

**The Import of Declaration of Sections 24(3) & 25 of The Children's Act as  
Unconstitutional on The Protection of The Right to Parental Responsibility**

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

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Word count (8938)

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## **ACKNOWLEDGEMENT**

First and foremost, I would like to thank God for the favour, grace and strength He has granted me. I would not be where I am today without Him. I would also like to thank my supervisor, Mr Josephat Kilonzo, who helped me throughout the journey. He offered words of encouragement and allowed me to genuinely express myself. This paper would not have been what it is without his guidance.

Lastly, I would like to thank my family for their unwavering support and for always believing in me. It is through their help and ability to stand by me that I was able to give my all into the writing of this paper. I am forever grateful.

## **DECLARATION**

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

Signed: .....

Date: .....

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

Signed:.....

MR. JOSEPHAT KILONZO.

## **ABSTRACT**

Parental responsibility is an essential facet in the overall wellbeing of a child. It takes into consideration the child's best interest, which is of paramount consideration in any case where a child is involved. Parental responsibility is explicitly provided for under article 53(e) of the Constitution of Kenya and sections 23, 24 and 25 of the Children Act. However, in 2013, The High Court declared sections 24(3) and 25 of the children Act unconstitutional for being in contravention of article 53(e) by not providing for equal parental responsibility. Section 24(3) provides that parental responsibility of a mother can be automatically acquired by virtue of the child's birth while a father is expected to apply for parental responsibility in accordance with section 25 in the case that they are not married. Section 25 further states that a father is required to apply for parental responsibility or enter into an agreement with the child's mother to acquire responsibility in the case that they are not married and have not subsequently done so.

Despite the declaration, no laws have been put in place to uphold equal parental responsibility. Therefore, this study is conducted based on four objectives: to analyse why the court went ahead to declare sections 24(3) and 25 of the Children Act unconstitutional; to analyse the effects the declaration has had on child laws and parental responsibility; to determine the steps taken by the government to remedy the provision in terms of rights of a child and lastly to investigate current practice regarding parental responsibility in terms of children rights in Kenya.

## LIST OF CASES

*AOG v SAJ and another* (2011) eKLR.

*Gillick vs West Norfolk and Wisbech Area Health Authority* (1986) AC 112

*Hewer v Bryant* (1970) 1 QB 357

*JGM v CNW* (2008) eKLR.

*Marbury v Madison* (1803) 5 U.S. 1 Cranch 137

*Michael Garska vs Gwendolyn McCoy* (1981) 278 S.E.2d 357

*RM & another vs Attorney General* (2006) eKLR.

*Zak and another v Ma and another* (2013) eKLR.

# CHAPTER 1: INTRODUCTION

## 1.1 Background to the Problem

Comprising an estimated 43% of the population of Kenya, children form an integral part of the family and society.<sup>1</sup> Laws have been enacted to safeguard this importance, both in the regional and international sphere. In the domestic sphere, the Constitution of Kenya can be considered one of the most fundamental laws in terms of children as it is recognised as supreme law. Chapter four of the Constitution, which comprises of general stipulations relating to the Bill of Rights, provides for the rights of children. Article 53 specifically caters to this. This paper has its main focus on article 53,1(e). The article grants each child the right to care and protection from either parent which also includes equal parental responsibility.

In the same vein, there has been legislation which has been enacted to focus mainly on children and their needs. An example of this is the Children Act of Kenya. The provision of parental responsibility is given under section 23, 24 and 25. These sections state what constitutes parental responsibility and ways in which children should benefit from it. Section 25 specifically provides that in instances where a mother and father were not married at the time of the birth of a child, the father is required to make a claim for parental responsibility.<sup>2</sup> However, in the case of *Zak and another v Ma and another*,<sup>3</sup> it was held that section 24(3) and section 25 of the Children Act are unconstitutional since they contravene article 53 of the Constitution on equal parental responsibility.<sup>4</sup> Article 2 of the Constitution of Kenya recognizes the supremacy of the Constitution and renders any law inconsistent with its provisions void.<sup>5</sup> In addition, The Supreme Court in the case of *Marbury v Madison*, found that the constitution is supreme and should triumph where there are conflicting positions with other laws.<sup>6</sup>

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<sup>1</sup> - <http://inequalities.sidint.net/kenya/abridged/demographics/> on 3 February 2019.

<sup>2</sup> Section 25(1) *Children Act* (Act No.8 of 2001).

<sup>3</sup> *Zak and another v Ma and another* (2013) eKLR.

<sup>4</sup> Article 53, *The Constitution of Kenya* (2010).

<sup>5</sup> Article 2(4) ,*The Constitution of Kenya* (2010).

<sup>6</sup> Mbondenyei K & Ambani J, *The New Constitutional Law of Kenya: Principles, Government and Human Rights*, Claripress Limited, Nairobi, 2012, 44.

The Act in this regard failed to establish equal parental responsibility for children which falls short of provisions, not only in the Constitution, but also in the regional and international sphere. This includes international and regional treaties such as the United Nations Convention on the Rights of a Child and The African Charter on the Rights and Welfare of the Child.

This research mainly focuses on how the declaration of sections 24(3) and 25 as unconstitutional promotes and protects children's right to parental responsibility and ultimately upholds the best interest of children in Kenya.

### **1.2 Statement of the problem**

According to the Constitution, children have a right to parental care and protection, which includes equal responsibility from both parents.<sup>7</sup> It thereafter succinctly states, that the provision shall be enforceable whether the parents are married or not. Taking this constitutional provision into consideration, Justice Mumbi Ngugi in the case of *Zak and another v Ma and another*,<sup>8</sup> declared sections 24(3) and 25 of the Children Act unconstitutional for their lack of conformity with the constitution.

However, despite this declaration, no law has been put in place to remedy this situation and uphold equal parental responsibility regarding children born outside marriage. In addition, as stated by Lady Justice Martha Koome in *JGM v CNW*<sup>9</sup> the section also offers differential treatment against children born outside marriage which fails to uphold the best interest of the child and should consequently be amended. Therefore, the overarching problem is what effect the declaration had on children laws and whether there have been steps taken to remedy this in terms of the rights of a child.

### **1.3 Statement of objectives**

This research aims to:

- i) Analyse why the court went ahead to declare sections 24(3) and 25 of the Children Act unconstitutional;
- ii) Provide an analysis on the effects the declaration has had in terms of child laws and parental responsibility;

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<sup>7</sup> Article 53(e), *The Constitution of Kenya* (2010).

<sup>8</sup> *Zak and another v Ma and another* (2013) eKLR.

<sup>9</sup> *JGM v CNW* (2008) eKLR.

- iii) Determine the steps taken by the government to remedy the provision in terms of rights of a child; and
- iv) Investigate current practice regarding parental responsibility in terms of children rights in Kenya.

