

**THE RIGHT OF CHILDREN OF INCARCERATED PERSONS TO FAMILY LIFE:
TOWARDS A MORE CHILD-CENTRED APPROACH**

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DEDICATION

This one is for all the little children separated from their parents: we see you and we are fighting for you.

DECLARATION

I, **ANITA EUNICE WAMBUI**, 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: *A E Wambui*

Date: *26/07/2021*

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

Signed: *J Wathuta*

DR. JANE WATHUTA

ABSTRACT

All children are vulnerable members of society and require the protection of the family and the State. This vulnerability is heightened when children are separated from their parents, in which case, they should be allowed to maintain contact with them unless it is contrary to their best interest. This applies even when the separation is state-sanctioned such as detention, imprisonment or any other legal deprivation of liberty. The State, in such instances, has the twin responsibilities of non-interference with the family life of these children, and the mandate to adopt measures to ensure that this right is protected.

This paper focuses on the dissonances in the laws governing contact and visitation, from a child's rights perspective and a prisoner's rights perspective, and how these dissonances translate into the reality of this children. It aims to shed light on the negative consequences of only adopting visitation laws and policies from a prisoner's rights perspective. This is because they frame what should ideally be a child's right as a prisoner's privilege, which can be taken away at the will of the prison officials. The research methodology applied in this paper is desktop research and zoom interviews to obtain empirical data and to inform the literature review.

The paper analyses child laws relevant to children of imprisoned parents against the four guiding principles of the CRC and juxtaposes these rights with the provisions on prisoner's rights. It finds that the problematic framing of contact and visitation as a 'privilege' often violates the child's right to maintain a family life with his or her imprisoned parents. It briefly highlights the situation in the Council of Europe, greatly attributing the good practices to the existence of a child-centred policy. It draws on this policy and practice to make recommendations to improve the situation in Kenya. Its main recommendation is that the child should be the focus of any policy likely to affect him or her.

LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
COPE	Children of Prisoners Europe
CRC	United Nations Convention on the Rights of the Child
FFP	For Fangers Påørende
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MUHURI	Muslims for Human Rights
NCCS	National Council for Children's Services
SPS	Scottish Prison Services
UDHR	Universal Declaration of Human Rights
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
UNTS	United Nations Treaty Series

LIST OF CASES

Horych v Poland, European Court of Human Rights, Ruling of 2012.

Marckx v Belgium, European Court of Human Rights, Judgement of 1979.

Paradiso and Campanelli v Italy [GC], European Court of Human Rights, Judgement of 2017.

S v M, Constitutional Court of South Africa (2007).

LIST OF LEGAL INSTRUMENTS

INTERNATIONAL INSTRUMENTS

Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment.
Charter on the Rights of the Family, 22 October 1983.

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

United Nations Declaration of the Rights of the Child (1959).

United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, 21 December 2010, A/RES/65/229.

United Nations Standard Minimum Rules on the Treatment of Prisoners, 8 January 2016, A/RES/70/175.

Universal Declaration on Human Rights, 10 December 1948, 217 A (III).

REGIONAL INSTRUMENTS

AFRICA

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

The African Charter on Human and Peoples' Rights, 27 June 1981.

The Kampala Declaration on Prison Conditions in Africa, 19-21 September 1996.

The Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 28 April - 12 May 2014.

Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 17 - 23 October 2002.

EUROPE

Charter of Fundamental Rights of the European Union (2000).

Italian Memorandum of Understanding (2014).

Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, Council of Europe, 2018.

DOMESTIC LAWS

Constitution of Kenya (2010).

Kenya National Police Service Act (2001).

The Children Act (2001).

The Children Bill (2017).

The Prison Rules (1962)

The Prisons' Act (Act No 49 of 1962).

