount of the conclusions from the research done in the previous chapters as well as the recommendations that could be put in place to remedy the current status with regard to the comprehension of the best interest of the child.

5.2 Conclusion

Despite acting in compliance with the universal requirement to legislate on children matters and giving utmost attention to the best interests of the child, the Kenyan draftsman has failed at giving a definition of the concept that could be used to comprehend the concept. It is not by reason of incompetence but rather in the interest of justice that the legislator opted to avoid giving such a definition. This follows from the discussion that drawing a conclusive meaning of the concept might result in rigidity in its application as courts might be limited to what is provided in law which in this instance would not cater for all situations affecting children. Similarly, the courts have not developed a definition since the understanding of the concept is mostly subjective and its application differs from case to case owing to the varying circumstances in the cases.

The courts have, nevertheless, played an important role with regard to interpreting the provision on the best interests of the child. The concept has been treated as a right, warranting protection since from it the children derive a claim, as well as a principle that guides in determining how to balance the different factors that could tilt the case in favour of one parent owing to them being better placed to provide for the child adequately. They have also interpreted the provision in a manner that peers into the intention of the drafter which would be to promote and protect the rights and well-being of the children. Such application has also been possible owing to the nature of the provision as being broad which ensures that courts can tailor it to fit the different and peculiar circumstances of each case.

The manner of interests usually determined by courts are the specific kind and are as many the cases tabled in court. Those interests mostly affect the welfare of a particular child or children rather than the whole multitude of children. As such it is nearly impossible to draft a law that would capture all the possible scenarios, circumstances

and needs of all children. This in effect shows the ideal nature of certainty of the law since in this instance no conclusive definition can be created without allowing room for court discretion lest injustice be the result. As such, the law remains with a gap that can only be adequately filled by allowing courts to apply the general principles to the particular cases tabled before them.

The research has demonstrated that certainty of the law with regard to the best interest concept and predictability of custody cases would be nearly impossible since obtaining absolute clarity in this arena is nothing more than an ideal.

5.3 Recommendations

In that regard, the Children Act should detail the content of best interest standard or the factors that the courts should consider before making a determination on the custody of a child. Such a provision *should*, however, be inclusive thus taking into account the dynamic nature of the society. The Act, while not explicitly referring to them, has outlined the elements put into consideration which are the rights of the child, its overall well-being and its needs.

As discussed in chapter three, the concept may be considered as a right, principle or rule of procedure that affects all children. Taking any of the three approaches demands an inevitable consideration of the rights, needs and well-being of the child. An approach towards understanding the concept would be null if the three mentioned requirements are not considered. As such, the best interest of the child may be defined as the comprehensive consideration of the rights, needs and general well-being of a child in matters affecting them.

This blanket definition ensures that while, the content of the concept is easily understood, its application in specific cases is not hindered due to unnecessary rigidity. The interpretation of the definition would cater for the interests of the children in general, owing to the fact that there are common needs among children, as well as those of the particular children whose cases end up in court. This follows the fact that the general interests may be broken down to specific ones that affect particular children in different cases. These particular interests would be weighed against each other in a bid to ensure that the maximum pool of interests of the child is protected by granting custody to a particular parent.

Normally, such a determination would require the balancing of the competing rights of the child. This can only be effectively done if the court has in view the immediate effect the decision will have on the life of the child as well as the effects on the future of the child. Having this in mind, the court ought to take into account various factors that may help in creating a reasonable balance of the child's rights. Such factors include: the wishes and views of the child as well as its parents, the child's safety, the importance of the family as well as other close relationships.¹⁵⁰

Also, section 4(3) of the Act should be amended from stating that the best interest of the child should be 'a' primary consideration to the best interest of the child should be 'the' primary consideration. This is because the current position of the provision in the Act implies that there are other interests at play that could topple those of the child from the pinnacle of protection that they are afforded. Such other interests as cast in the Act include those of the family and the community in general which are to be considered when making a custody order.¹⁵¹ The *status quo* implies that the interests of the family and community may in some instances override those of the child but this would essentially counter the intended purpose of the provision which is to give the child's interests paramount consideration. It is for this reason that amendment of the section is needed. Moreover, other than ensuring that the child's interests are given the highest level of consideration and accorded an overriding aspect with regard to other considerations, this shall also ensure that the Act is in line with Article 53(2) of the Constitution as well as the African Charter.¹⁵²

¹⁵⁰ United Nations High Commission for Refugees Guidelines on determining the best interests of the child, 2008, 68-71. Also see United Nations High Commission for Refugees Guidelines on assessing and determining the best interests of the child, 2018, 99-104.

¹⁵¹ Section 83 (1) *Children Act* (Cap 141 of 2012).

¹⁵² Article 4 (1), *African Charter on the Rights and Welfare of the Child*, 11 July 1990.

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