#### **1.4 Hypothesis**

This paper proceeds on the assumption that equal parental responsibility is not adequately provided for in existing legislation.

#### **1.5 Research Questions**

The paper primarily focuses on the subsequent questions:

- i) What constitutes parental responsibility in Kenya? ;
- ii) Who does parental responsibility vest in? ;
- iii) What effects does the declaration of sections 24(3) and 25 of the Children Act being unconstitutional have on the Child laws in Kenya? ; and
- iv) What are the current practices in terms of parental responsibility and children laws?

#### **1.6 Justification of the Study.**

The United Nations Convention on the Rights of the Child provides that in any action involving a child, his/her best interest shall be of primary concern.<sup>10</sup> The African Charter on the Rights and Welfare of the child further upholds this principle stating that the best interest of a child shall be of primary consideration in all actions involving them.<sup>11</sup> This same principle was upheld in the case of *AOG v SAJ and another*, where it was stated that the interests of a child shall be of utmost consideration in any case where the child is involved.<sup>12</sup> In this regard, while parental responsibility is being exercised, it should consider the best interest of the child.

The Constitution, being the supreme law of the land, as stated in article 2, provides that in taking care of a child, equal parental responsibility should be exercised.<sup>13</sup> This includes parental care and protection. However the provision stated in the Children Act, that caters to this need has been declared unconstitutional.<sup>14</sup> It can therefore be concluded that there is

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<sup>10</sup> Article 3(1), *The United Nations Convention on the Rights of a Child*, 20 November 1989.

<sup>11</sup> Article 4(1), *African Charter on the Rights and Welfare of the Child*, 1990.

<sup>12</sup> *AOG v SAJ and another* (2011) eKLR.

<sup>13</sup> Article 53(e), *The Constitution of Kenya* (2010).

<sup>14</sup> *Zak and another v Ma and another* (2013) eKLR.

need for a new provision to uphold equal parental responsibility and as a result, uphold the best interest of the child. This is necessary to ensure that there is certainty in the law to pave way for easy enforcement and clarity.<sup>15</sup>In the words of Lord Denning, in the case of *Hewer v Bryant*, “the common law can, and should, keep pace with the times.”<sup>16</sup>

Therefore, the reason for this research study is to identify the gap present in the laws, which is the lack of necessary legislation that provides for equal parental responsibility and offer ways in which the issue can be remedied, and the gap filled.

### **1.7 Theoretical Framework.**

This paper is based on Maslow’s theory on hierarchy of needs. According the theory, there are five hierarchical needs whose fulfilment each depend on the one below them. These include physiological needs, safety needs, needs for love, affection and belonging, needs for esteem and need for self-actualization.<sup>17</sup>Self- actualization is at the top of the hierarchy.

Physiological needs rank among those one cannot live without and include water, food, oxygen. Safety needs follow closely after as they satisfy the need for physical safety, such as the protection from violence.<sup>18</sup> Need for love, affection and belonging allow one to overcome loneliness and able to fit in. Needs for esteem on the other hand allow one to have a stable respect for oneself and others. Lastly, once all the needs are met, self-actualization, becomes a priority as it involves reaching one’s full potential.

The theoretical framework, regarding the issue at hand, proposes that a child should be able to acquire all those needs to live a fulfilled and purposeful life. In this regard, parental responsibility, as described in the Children Act under section 23, is represented in the

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<sup>15</sup> Lord Mance, ‘Should the law be certain? The Oxford Shrieval lecture given in the University Church of St Mary The Virgin, Oxford’ 11th October 2011, 1.

<sup>16</sup> *Hewer v Bryant* (1970) 1 QB 357

<sup>17</sup> Jerome N, ‘Application of the Maslow’s hierarchy of need theory ;impacts and implications on organizational culture, human resource and employee’s performance’ *International Journal on Business and Management Invention* 3, 2013, 41.

<sup>18</sup> Jerome N, ‘Application of the Maslow’s hierarchy of need theory ;impacts and implications on organizational culture, human resource and employee’s performance’ *International Journal on Business and Management Invention* 3, 2013, 41.

hierarchy of physiological needs, safety needs, and the need for love, affection and belonging. These ensure that a child grows into a responsible adult.

Therefore, it proposes that in there being equal parental responsibility, according to article 53 of the Constitution of Kenya, children will be able to reach the top of the hierarchy and get to the fullest potential. This theoretical framework is elaborated further in chapter two.

### **1.8 Literature Review**

This chapter reviews the theoretical literature related to the problem being investigated and is linked to the research questions and objectives. It also looks at literature done by other researchers, the methodology used by the researchers, as well as any existing gaps in the studies. The chapter also critiques existing literature relevant to the research.

To understand the essence of this research, it is essential for the meaning of parental responsibility to be established. According to Sikuta MD in his paper, ‘Parental Responsibility and Child Maintenance in Kenya: The Role of the Children’s Court’ defines parental responsibility as the legitimate duty a parent has over his or her child.<sup>19</sup> He further states that while parental responsibility is automatically granted to mothers, some biological fathers may need to apply for parental responsibility.

Gloria Lucky in her paper, ‘Parental Responsibility towards a child in Kenya’ provides that parental responsibility begins when a child is conceived. It includes the rights, duties and authority as provided by law that a parent has over their child.<sup>20</sup>In addition she states that parental responsibility is automatically obtained by both parents despite their marital status.

In her article, ‘Unmarried Fathers and Parental Responsibility: A Case for Reform?’ Sally Sheldon avers that parental responsibility is seen as the first step to acquiring rights over a

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<sup>19</sup> Sikuta MD, ‘Parental Responsibility and Child Maintenance in Kenya: The Role of the Children’s Court’, 2015 - <  
[https://www.academia.edu/31644993/Parental\\_Responsibility\\_and\\_Child\\_Maintenance\\_in\\_Kenya\\_The\\_Role\\_of\\_the\\_Childrens\\_Court](https://www.academia.edu/31644993/Parental_Responsibility_and_Child_Maintenance_in_Kenya_The_Role_of_the_Childrens_Court) on 15 February 2019.

<sup>20</sup> Amondi G, ‘Parental Responsibility towards a Child in Kenya’, - <  
[https://www.academia.edu/33195731/Parental\\_Responsibility\\_towards\\_a\\_Child\\_in\\_Kenya](https://www.academia.edu/33195731/Parental_Responsibility_towards_a_Child_in_Kenya) on 15 February 2019.

child such as their education and residence.<sup>21</sup> Moreover, she opines that the guiding criteria for acquiring parental responsibility should be the child's welfare which includes anything that will lead to a strong relationship between the parent and the child.