CHAPTER 1: INTRODUCTION

1.1. Background of the Study

The effects of imprisonment of an individual are far reaching, spanning from those to the individual themselves, those to the individual's family and those to the community.¹ When persons who are parents are incarcerated, the brunt of this separation is borne, in a particular way, by both these parents and their children. Traditionally however, criminal justice systems in most countries narrowly focused on the accused as a free-standing actor and target for reprisal throughout the process of arrest, conviction and sentencing, despite the invariable effect that parental incarceration had on children.² This predicament saw these children being referred to as 'the forgotten victims of incarceration'.³

The Prisons Act (Act No 49 of 1962), Laws of Kenya, broadly divides these children according to their age into two groups; those below the age of four and those who have attained the age of four.⁴ The former group are dependants and rely especially on their mothers. For this reason, the United Nations Convention on the Rights of the Child (hereafter 'the CRC') provides that preference should be given to non-custodial measures for women offenders who are pregnant and those with young infants.⁵ However, should a custodial sentence be imposed, the Prisons Act allows infant children of female prisoners to accompany their mothers to prison until the age of four, or until arrangements for its proper care outside prison are concluded.⁶ More recently, this category of children has gained more attention among researchers and policy and law makers alike

The latter group form the primary focus of the paper. This group consists of the dependent children who are left behind when their parents are imprisoned or have to leave prison on attainment of the

¹ Hagan J, Dinovitzer, Collateral consequences of imprisonment for children, communities and prisoners, *University of Chicago Press Journals*, 1999, 123.

² Golden R, *War on the family: Mothers in prison and the families they leave behind*, Routledge Publishers, New York, 2005, 190.

³ Robertson O, 'Collateral convicts: Children of incarcerated parents: Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011' Quaker United Nations Office, Human Rights & Refugees Publications, 2012, 2.

⁴ Section 30 (4), *Prisons' Act* (Act No 49 of 1962).

⁵ Article 3 (1), *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3.

⁶ Section 30 (4), *Prisons' Act*.

age of four in line with the Prisons Act.⁷ When such a separation occurs, whether from one or both the parents, the child is entitled to maintain personal relations and direct contact with both parents on a regular basis, pursuant to Article 9 (3) unless it is contrary to their best interests.⁸ This right to maintain personal relations and direct contact with one or both parents on a regular basis, through visitation or other means of communication, is what this paper refers to as the right to family life.

The family has indeed been recognized as the natural and fundamental unit of society, and is entitled to the recognition and protection of the State,⁹ and the child has been guaranteed the right to parental care and protection.¹⁰ The right to privacy, a family, a home or correspondence for every person, without arbitrary or unlawful interference, has further been enshrined in the International Covenant on Civil and Political Rights (hereafter ‘ICCPR’).¹¹ The CRC and the African Charter on the Rights and Welfare of the Child (hereafter ‘Children’s Charter’) mirror this provision, but with a specific focus on children as the right-holders.¹² Read together, the import of these provisions is twofold. On one hand, the State has a negative obligation to refrain from arbitrary interference with private and family life, home, and correspondence, and to ensure that any interference is legitimate and proportional. But beyond mere non-interference from the State, the second realm of this right includes a positive obligation of the State to ensure that private life is respected – which includes adoption of measures designed to secure the right.¹³

Current statistics in Kenya have recorded 329 children of imprisoned persons between the years 2016 and 2020, with about a 50% increase every year. Less than half of these children are aged below five.¹⁴ Beyond that, the data reveals nothing about prior relationships with the parents or

⁷ Section 30 (4), *Prisons’ Act*.

⁸ Article 9 (3), *Convention on the Rights of the Child*.

⁹ Article 45 (1), *Constitution of Kenya* (2010); Article 18, *African Charter on Human and People’s Rights*, 27 June 1981.

¹⁰ Article 53, *Constitution of Kenya* (2010).

¹¹ Article 17, *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS 999.

¹² Article 10, *African Charter on the Rights and Welfare of the Child*, 1 July 1990; Article 16, *Convention on the Rights of the Child*.

¹³ European Court of Human Rights, Guide on Article 8 of the *European Convention on Human Rights* – Right to respect for private and family life, home and correspondence, 8 – 10.

¹⁴ Kenya Child Protection Data, Children of Imprisoned Parents, <https://data.childprotection.go.ke/archive/#000/SCCI/2018/ALL>, accessed on 10 September 2020.

whether contact is still maintained. Reports on prisons, however, reveal the positive strides that Kenya has taken in maintaining contact between prisoners and their families. For example, in Kamiti Maximum Prison and Shimo La Tewa Women Prison, in addition to normal visiting hours, whole-day family open days have been introduced, which also allow for remote parenting.¹⁵

Despite these positive strides, some larger prisons only organize such open days for smaller groups of prisoners based on their character, with a view to maintaining security during the open days.¹⁶ This is an exemplification of the problematic framing of visitation and contact policies as a privilege to the inmate, hinged on various contingencies, such as the character and conduct of the offenders.¹⁷ This offender-centred approach disproportionately disadvantages children of inmates who fall short on the character meter. Children of imprisoned persons also face geographical challenges when trying to maintain contact with their parents when prison locations are decided upon without due consideration to proximity to the children.¹⁸ Moreover, since most inmates are from a poor background,¹⁹ financial constraints are also a hindrance to frequent visitation and contact with their children.²⁰ Additionally, visiting areas are often rendered inadequate by the levels of overcrowding and limited infrastructure.²¹

The State, in fulfilment of its positive obligation to protect the family, is mandated to provide amenities and take measures geared towards the protection of the right to family life for such children.²² This would include ensuring proximity of children to the prisons housing their

¹⁵ Kinyanjui S, *Actualizing penal reforms: Best practices in prisons in Kenya*, Muslims for Human Rights (MUHURI), 26.

¹⁶ Kinyanjui S, *Actualizing penal reforms*, 27.

¹⁷ Sections 53 (1) and 55 (1), *The Prison Rules* (established under Section 74, *The Prisons' Act*).

¹⁸ Ndunda E, *Rights of children of imprisoned mothers: Towards non-custodial sentencing for women offenders in Kenya*, LL.M Thesis, University of Nairobi, 12 October 2017, 57.

¹⁹ National Council on Administration of Justice (Kenya), Legal Resources Foundation Trust (Kenya) and Resource Oriented Development Initiatives, 'Criminal Justice System in Kenya: An Audit, Understanding pre-trial detention in respect to case flow management and conditions of detention' (2016), xxiv, 52.

²⁰ Ndunda E, *Rights of children of imprisoned mothers*, 66.

²¹ National Council on Administration of Justice, 'Criminal Justice System in Kenya', 366.

²² *ACERWC, General Comment No. 1 (Article 30 of The African Charter on the Rights and Welfare of the Child) on: "Children of Incarcerated and Imprisoned Parents and Primary Caregivers"*, 2013, Para. 63.

incarcerated parents, providing a budgetary allowance to ensure that transport and accommodation costs are covered during visitation and, making visitation areas more child-centred and friendly.²³

However, this mandate of the State cannot be actualized as long as visitation and contact are considered a privilege to the inmates rather than a right to the children. The central thesis of this paper therefore is that a shift in the object of visitation and contact policies from the offender to the child, by enshrining such policies as a child's right would in turn spur positive obligations on the State to ensure that this right is safeguarded. The paper draws on some of Council of Europe's child-centred policies and practices in making its argument.

1.2. Statement of the Problem

The law provides that when children are separated from their parents, they must be allowed to maintain regular contact, with either, or both parents.²⁴ However, children of imprisoned persons currently face multiple impediments when trying to maintain contact. The genesis of this problem seems to be hinged on the fact that most visitation and contact laws and policies are considered privileges to the offender which in effect subsumes children's rights under the arrangements of their parents. The problematic phrasing of prisoner visitation and contact as a 'privilege' not only allows it to be taken away at every hiccup, but also fails to provide an ample legal basis for children to claim for the safeguarding of this right when their parents are imprisoned. Therefore, a shift in focus of visitation and contact policies from a prisoner's privilege to a children's right would contribute, to a great extent, to the safeguarding of the right of children to maintain a family life.

1.3. Justification of the Study

The study has both academic and policy relevance. Academically, this paper will contribute to the scant literature in Kenya on children of incarcerated persons from a legal perspective. Policy wise, the paper will demonstrate the importance of child-centred visitation and contact policies in the realization of the right of children to have a family life with their parents in prison.

²³ *Committee on the Rights of the Child, Report and recommendations of the Day of General Discussion on "Children of incarcerated parents"*, 30 September 2011, 5, Para. 22 – 24.