Nigel Lowe and Gillian Douglas state that parental responsibility involves two major concepts: that both parents must behave devotedly towards their children and that the onus of bringing up the child belongs to the parents and not the State.<sup>22</sup> The duty therefore rests on both the parents to fulfil the necessary obligations towards their children. Furthermore, the example was given that unmarried fathers have a legal duty to maintain their children regardless of whether they have parental responsibility.<sup>23</sup>

In addition, Tim Jarret states that, "whether or not someone has parental responsibility does not affect the duty which he may have in relation to the child on the issue of equal parental responsibility (such as a statutory duty to maintain the child)".<sup>24</sup>

Therefore, the above literature portrays an existent gap in Kenya's legislation in terms of its provision on equal parental responsibility in the Children Act of Kenya. This study thus seeks to fill the gap that exists between the above literature and legislation related to equal parental responsibility in Kenya.

### **1.9 Research Design and Methodology**

This research is mainly a desktop research. Information in this paper is based on data obtained from various sources. It is based on primary sources such as the Constitution of Kenya 2010 and secondary sources of information which include but are not limited to : textbooks, newspaper articles, journals and theses. There is also the use of case law and various statutes. This is accompanied by use of internet sources.

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<sup>21</sup>Sheldon S, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' *Feminist Legal Studies*, 2001, pp 93-118 - < <https://core.ac.uk/download/pdf/90255.pdf>> on 16 February 2019.

<sup>22</sup> Lowe N and Douglas G, *Bromley's Family Law*, Oxford University Press, United Kingdom, 2015, 331.

<sup>23</sup> Lowe N and Douglas G, *Bromley's Family Law*, Oxford University Press, United Kingdom, 2015, 337.

<sup>24</sup> Jarrett T, 'Children: parental responsibility - what is it and how is it gained and lost (England and Wales)' Briefing Paper Number 2827, 2017, 1, - < [researchbriefings.files.parliament.uk/documents/SN02827/SN02827.pdf](https://researchbriefings.files.parliament.uk/documents/SN02827/SN02827.pdf) on 26 February 2019.

### **1.10 Assumptions**

The paper assumes that the declaration of sections 24(3) and 25 of the Children Act as unconstitutional protects the right to parental responsibility.

### **1.11 Limitations**

The research may be limited by inaccessibility of reliable material to the specific topic since it has not been delved into after article 25 being declared unconstitutional. This is also related to internet sources, some of which do not allow access to the use of information.

### **1.12 Chapter Breakdown**

**Chapter one:** It gives a brief overview of the research paper. It introduces the problem and outlines the objectives the paper seeks to fulfil by the end of the study. It provides the theory the paper is based on and gives insight on the literature to be used in the paper. It concludes by giving a breakdown of the chapters the paper expounds on.

**Chapter two:** This focuses on the theoretical framework. It seeks to provide a basis for the use of Maslow's Theory on the Hierarchy of Needs by providing a background to the theory and a detailed account of what the theory consists of. It thereafter seeks to reconcile the theory to the importance it has on equal parental responsibility. A conclusion is drawn from that.

**Chapter three:** The chapter seeks to answer the question of who parental responsibility vests in. It also analyses what constitutes parental responsibility generally and in the Kenyan context. Conclusions are made based on the analysis made.

**Chapter four:** This chapter discusses the effects the declaration of sections 24(3) and 25 of the Children Acts as unconstitutional has had on Kenyan laws on parental responsibility. It then addresses the emerging actions(steps) taken by the government to remedy the provision in terms of rights of a child in Kenya.

**Chapter five:** This chapter concludes the research. It offers recommendations concerning the legal framework regarding laws on parental responsibility in Kenya.

## CHAPTER 2: THEORETICAL FRAMEWORK

### 2.1 Introduction

According to Article 53 of the Constitution of Kenya 2010, a child is entitled to parental protection and care. It is inclusive of mutual responsibility from the parents, that is, the father and the mother, to provide for their needs, regardless of the marital status they identify with at the time. In this regard, Maslow's Theory on the Hierarchy of Needs can be used as a basis to support the argument that equal responsibility bestowed on parents to cater to their children's wellbeing, which conclusively also involves their physiological, safety and emotional needs is one of the ways in which children can achieve the highest level of the hierarchy. The highest level being, self-actualisation.<sup>25</sup> Therefore, equal parental responsibility can be said to go beyond its basic meaning and transcend into the advancement of the well-being and ultimate growth of children into responsible adults.

This chapter delves into discussing Maslow's Theory on the Hierarchy of Needs as the theoretical framework underpinning the above arguments.

### 2.2 Maslow's Theory on the Hierarchy of Needs

Maslow's Theory on the Hierarchy of Needs was first introduced in 1942. According to *Motivation and Personality*, a book published by Abraham Maslow in 1954, it was an integration of all that had been said by earlier writers such as Adler and Freud.<sup>26</sup> Maslow acknowledges that although his theory does not have any scientific backing to how it is linked to neurosis<sup>27</sup>, which is one of the discussions the theory revolves around, it has given individuals a way to be able to make sense of their inner lives.

According to the theory, Maslow posits that people follow recognized patterns of needs and wants that help in their personal growth and fulfilment. It follows that the level of need the individual is currently seeking to achieve in the hierarchy needs to be satisfied, for the next

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<sup>25</sup> Tezcan H, Sibel Aydemir, Gene E, 'Maslow's Hierarchy of Needs in 21<sup>st</sup> Century: The Examination of Vocational Differences' April 2018, 216.

<sup>26</sup> Maslow A, 'Motivation and Personality', Harper and Row Publishers Inc, 1954, preface xii

<sup>27</sup> A general term that refers to any mental imbalance that causes distress, but does not interfere with rational thought (i.e., psychosis) or an individual's ability to function in daily life (i.e., psychosis or a personality disorder). -<https://www.sciencedaily.com/terms/neurosis.htm> on 27 August 2019.

need to be met. This is referred to as prepotency.<sup>28</sup> Conclusively, the lower level needs should first be met for the higher level needs to be taken into consideration. To put this into context, according to R.I Westwood, the model is not only based on the prepotency principle, but also based on two other principles. They include: the deficit principle which proposes that where there is an unmet need, action will be set in place to satisfy it, and the progression principle which states that basic needs will have to be met for a person to go further up the hierarchy.<sup>29</sup> The hierarchy was originally divided into five groups. They included physiological needs, safety needs, belongingness and love needs, esteem needs, and the need for self-actualization. Understanding and aesthetic needs were thereafter included in the hierarchy.

In order to understand the theory and how it relates to parental responsibility, it is imperative to delve into key components of the hierarchy and what they entail. At the bottom of the hierarchy is physiological needs. Physiological needs are those that need to be satisfied for the overall improvement of an individual's biological structure. An example of a physiological need is the intake of water, nutrients, minerals, vitamins, salts, and other substances in order to ensure that the body's internal balance is maintained. This is known as homeostasis.<sup>30</sup> Other physiological needs include sleep, smell, taste, which cannot be included in the homeostasis category but are also a part of physiological needs. Maslow points out that physiological needs may be a driving force for many individuals, especially where they lack every other need. For example, a person lacking love has a higher chance of being in dire need of food and would work to seek it, than they would seek love.<sup>31</sup> Without the satisfaction of physiological needs, all other needs are inevitably deemed to be of non-importance. Therefore, the satisfaction of physiological needs leads to the emergence of other needs, in this regard, safety needs.