²⁴ Article 9 (3), *Convention on the Rights of the Child*.

1.4. Significance of the Study

The failure to specifically contemplate children who are likely to be impacted by the incarceration of their parents during formulation of prison and visitation policies implicates various actors to varying degrees. These actors include the scholars, donors, policy and law makers, and most fundamentally the State, on which the mantle of protecting the family unit is placed.

First, the study may elicit information on the consequences of offender-centred visitation and contact policies to the child's right to maintain a family relationship. Second, the findings of the study may serve as a basis for other scholars interested in the same field. Finally, the study may be beneficial to practitioners and policymakers who may use the findings of the study to influence and change policy.

1.5. Aims and Objectives

The aim of this study is to evaluate the means and policies that can be adopted in order to safeguard the right to family life for children of incarcerated persons. The research objectives are:

- 1) To define the right to family life, its scope, and its basis.
- 2) To analyse the legal framework governing the protection of the child's right to family life with one or both imprisoned parents in Kenya.
- 3) To discuss the Council of Europe's child-centred policies and practices in upholding the right of the child to family life and to make pertinent recommendations.

1.6. Research Questions

The study is guided by the following research questions:

- 1) What does the right to family life entail, and what is the scope and basis of this right?
- 2) To what extent does the existing legal framework protect the right of children of incarcerated persons to family life in Kenya?
- 3) What can Kenya borrow from Council of Europe's child-centred policies and practices in protecting this right?

1.7. Hypothesis

Shifting the approach of the law and policies from an offender-centred approach to a child-centred approach when formulating visitation and contact policies can, to a large extent, contribute to safeguarding the right of children of incarcerated persons to family life.

1.8. Research Methodology and Design

1.8.1. Scope of the Research

The study has taken place over a six-month period between June and December 2020. The qualitative research encompasses an analysis of the international, regional and national laws protecting the right of children of imprisoned persons to a family life with their parents. It also highlights the laws and practice in the Council of Europe and cherry-picks some of the child-centred practices to inform the recommendations of the paper.

1.8.2. Research Methods

1.8.2.1. Desktop Research

The qualitative research is through desktop research of both primary and secondary sources. The primary sources include, inter alia, international, regional and national statutes, legislations and bills and some cases. Other primary sources that have been relied on to aid with the interpretation of the rights of prisoners who are parents and those of the child are General Comments by the Human Rights Committee, The Committee on the Rights of the Child and the Committee of Experts on the Rights and Welfare of the Child.

The study has also relied heavily on secondary sources including books and chapters in books, journal articles, working papers, dissertations, country reports and other online sources to inform the literature review. These sources have also been relied on to provide empirical data regarding children of imprisoned parents in Kenya, and the major trends in visitation and contact policy and practice.

1.8.2.2. Sampling practices in the Council of Europe

The study also samples some of the child-centred practices across the Council of Europe. The research is based on the thesis that a shift in law and policy from a prisoner's rights perspective to

a child's rights perspective would, to a great extent, achieve greater realization of the right of children of imprisoned persons to a family life. The Council of Europe has therefore been chosen for this research because its child-centred practices are attributable, to a great extent, to the implementation of a child-centred law. The study draws parallels between the instrument and the good practices and proposes the same for Kenya.

1.8.3. Caveat

The sampling of child-centred practices considers Member States of the Council of Europe with such practices at random.

1.9. Literature Review

A vast portion of literature focuses on the right of children of imprisoned persons to maintain contact with their mothers, because of the special and unique role they play in a child's life.²⁵ Other studies approach sentencing and visitation policies and rights purely from the traditional frame of the prisoner's rights, as discussed by Lagoutte.²⁶ Here, family contact policies warrant particular attention because of their evident links to reduced recidivism.²⁷ These rights can therefore be extended, limited or terminated in response to the actions of the incarcerated parent.²⁸ However, this paper focuses on the right of children to maintain contact with *both parents*, pursuant to Article 9 (3) of the Convention on the Rights of the Child. It also approaches it from a children's rights perspective, distinct from the rights of the prisoners.

Hagan argues that the punishment of an offending person often reverberates through kin to affect many guiltless people in the family.²⁹ When children are at the receiving end of such separation,

²⁵ See Munro V, 'The emerging rights of imprisoned mothers and their children', 14 (3) *Child and Family Law Quarterly*, 2002; Golden R, *War on the family: Mothers in prison and the families they leave behind*, Routledge Publishers, New York, 2005; Haney L, 'Motherhood as punishment: A case of parenting in prison', 39 (1) *Journal of Women in Culture and Society*, 2013.

²⁶ Lagoutte, S. 'The right to respect for family life of children of imprisoned parents' 24 (1) *International Journal of Children's Rights*, 2016, 206; See also Smith PS, *When the innocent are punished: The children of imprisoned parents*, Palgrave Macmillan, New York, 2014, 82.

²⁷ Arditti JA, *Parental Incarceration and the Family: Psychological and Social Effects of Imprisonment on Children, Parents, and Caregivers*, New York University Press, New York, 2012, 39.

²⁸ Farrugia R, 'The rights of a child whose parents are in prison,' 31 (3) *Children's Legal Rights Journal*, 2011, 16.

²⁹ Hagan J, Dinovitzer, *Collateral consequences of imprisonment for children, communities and prisoners*, 123.

it often results in negative behavioural, social and emotional changes in them.³⁰ Although each case is unique and the responses of children to this predicament vary, such a separation has a great impact on the physical, emotional, educational and material well-being of the children involved.³¹ The uncertainty permeating the child's life on separation from the parents through incarceration results in remarkable instability in the child.³² Life as they know it is likely to change – the family may lose its breadwinner and its family home, while children are likely to change schools³³ – which may result in periods of depression and aggression. Such children also face social stigma from society,³⁴ especially where the parent's offence is known, and as a result they may suffer profound trauma, fear, shame and low-self-esteem.³⁵

Yet studies show that when such children are allowed to maintain family relationships with their parents, they exhibit positive changes in their attitudes and overall improvement in their well-being.³⁶ This is because no other institution can top the ability of the family to endow every new generation with enduring love, values and virtues required for character development.³⁷ This does not disregard the fact that, in some instances, parental imprisonment can be a positive experience – for example where the parents were abusers, or where the relationship between the children and parents was already damaged. Similarly, where parents and children had minimal contact pre-incarceration, the impact of the separation is equally minimal.³⁸ This study, however, focuses on instances where the child and his or her parent had a good relationship before incarceration.

³⁰ Kaplan SJ, Pelcovitz D and Labruna V, 'Child and adolescent abuse and neglect research, A review of the past 10 years', 38 (10) *Journal of the American Academy of Child & Adolescent Psychiatry*, 1999, 1220.

³¹ Martin E, 'Hidden consequences: The impact of incarceration on dependent children', 278 *National Institute of Justice Journal*, 2017, 2 – <https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children>.

³² Cooper C, Geller A, Garfinkel I, Mincy R, Parental incarceration and child wellbeing: Implications for urban families, 90 (5) *Social Science Quarterly*, 2009, 5.

³³ Townhead L, Brett R, Quaker United Nations Office, 'Putting access to the United Nations Committee on the Rights of the Child into the hands of children of prisoners', *European Journal of Parental Imprisonment*, 2015, 17.

³⁴ Cunningham A, 'Forgotten Families – the impacts of imprisonment' 59 (Winter) *Family Matters*, 2001, 37.

³⁵ Simmons CW, Children of Incarcerated Parents, 7 (2) *California Research Bureau*, 2000, 4.

³⁶ Robertson O, 'Child rights: some long-term perspectives', *European Journal of Parental Imprisonment*, 2015, 12.

³⁷ Sexuality and Family, The Public Discourse, *Journal of Witherspoon Institute* – <https://www.thepublicdiscourse.com/pillars/sexuality-and-family/>

³⁸ Robertson O, 'Women in prison and children of imprisoned mothers – project background', Women in Prison and Children of Imprisoned Mothers Series, Quaker United Nations Office, 2007, 10.