Safety needs are second in the hierarchy. They include security, protection, stability, freedom from fear, need for structure, order and anything that may contribute to the feeling of safety. Maslow proposes that this is best demonstrated by children. His reason for this is

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<sup>28</sup> Gawel J, 'Herzberg's Theory of Motivation and Maslow's Hierarchy of Needs' 5 *Practical Assessment, Research & Evaluation* 11, 1997, 2.

<sup>29</sup> Westwood R, *Organisational Behaviour: Southeast Asian Perspective*, Longman Group, 1992.

<sup>30</sup> Tezcan H, Sibel Aydemir, Genc E, 'Maslow's Hierarchy of Needs in 21<sup>st</sup> Century: The Examination of Vocational Differences' April 2018, 215.

<sup>31</sup> Maslow A, 'Motivation and Personality', Harper and Row Publishers Inc, 1954, 35.

that children have unfiltered responses to the failure of the meeting of their safety needs, unlike adults who have been taught to conceal their displeasure.<sup>32</sup> Safety needs are stated to be essential in a scenario where social order is to be maintained. Once this is gratified, belongingness and love needs emerge.

Belongingness and love needs fall third in the hierarchy. Maslow propounds that once feelings of safety have been satisfied, the individual may seek to establish deep relationships. This is demonstrated through relationships with friends, a wife, husband, relatives. It is the need to love and be loved.<sup>33</sup>

Esteem needs follow thereafter being defined as the way members tend to see themselves and others. It falls mostly under reputation, general feelings of importance, dignity and appreciation of self by others.<sup>34</sup>

Lastly, according to Maslow's book 'Motivation and Personality', self-actualisation ranks at the top of the hierarchy. It can be described as the ability of a human being to be true to his or her nature. It can further be defined as the ability of one to develop into more of what one is and is meant to become.<sup>35</sup> It may vary from person to person as everyone has a differentiated view on what they aspire to be. The additional needs, understanding and aesthetic needs, deal with the acquisition of knowledge and the promotion of beauty in the environment respectively.<sup>36</sup>

Although Maslow's Theory has been commended by writers and psychologists alike, it has still been criticized for its shortcomings. One of them is that the theory proceeds on the assumption that all situations are alike. Secondly, it proceeds from the assumption that there is only one way to meet the needs of an individual which is demonstrated through the

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<sup>32</sup> Maslow A, 'Motivation and Personality', Harper and Row Publishers Inc, 1954, 40.

<sup>33</sup> Tezcan H, Sibel Aydemir, Genc E, 'Maslow's Hierarchy of Needs in 21<sup>st</sup> Century: The Examination of Vocational Differences' April 2018, 215

<sup>34</sup> Maslow A, 'Motivation and Personality', Harper and Row Publishers Inc, 1954, 45.

<sup>35</sup> Pardee R, 'Motivation Theories of Maslow, Herzberg, McGregor & McClelland :A Literature Review of Selected Theories Dealing with Job Satisfaction and Motivation', Educational Resources Education Centre.

<sup>36</sup> Aruma E, Hanachor M, 'Abraham Maslow's Hierarchy of Needs and Assessment of Needs in Community Development' 5 *International Journal of Development and Economic Sustainability* 7, 2017, 25.

hierarchy.<sup>37</sup>Thirdly, Maslow's theory is criticised for focusing more on an individualistic society and not a more collectivist society.<sup>38</sup>

### **2.2.1 Relevance of the Theory to Parental Responsibility**

Despite the flaws presented in Maslow's theory on the hierarchy of needs, there are numerous advantages to it. This is especially in the support of equal parental responsibility and its contribution towards child growth. The theory proposes that for the growth of an individual, all the needs should be fulfilled. This is especially important for the growth and wellbeing of children which can be upheld when parents not only support their children, but also ensure that they help to promote the fulfilment of their needs where possible. One of the ways that can be achieved is through offering a stable environment where each parent equally contributes to the child's necessities.

Maslow states that parental responsibility is influential in children mostly in the satisfaction of their safety needs. As stated earlier, children, unlike adults, do not inhibit their reactions to inadequate safety and care.<sup>39</sup>Where they feel that they are experiencing an overwhelming feeling of discomfort or the sudden awareness that their safety needs may be threatened, they will ensure that it has been made known to those around them. This in turn allows the child's safety needs to be met and allows them to move on to the next need of the hierarchy.

Maslow, in proving the importance of safety needs, states that children prefer environments where there is predictability and order.<sup>40</sup> This is mostly demonstrated by parents during the early stages of the children's growth. Where parents show an inconsistency in this belief, children tend to grow up with the notion that the world is unreliable and unsafe.<sup>41</sup> The children therefore fail to fully satisfy the requirements meant to fulfil their safety needs and

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<sup>37</sup> Kaur A, 'Maslow's Need Hierarchy Theory: Applications and Criticisms' 3 *Global Journal of Management and Business Studies* 10, 2013, 1064.

<sup>38</sup> Bouzenita A and Boulanouar A, 'Maslow's hierarchy of needs: An Islamic Critique', 24 *Intellectual Discourse* 1, 2016, 64.

<sup>39</sup> Maslow A, '*Motivation and Personality*', Harper and Row Publishers Inc, 1954, 39.

<sup>40</sup> Maslow A, '*Motivation and Personality*', Harper and Row Publishers Inc, 1954, 39.

<sup>41</sup> Maslow A, '*Motivation and Personality*', Harper and Row Publishers Inc, 1954, 40.

end up not being able to reach a level of self-actualisation. Maslow proposes that children need to be in an environment where there is stability and routine, something which equal parental responsibility may contribute towards, which children can count on in order to fulfil other levels of needs in the hierarchy.

This can be said to be the same in the fulfilment of all other levels of the hierarchy, something which equal parental responsibility will help to achieve in nurturing all-round individuals. It is therefore safe to say that Maslow's theory on the hierarchy of needs supports that equal parental responsibility is essential in the prosperity of children.

### **2.3 Conclusion**

It is not disputed that Maslow's theory on the hierarchy of needs has its shortcomings. Nevertheless, it greatly supports the argument that a child, as does every individual, requires an aspect of stability in order to reach the optimum level of growth; one where living is aimed at pursuing true nature and improving abilities. Therefore, it is pertinent that the right to equal parental responsibility embodied by article 53 of the Constitution of Kenya 2010, is upheld in order to ensure that there is proper growth of children into able and prosperous individuals in all respects.

## **CHAPTER 3: PARENTAL RESPONSIBILITY- WHO DOES IT VEST IN?**

### **3.1 Introduction**

The right to parental responsibility is one provided for under several jurisdictions around the world. The general position in the previous chapters points toward acknowledgment and overall importance of such a right in the upbringing and well-being of a child. Although there may be an automatic assumption that parental responsibility is conferred to the bearer of the child, more significantly one with biological ties, with the changing times, it has become necessary for there to be a point of reference for what parental responsibility really means. This is inclusive of the duties to be carried out while holding such right.

This chapter seeks to analyse what constitutes parental responsibility and who it vests in. In addition to that, the chapter, based on legal arguments, shows the effects of the declaration of sections 24(3) and 25 of the Children's Act as unconstitutional on child laws in Kenya.

### **3.2 Parental Responsibility: Who Does it Vests in?**

In most of the countries in the world today, there is general acceptance that parents possess primary responsibility over their children. It bears with it the duty to cater to the needs of the child, which at the forefront, comprises of meeting basic needs such as clothing, food and shelter. Although it can automatically be assumed that the bearer of the child is the one who has parental responsibility, it becomes rather problematic once other complex matters arise. Some of them include the involvement of repudiation, acknowledgement, adoption or childcare placement.<sup>42</sup> In that regard, it is pertinent to recognise and outline instances in which a person may possess the right of parental responsibility. In other words, this section will set out to answer the question: who is entitled to the acquisition of parental responsibility?

With the mentioning of the above cases in point, such as adoption, it can be concluded that there can be several other ways in which parental roles can be taken up. However, as is the conventionally recognised way, biological connection has been relevant in the determination

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<sup>42</sup> Farrugia R, 'Parental Responsibility and State Intervention' 31 California Western International Law Journal 1, 2000, 127.

of parental responsibility.<sup>43</sup> Biological connection is thus one of the first bases on which parental responsibility may be granted. By virtue of childbirth, a woman is said to have taken up the parental role of a mother and with that, the responsibility that comes along with it. In the same regard, the spousal relationship that exists between the man and the biological mother of the child, carries with it parental rights over the child, on the assumption that the existing relationship is enough proof of the presence of biological ties between the man and the child.<sup>44</sup> This therefore means that by virtue of that relationship, the man, who in this case is the father of the child, acquires parental responsibility. It is also presumably stated that a child's best interest is upheld when their needs are catered for by their biological parents.

Consequently, the statement above has been in contention and has been declared unconvincing by scholars such as Zanghellini and Chodorow. Zanghellini argues that an adult's love and nurturing ability towards a child is not dependent on the presence of biological ties.<sup>45</sup> Rather, he states that it can exist regardless of it, if it constitutes more so, on the aspect of belonging which in turn triggers the aforementioned nurturing ability. Chodorow on the other hand puts forward that:<sup>46</sup>

“One becomes a person in relation to stable caring others. But such commitment may be made by biological or non-biological parents, members of an extended household or kin network, even, in some cases, nurses.”

Therefore, despite the notion that offering parental responsibility to the child biological parents would cater to their best interests, the above arguments propound that it does not end there and is not solely dependent on that. The child's best interests may be catered for, regardless of the presence of biological ties, if there is a nurturing aspect.

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<sup>43</sup> Zanghellini A, 'Who is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis' 35 *Monash University Law Review* 1, 2009, 152.

<sup>44</sup> Zanghellini A, 'Who is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis' 35 *Monash University Law Review* 1, 2009, 152.

<sup>45</sup> Zanghellini A, 'Who is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis' 35 *Monash University Law Review* 1, 2009, 156.

<sup>46</sup> Lorber J, Coser R, Rossi A and Chodorow N, 'On the Reproduction of Mothering: A Methodological Debate' 6 *The University of Chicago Press Journals* 3, 1981, 513.

Another instance in which parental responsibility may be granted is in the context of a caregiver or a caretaker.<sup>47</sup> The primary caretaker presumption arises as a result. This was held in the case of *Michael Garska v Gwendolyn McCoy*.<sup>48</sup> This primary caretaker presumption proposes that, in the case where a divorce is underway, parental custody over a child may be granted to the parent who took primary responsibility in taking care of the recurring needs of the child.<sup>49</sup>

According to the case, some of the needs the court looks at to determine who possesses the primary caretaker role include: the catering of basic needs such as preparation of child's meals, bathing and grooming, the buying and cleaning of the child's clothes, disciplining the child and generally being involved in the child's social interactions through planning.<sup>50</sup> The court will therefore make their decision based on who catered to more of the child's needs. In the case where responsibility was equally shared, no party is entitled to the role of primary caretaker unless the court acquires further information on the resources available to each parent, their competence and age, health and sex of the child and thereafter makes an informed decision. The primary caretaker presumption is therefore based on the child's best interest standard which seeks to put the child in the care of a person who is knowledgeable in who the child is and what they need.

As is the case with every doctrine, the existence of positive effects guarantees the presence of negative ones. Paul Smith provides several criticisms to the primary caregiver presumption which have come up time and again. Although they may be many, he focuses more on those that have a common theme.

The first major criticism presented is that the presumption is sexist because it tends to favour women. Mothers are more likely to be chosen as primary caretakers according to the list of factors set out in the *Michael Garska vs Gwendolyn McCoy* case.<sup>51</sup> The second criticism is that it grants judges too much discretion about whether a parent is fit to be a primary

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<sup>47</sup> Zanghellini A, 'Who is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis' 35 *Monash University Law Review* 1, 2009, 159.

<sup>48</sup> *Michael Garska vs Gwendolyn McCoy* (1981), Thee Supreme Court of West Virginia.

<sup>49</sup> Smith P, 'The Primary Caretaker Presumption: Have We Been Presuming Too Much?' 75 *Indiana Law Journal* 2, 2000, 737.

<sup>50</sup> *Michael Garska vs Gwendolyn McCoy* (1981), Thee Supreme Court of West Virginia.

<sup>51</sup> *Michael Garska vs Gwendolyn McCoy* (1981), Thee Supreme Court of West Virginia.

caretaker.<sup>52</sup> This in turn presents a scenario where a subjective judgement is likely to be made which may not be at par with the reality present in taking care of the child. Paul Smith states that the major issue with this presumption in relation to the second criticism is that because the factors arrived at as set out in the aforementioned case have no scientific or psychological basis, the child is likely to end up in a scenario where they are not with the better parent.<sup>53</sup> According to him, the meeting of the criteria does not really mean that the child's best interest will be met. As a matter of fact, it may lead to a situation where the parents' rights are chosen over a child's best interest. Despite the reasons, being a primary caretaker is one of the ways in which parental responsibility may be granted.