For those children who had good relationships with their parents prior to the latter's incarceration, the most effective way of maintaining contact during incarceration is through visitation.³⁹ Oliver Robertson however highlights the myriads of challenges such children face when trying to maintain contact. These challenges include prison regulations, long distances to be travelled to remote prisons, competing demands on family members.⁴⁰ In her discussion, Arditti includes, as part of the challenges, the lack of privacy that parents and children have to endure, the tedious and lengthy waits, humiliation, rude treatment, and poor visiting conditions.⁴¹ This leads to reliance on indirect forms of communication such as letter writing and telephone calls, but even these means are riddled with the same temporal and financial inhibitions.⁴² Consequently, and understandably, many consider such visits a major temporal, financial and energy resource expense with little return.⁴³

Additionally, in many jurisdictions, even where individual prisons have child-friendly facilities, the practice is often regarded as a privilege to prisoners rather than a right of children, as discussed by Boudin.⁴⁴ Consequently, the 'privilege' can be taken away at the will of prison officials. Children of imprisoned persons thus face additional challenges in exercising their right to maintain contact with their parents in prison.⁴⁵

Lagoutte recognizes that there are often public interests at risk that may limit the child's right to maintain a family relationship with their parents.⁴⁶ The main risk faced when persons in pre-trial detention are concerned is that of collusion between the accused person with his family. Other risks include security risks of prisoners who have previously attempted to escape, which justifies physical separation, such as glass partitions.⁴⁷ In such cases, while the limitation is justified, the

³⁹ Robertson O, 'Women in prison and children of imprisoned mothers', 10.

⁴⁰ Robertson O, 'Women in prison and children of imprisoned mothers', 19.

⁴¹ Arditti JA, *Parental Incarceration and the Family*, 123.

⁴² Robertson O, 'Women in prison and children of imprisoned mothers', 20.

⁴³ Christian J 'Riding the bus: Barriers to prison visitation and family management strategies', 21(1) *Journal of Contemporary Criminal Justice*, 2005, 31-48.

⁴⁴ Boudin C, 'Children of incarcerated parents: The child's constitutional right to the family relationship', 101(1) *The Journal of Criminal Law and Criminology*, 2010, 80.

⁴⁵ Travis J and Waul M, *Prisoners once removed: The impact of incarceration and re-entry on children, families, and communities*, Urban Institute Press, Washington, 2004, 8.

⁴⁶ Lagoutte, S. 'The right to respect for family life of children of imprisoned parents', 215.

⁴⁷ Lagoutte, S. 'The right to respect for family life of children of imprisoned parents', 216.

duration of the limitation of the right must be proportionate.⁴⁸ She however asserts that the recognition of children as distinct right holders by the CRC should afford them separate consideration in matters where their rights are likely to be affected.⁴⁹ For example, where ‘dangerous convicts’ are concerned, authorities must always strike a balance between the conditions of their detention and the right to respect their family life.⁵⁰ Visitations from children in such instances may require special arrangements and that the State is obligated to ensure an appropriate, stress-free environment for visitation even in such cases.⁵¹

This paper, taking cognizance of the negative impacts of parent-child separation due to incarceration, and the positive impact of maintaining contact to the child’s life, proposes a shift in law and practice from regarding visitation as a privilege to giving it the legal authority of a right. This would bestow on the State the duty to adopt measures to ensure that this right is safeguarded.

1.10. Limitations and Delimitations of the Study

This study is limited to the rights of children who do not reside with their incarcerated mothers in prison. It is also limited to the rights of children who had a good relationship with their parents prior to incarceration of the parents. The research methodology excludes fieldwork and as such, the scope of the study is limited to desktop research. The study is thus limited to available data. Finally, there is lack of evidence that the child-centred practices around Europe on which the recommendations are based are in fact the “best practices”.

1.11. Chapter Summary

Chapter one introduces the study by providing a brief background, the problem statement, the justification and significance of the study, the aim and the specific objectives of the study, the research questions, hypotheses, research methodology, literature review, limitations and delimitations of the study, and the chapter summary.

⁴⁸ Lagoutte, S. ‘The right to respect for family life of children of imprisoned parents’, 216.

⁴⁹ Lagoutte, S. ‘The right to respect for family life of children of imprisoned parents’ 225.

⁵⁰ *Horych v Poland*, ECtHR Ruling of 2012, para. 126.