Intention is the last of the bases on which parental responsibility may be granted. It presents a scenario where either two or more people come to a consensus to take up parental responsibility over a child despite not being biologically related to him or her.<sup>54</sup> The concept of intentional parenthood arises from intention as a basis for granting parental responsibility. Yehezkel Margalit, a legal scholar, is in favour of intentional parenthood, and uses a different name to refer to it: determining legal parenthood by agreement (DLPBA).<sup>55</sup> According to him, intentional parenthood is one of the main ways a shift from the normal traditional family structure may be adopted. He points out that parentage may be acquired through voluntary acknowledgment of paternity which ensures that the new parent-child relationship is recognized.<sup>56</sup>

Another way the relationship may be recognised is through a decision from the court granting a person parental responsibility over a child. This model of allocating parental responsibility does not however lack its criticisms as it has been deemed unacceptable in

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<sup>52</sup>Smith P, 'The Primary Caretaker Presumption: Have We Been Presuming Too Much?' 75 *Indiana Law Journal* 2, 2000, 742.

<sup>53</sup> Smith P, 'The Primary Caretaker Presumption: Have We Been Presuming Too Much?' 75 *Indiana Law Journal* 2, 2000, 744.

<sup>54</sup> Zanghellini A, 'Who is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis' 35 *Monash University Law Review* 1, 2009, 165.

<sup>55</sup> Margalit Y, 'Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents' 12 *Whittier Journal of Child and Family Advocacy* 2, 2013, 41.

<sup>56</sup> Margalit Y, 'Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents' 12 *Whittier Journal of Child and Family Advocacy* 2, 2013, 56.

different settings. The reason for this is because having intention as a basis for granting parental responsibility disintegrates the normal social order. It not only paves way for the establishment and growth of heterosexual families, but also encourages the prosperity of same-sex marriages. In a heterosexual family-based setting, intentional parenthood is considered an evil. However, according to Zanghellini, who greatly disagrees with that premise, granting of parental responsibility based on intention does not mean that children will not be provided for equally as well as those in heterosexual settings or through other means where parental responsibility is in question.<sup>57</sup> In fact, the positive that arises from this is that people are allowed the opportunity to experience a life with children, whom they may be so invested to ensure their wellbeing is upheld.

Under the Kenyan context, the above three options may suffice to grant parental responsibility to a person. However, with intention as a basis, adoption in a heterosexual family may be the only grounds for it to be granted. This is because under the Constitution, marriage between people of the opposite-sex is the only recognised form of marriage.<sup>58</sup> Part III of the Children Act makes a provision for who parental responsibility may vest in. It states that where the father and mother of the child were married at his or her birth, parental responsibility will belong to both in equal measure. The mother will automatically acquire parental responsibility in an instance where the parents of the child were not married while the father will be required to get into an agreement to be granted responsibility. Where both parents are deceased, parental responsibility will be vested in an appointed testamentary guardian, a court-appointed guardian and in absence of the first two, in a relative.<sup>59</sup>

### **3.3 What Constitutes Parental Responsibility?**

Having already established who parental responsibility vests in and by what means it can be made possible, this section delves into what parental responsibility constitutes of.

Under several regimes in the world, parental responsibility bears with it an obligation to cater to the child's needs. This was duly demonstrated in the case of *Gillick vs West Norfolk*

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<sup>57</sup> Zanghellini A, 'Who is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis' 35 *Monash University Law Review* 1, 2009, 167.

<sup>58</sup> Article 45(2), *Constitution of Kenya* (2010).

<sup>59</sup> Section 27(1), *Children Act* (Act No 8 of 2001).

*and Wisbech Area Health Authority*.<sup>60</sup> According to Lord Scarman, parental responsibility should be exercised in such a way that a child's interests are catered to with utmost consideration.<sup>61</sup> The responsibility is also largely recognised in the international arena. The United Nations Convention on the Rights of a child provides for what constitutes parental responsibility. States are granted the power to uphold equal responsibility between parents in support of what is deemed best for a child.<sup>62</sup> This is further upheld by granting duties and rights to parents in relation to their child. The reason for this is because parents are generally assumed to prioritise the best interests of their children in their decision making. The African Charter on the Rights and Welfare of the Child also provides for what constitutes parental responsibility by stating that parents need to ensure that their children's best interests are fulfilled and that the conditions necessary for their development are met.<sup>63</sup>

Under the Kenyan legal regime, parental responsibility is no different. It is stipulated under article 53 of the Constitution of Kenya which sets a foundation for the recognition of parental responsibility. The article provides for the rights of a child which, with reference to the problem in question, affords the right to equal care and protection to children demonstrated by mutual parental responsibility from the parents. In all settings, section 4 of the Children Act requires that the best interest of the child is taken into consideration. Among the settings it provides for is the family. Article 53 of the Constitution may be read hand in hand with section 23 of the Children Act of Kenya. The Act states that parental responsibility is inclusive of all powers, duties, rights and responsibilities a parent has with respect to a child.<sup>64</sup> The duties are provided for under the Act and include the duty to meet the needs of the child such as food, shelter, healthcare and education and to safeguard the child against abuse and discrimination. In addition to that, the parent has a right to offer advice on religion and other values that are essential to the overall well-being of the child, to give a name to the child, appoint a guardian deal with the child's property in their best interest and upon the demise of the child, cater to the interment preparations.<sup>65</sup>

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<sup>60</sup> *Gillick vs West Norfolk and Wisbech Area Health Authority* (1986), The United Kingdom House of Lords.

<sup>61</sup> *Gillick vs West Norfolk and Wisbech Area Health Authority* (1986), The United Kingdom House of Lords.

<sup>62</sup> Article 18(1), *United Nations Convention on the Rights of the Child*, 20 November 1989, Treaty Series vol. 1577.

<sup>63</sup> Article 20(1), *African Charter on the Rights and Welfare of the Child*, 1990.

<sup>64</sup> Section 23(1), *Children Act* (Act No 8 of 2001).

<sup>65</sup> Section 23(2), *Children Act* (Act No 8 of 2001).

Besides catering to the needs of the child and having parents exercise the rights accorded to them above, the main theme that arises in what constitutes parental responsibility is fulfilling such needs while firmly upholding the child's best interest. However, what does the best interest of a child really mean, and does this approach ensure that equal parental responsibility is upheld to its greatest standard?

Despite having been included in many conventions and law regimes in the world, the best interest principle has not had a central definition. This has presented a challenge as its meaning has become subjective, making it dependent on the country and the person applying it. In this regard, the best interest of a child may vary from person to person which may lead to a scenario where the standards to decide on what is best for a child are lacking. In order to remedy this situation, the application of a right based approach has been proposed.<sup>66</sup> This means that the child's best interest should be viewed in conjunction with other rights of the child in mind. In so doing, other factors are taken into consideration, including the socio-economic factors that may influence the case.

It is therefore important that while assessing a child's well-being the child's right may be factored in to provide a better understanding on the best interest of a child principle. This is inclusive of the child's right to communicate. The African Charter on the Rights and Welfare of the Child has managed to put this into context by stating that a child may be allowed to present their views on matters concerning them in court proceedings.<sup>67</sup> This is in an effort to promote the child's best interest.

Therefore, equal parental responsibility should be exercised as per the constitution and proposed statutes while paying due regard to the best interest of the child.

### **3.4 Conclusion**

Establishing what constitutes parental responsibility and who it vests in is important in ascertaining who bears the duty, what the duty is and the principle that guides the exercise of such duty. In doing so, it is easier to know when a duty is not being fulfilled and when a

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<sup>66</sup> Degol A and Dinku S, 'Notes on the Principle "Best Interest of the Child": Meaning, History and its Place under Ethiopian Law', 5 Mizani Law Review 2, 2011, 325.

<sup>67</sup> Article 4(1)(1), *African Charter on the Rights and Welfare of the Child*, 1990.

child's rights are not being met in what is stated to be their best interest. The declaration of section 24(3) and 25 of the Children Act as unconstitutional and as a result null and void is proof that the sections did not honour what is known and stated to constitute parental responsibility. Therefore, in relation to children born outside a marriage, mentioning who parental responsibility vests in as discussed in the chapter, makes it possible for the children to have a recourse under law where fathers evade the parental responsibility, they legally possess.

## **CHAPTER 4: EFFECTS OF THE DECLARATION OF SECTIONS 24(3) AND 25 OF THE CHILDREN ACT AS UNCONSTITUTIONAL ON KENYAN LAW ON PARENTAL RESPONSIBILITY**

### **4.1 Introduction**

On the 24th May 2013, Justice Mumbi Ngugi delivered a judgement that was set to change the implementation of child laws in Kenya. In the case of *Zak and another vs Ma and another* (2013), Justice Mumbi Ngugi declared section 24(3) and 25 of the Children Act of Kenya in contravention of the Constitution and therefore null and void. Taking into consideration the supremacy of the Constitution as upheld in the case of *Marbury vs Madison* (1803), the judgement set precedent for the application of children laws in a manner that seeks the child's best interest through paying equal regard to the exercise of parental responsibility by both parents.

Despite the ruling, the sections have still not been amended. This chapter delves into discussing the effects of the declaration of sections 24(3) and 25 as unconstitutional on Kenyan law in respect of parental responsibility. In addition, it also seeks to show the steps taken by the government to remedy the provisions.

### **4.2 Effects of Declaration of Section 24(3) and 25 of the Children Act as Unconstitutional on Kenyan Law on Parental Responsibility**

The laws governing the protection and wellbeing of children in Kenya have varied over the years. Before the Children Act came into force, several statutes existed. However, the primary laws were three: The Children and Young Persons Act (Cap 141), the Guardianship of Infants Act (Cap 144) and lastly, the Adoption Act (Cap143).<sup>68</sup> The Children and Young Persons Act addressed issues relating to the disciplining and protection of not only children, but also young persons and juveniles. The Guardianship of Infants Act dealt with issues of providing custody and guardianship related matters of unmarried persons below eighteen

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<sup>68</sup> Nielson J, Wakefield L and Murungi N, 'Does the Differential Criterion for Vesting Parental Rights and Responsibilities of Unmarried Parents Violate International Law? A Legislative and Social Study of Three African Countries' 55 *Journal of African Law* 2, 2011, 206.

years.<sup>69</sup> Lastly, as the name suggests, the Adoption Act dealt with adoption cases concerning children. Despite the existence and implementation of the statutes, owing to the progression and changing of times, it became pertinent to have a law that consolidated all children laws, including conventions ratified by Kenya such as the Conventions on the Rights of a Child (CRC). The Children Act of Kenya was implemented as a result. One of the governing principles the Act was and is still founded on is that of non-discrimination.<sup>70</sup>

The implementation of section 24(3) and 25 of the Children Act presents a situation where discrimination may be deemed acceptable. This is counter to the founding principle the Children Act is based upon. Having the view held by several other people led to the lodging of a case in 2006. RM, a minor, filed a case through her mother JK, asking the court to uphold her right to be treated fairly, through the exercise of equal parental responsibility.<sup>71</sup> The facts of the case are as follows: RM was born at a time when her mother and father were cohabiting. The father paid for the hospital expenses but afterwards abdicated his responsibility by failing to provide for RM's needs. According to the plaintiff in this case, for children born outside a marriage, section 24(3) does not grant a father the responsibility to provide for the needs of a child which places the child at a disadvantage because they are not able to receive proper care necessary for their upbringing and overall well-being. The consequence of evading such responsibility was demonstrated by the fact that the plaintiff and her mother were relying on the help of well-wishers to sustain them. The court in this case however, giving due regard to the facts of the case, held that the section was not discriminatory. This was decided before the enactment of the Constitution of Kenya 2010.

A similar case was presented in 2013. However, in this scenario, the courts took on a different view. In the case of *Zak and another vs Ma and another*,<sup>72</sup> the constitutionality of section 24(3) and 25 were in question. The petitioners in the case were seeking a

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<sup>69</sup>Nielson J, Wakefield L and Murungi N, 'Does the Differential Criterion for Vesting Parental Rights and Responsibilities of Unmarried Parents Violate International Law? A Legislative and Social Study of Three African Countries' 55 *Journal of African Law* 2, 2011, 206.

<sup>70</sup> Nielson J, Wakefield L and Murungi N, 'Does the Differential Criterion for Vesting Parental Rights and Responsibilities of Unmarried Parents Violate International Law? A Legislative and Social Study of Three African Countries' 55 *Journal of African Law* 2, 2011, 206.

<sup>71</sup> *RM & another vs Attorney General* (2006) eKLR.

<sup>72</sup> *Zak and another vs Ma and another* (2013) eKLR.

declaration that both sections are inconsistent with the constitution and therefore void.<sup>73</sup>This is in relation to children born outside marriage. In her judgement, Justice Mumbi Ngugi held that the sections were unconstitutional for being in contravention with article 27 of the Constitution of Kenya that deals with equality before the law and article 53 that deals with equal parental responsibility. Taking into consideration that the constitution is the supreme law of the land as provided for under article 2(1) of the Constitution, it triumphs over all laws and binds all persons.

Following the judgement, it was necessary to make a law that not only upheld equal parental responsibility for children born outside marriage, but also ensured that the children's rights are protected. Therefore, one of the effects of the judgement on child laws, was the fact that it made it necessary to have a law that would make all children equal before the law. In that regard, it was vital to have the Children Act amended. Another effect that the declaration had on child laws was that the laws that would be put into effect thereafter would have to be based the non-discrimination principle in their practicality.