⁵¹ *Horych v Poland*, para. 131.

Chapter two grounds the study in two theories: the attachment theory, and the social learning theory.

Chapter three analyses the right to family life, its scope and its basis.

Chapter four analyses the legal framework governing the protection of the right to family life for children of imprisoned persons in Kenya, from a child's rights perspective and from a prisoner's rights perspective. It also analyses the current situation status of protection of this right.

Chapter five discusses the child-specific law and policy governing the rights of children of imprisoned persons in the Council of Europe and some of the child-centred practices in safeguarding the right of children of incarcerated persons to a family life.

Chapter six presents the findings, proposes recommendations and concludes the study.

CHAPTER 2: THEORETICAL FRAMEWORK

2.1. Introduction

The arguments advanced in this paper are based on the sanctity of the parent-child relationship and the indispensable role parents play in the development of the children. The study is thus underpinned by John Bowlby's *attachment theory* and the Albert Bandura's *social learning theory*. This chapter discusses these two theories.

2.2. Attachment Theory

To understand the need to refocus family contact and visitation policies to a child-centred approach, it is paramount to first understand the importance of the parent-child relationship for the healthy development of a child.⁵² The sanctity of parent-child relationships is underscored by the *attachment theory* which was developed by John Bowlby, a British psychoanalyst, in an attempt to understand the distress faced by children separated from their parents.⁵³

The attachment theory positions the parent-child relationship as the foundation on which children can develop the warmth, love and trust allowing them to learn how to build and sustain long healthy relationships.⁵⁴ According to Bowlby, children come into this world with an innate need to form relationships or attachments with their primary caregivers as a means of survival.⁵⁵ They should therefore experience intimate and continuous relationships with their parents, in a way that elicits satisfaction and enjoyment,⁵⁶ as this determines the child's perceptions and reactions to the world.⁵⁷ It also argues that supportive relationships with parents go a long way in buffering children from external environmental stresses, such as poverty.⁵⁸ When these relationships are

⁵² Cramer L, Goff M, Peterson B and Sandstorm H, 'Parent-child visiting practices in prisons and jails', A Synthesis of Research and Practice, Urban Institute, 2017, 6.

⁵³ Fraley C, Adult attachment theory and research: A brief overview, University of Illinois -Urbana, Champaign - <<http://labs.psychology.illinois.edu/~rcfraley/attachment.htm>> on 06 March 2020.

⁵⁴ Cramer L, Goff M, Peterson B and Sandstorm H, 'Parent-child visiting practices in prisons and jails', 6.

⁵⁵ Bretherton I, 'The origins of the attachment theory: John Bowlby and Mary Ainsworth' *Development Psychology* 1992, 762.

⁵⁶ Bowlby J, 'Maternal care and mental health', 3 Bulletin of the World Health Organisation, 1951, 355.

⁵⁷ Siegel D, *The developing mind: How relationships and the brain interact to shape who we are*, The Guilford Press, New York, 2015.

⁵⁸ Poehlmann J, 'Representations of attachment relationships in children of incarcerated mothers', 76 (3) *Child Development*, 2005, 692.

disrupted, children lose the strong feeling of connection with their parents.⁵⁹ Where these children are very young, such separation is likely to be accompanied by feelings of abandonment and rejection.⁶⁰ Where it is caused by parental incarceration, the child is affected in a unique way due to the stigma associated with it, and the uncertainty around the length of separation.⁶¹ However, frequent contact and visitation of parents enables their children to develop a stronger sense of security, which in turn acts as a protective factor against negative social and behavioural turnouts.⁶²

The attachment theory argues that there is an inextricable link between the parent-child relationship and the behavioural, emotional, and social development of the child. It therefore elucidates the importance of maintaining direct and regular contact between the parents to prevent severing the relationship between the incarcerated parent and the child.