#### **4.3 Government Intervention: Steps taken by the Government to remedy the provisions**

Although not approved, an amended version of the Children Act of Kenya was put forward in parliament in 2016. The Act offers a remedy to section 24(3) and 25 by making a provision under section 27. It asserts that equal parental responsibility is available to the parents of the child where they are not married.<sup>74</sup>The Bill containing the amended provisions of the Act went through a first reading which grants the departmental committee dealing with matters concerning children the power to facilitate public participation.<sup>75</sup> This allows the public to provide their input on the bill and what they think of it. The bill is therefore currently still under the first reading stage and has not proceeded any further. Taking into consideration that it has not been fully approved to date, child focused organisations, such as Terre des Hommes have been in the process of intensive lobbying to ensure the act is adopted into law.<sup>76</sup>The problem with this is that the prescribed time period on the adoption of the Bill into Law has not been given.

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<sup>73</sup> *Zak and another vs Ma and another* (2013) eKLR.

<sup>74</sup> Section 27(3), *Proposed Children Bill* 2016.

<sup>75</sup> <https://www.terredeshommes.nl/en/node/1181> on 15 November 2019.

<sup>76</sup> <https://www.terredeshommes.nl/en/node/1181> on 15 November 2019.

#### **4.4 Conclusion**

The declaration of section 24(3) and 25 of the Children Act as unconstitutional signified the beginning of a new era in terms of reformulation of child laws. This is especially with due regard to equality and the promotion of overall well-being. The declaration was therefore a positive step towards the drafting of better child laws. Despite the proposed bill to remedy the situation, the government has not yet considered it and passed it into law. Hopefully, with more child focused organisations engaging in intensive lobbying, the new Act will be implemented to ensure people exercise responsibility and children grow up in a good and secure environment to be better people in society.

## CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

### 5.1 Introduction

The research paper set to establish whether the declaration of section 24(3) and 25 of the Children Act of Kenya as unconstitutional had an effect on upholding equal parental responsibility and promoting the child's best interest. In addition to that, whether the declaration also had an effect on child laws and what steps have been taken to remedy the situation.

The first chapter set to introduce the research problem, presented the research questions that would be answered and the hypothesis upon which the research would be based on. The second chapter delved into discussing the theoretical framework that supports equal parental responsibility and its importance in the upbringing and overall well-being of a child. Chapter three discussed what constitutes parental responsibility and who it vests in in order to ascertain its importance in child laws in Kenya. Chapter four constituted an analysis of the effects of the declaration of the unconstitutional aspects of section 24(3) and 25 and the strides the government has taken to remedy this situation.

The chapter concludes this research by expounding on the conclusions arrived at during the study and offering recommendations that may help remedy the problem.

### 5.2 Conclusion

As stated in the case of *Gillick vs West Norfolk and Wisbech Area Health Authority* (1986), a child's best interest is of paramount significance.<sup>77</sup> In order to ensure that this standard is met, equal parental responsibility needs to be upheld. Without this requirement, the law ceases to abide by the principle it is based on, the principle of non-discrimination, and in turn fails to seek the highest good of the child.

This research established that while there exists a Bill in Parliament that offers solutions to the problems that this paper seeks to address, which includes the recognition of equal parental responsibility to children born outside marriage, the Bill has neither been passed nor formally recognised. This presents a problem as the Bill was proposed in 2016 and no efforts have been made to aid in its implementation.

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<sup>77</sup> *Gillick vs West Norfolk and Wisbech Area Health Authority* (1986), The United Kingdom House of Lords.

The proposed bill addresses the question of what constitutes parental responsibility which under the Children Act 2001 is provided for under section 24. It remedies the problem presented in this research paper and states that:<sup>78</sup>

“Where a child’s father and mother were not married to each other at the time of the child’s birth and have not subsequently married each other both the father and the mother shall have parental responsibility.”

With section 24(3) and 25 of the Children Act having been declared unconstitutional and therefore null and void,<sup>79</sup> there is no section that governs that relationship which is necessary in determining cases that concern parental responsibility and children born outside marriage.

Taking into consideration that there exists no perfect law, it would be best if the proposed children bill is passed. This will in turn guarantee that all the rights of the parties involved are sustained and that everyone is given that which is due to them. Consequently, everyone will be able to seek their highest good, including the parents of the child, that will help everyone attain to be the best version of themselves.

### **5.3 Recommendations**

#### **5.3.1 Enactment of the Proposed Children Bill of 2016 as law.**

The issue in question is the recognition of equal parental responsibility which has an effect on promoting the well-being and proper upbringing of a child. Having the Proposed Children Bill made into law will ensure that children born outside the marriage have their needs met, not only through the meeting of their basic needs, but also fulfilling the needs in the emotional and psychological sphere. Prior to the declaration of the contravention of section 24(3) and 25 of the Children Act to the constitution and its subsequent invalidity, people who did not want to possess parental responsibility could easily abandon their children. The children would in turn suffer the consequences, as was demonstrated in the case of *RM & another vs Attorney General* (2006) who depended on well-wishers for the child and mother’s survival. It would therefore be pertinent to have this bill passed not only to remedy such a provision, but also to prevent children from going through such injustices that do not cater to their best interest. Since the Bill had gone through the first reading which grants power to the Departmental Committee in charge of matters relating to children to facilitate

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<sup>78</sup> Section 27(3), *Proposed Children Bill 2016*.

<sup>79</sup> *Zak and another vs Ma and another* (2013) eKLR.

public participation, it is up to the said committee to ensure the process is complete. Thereafter, with the information gathered, the Committee scrutinizes the Bill in the presence of the sponsor of the Bill and other stakeholders and comes up with a report to be presented to the House for the commencement of the second reading of the Bill.<sup>80</sup> This will ensure the process of the Bill being accepted to law progresses and is eventually completed.

### **5.3.2 Focus of Advocacy Groups and Child Organisations on Promotion and Protection of the Right to Parental Responsibility.**

Advocacy groups and Child Focused Organisations should advocate for promotion and protection of children's right to parental responsibility.

This may entail lobbying for changes to the law to ensure such equality in parental responsibility as needed in the support of children rights and overall well-being. An example of such an organisation that already exists in Kenya is the Terre des Hommes Netherlands , which has been involved in intensive lobbying to ensure that the Proposed Children Bill of Kenya is passed.<sup>81</sup>

### **5.3.3 Foster awareness on statutes relating to equal parental responsibility.**

In addition to having the proposed bill enacted, awareness needs to be created for the community to know the rights they are accorded under the law. This will allow for members of the family to make more informed decisions suitable for the upbringing of the children while taking their best interest into consideration.

### **5.3.4 Focus of the Government and other Institutions on promoting the Importance of the Family**

The Government and other institutions emphasising on the importance of the family as an important unit in the community will allow people to better appreciate it. This appreciation will be translated into parents being equally responsible for their children which will consequently lead to proper upbringing and overall well-being.

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<sup>80</sup> The National Assembly of Kenya, *How Law is Made*, 2017, 4.

<sup>81</sup> <https://www.terredeshommes.nl/en/node/1181> on 15 November 2019.

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