2.3. Social Learning Theory

The *social learning theory* is based on the works of psychologist Albert Bandura. Bandura posited we learn that our interactions with others in a social context.⁶³ He argued that human learning and behaviours were not fully attributable to conditioning and reinforcement, but rather, could be attained through observation and modelling.⁶⁴ Children emulate their parents' behaviours through imitation, where there is a perceived personal relationship and direct observation.⁶⁵ When children of imprisoned persons are involved, one cannot ignore the risk of adverse social contagion effects, where the children emulate the aggressive behaviour of their parent and end up in the justice system themselves.⁶⁶ However, more cases have established a direct correlation between increased contact

⁵⁹ Cramer L, Goff M, Peterson B and Sandstorm H, 'Parent-child visiting practices in prisons and jails', 6.

⁶⁰ Flynn C, 'Getting there and being there: Visits to prisons in Victoria—the experiences of women prisoners and their children', 61 (2) *Probation Journal*, 2014, 178.

⁶¹ Arditti J and Jyoti S, 'Parental incarceration and child trauma symptoms in single caregiver homes', 24 (3) *Journal of Child and Family Studies*, 2015, 551.

⁶² Hedge J, 'Children of incarcerated parents: The relation of contact and visitation to the parent-child relationship and internalizing and externalizing problems', Published dissertation, Clemson University, 2016, 27.

⁶³ Nabavi RT, Bandura's social learning theory & social cognitive learning theory, University of Science and Culture, 2014, 5.

⁶⁴ Bowlby J, *Attachment: Attachment and loss: Volume One*, Basic Books, New York, 1969.

⁶⁵ Burdick CL, 'The merits, limitations, and modifications of applying Bandura's social learning theory to understanding African American children's exposure to violence' 3(5) *American International Journal of Social Science*, 2014. 183.

⁶⁶ Murray J and Farrington D, *The effects of parental imprisonment on children*, University of Chicago, 2008, 178.

between children and their imprisoned parents and the former's enhanced coping mechanisms., and consequent good behaviour⁶⁷

Where both parents are incarcerated, alternative care might be sought. It tends to fall short of the safe and nurturing place it is made out to be, as it hardly offers the valuable and indispensable education endowed to children by their parents.⁶⁸ The family has indeed been recognized as the pre-eminent and irreplaceable place for the development of a person, through education and promotion.⁶⁹ Denying a person this initial promotion and education hampers the achievement of human fullness.⁷⁰ Conversely, by virtue of conferring life to their children, parents are recognized as the first and foremost educators of their children, with an original, primary and inalienable right to educate them.⁷¹ This right does not terminate automatically on the basis of incarceration, because their duty to educate them to ensure their social, spiritual, moral, physical and mental wellbeing is not diminished on incarceration.⁷²

2.4. Conclusion

In conclusion, this chapter has grounded the right of the child to maintain contact with his or her imprisoned parents in two theories. The attachment theory posits that right from birth, a child is pre-programmed to form an attachment to the primary caregiver and that these attachments formed at the child's infancy impact the child's future social interactions and their ability to form meaningful relationships. The social learning theory highlights the importance of parents as the primary educators of their children, and that meaningful contact between imprisoned persons and their children would allow parents to continue playing this invaluable role.

⁶⁷ Murray J and Farrington D, *The effects of parental imprisonment on children*, 177; Bullen T, Taplin S, Kertesz M, Humphreys C, and McArthur M, 'Literature review on supervised contact between children in out-of-home care and their parents', Institute of Child Protection Studies, Canberra, ACU, 2015, 12.

⁶⁸ Bonding is a Critical Issue, <https://adoptioninchildtime.org/bondingbook/introduction-bonding-is-a-critical-issue>

⁶⁹ Pontifical Council for the Family, *The Family and Human Rights*, Para. 15 at – http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html

⁷⁰ Pontifical Council for the Family, *The Family and Human Rights*, Para. 16.

⁷¹ Article 5, *Charter on the Rights of the Family*, 22 October 1983.

⁷² Phillbrick K, Ayre L, Lynn H, *Children of imprisoned parents: European perspectives on good practices*, Children of Prisoners Europe, Paris, 2014, 73.

CHAPTER 3: THE RIGHT TO RESPECT FOR FAMILY LIFE FOR CHILDREN OF IMPRISONED PERSONS

3.1. Introduction

This chapter discusses the scope of the right to a family life for children of imprisoned persons, and its underlying foundations. This right is grounded in two main premises – that all human beings are equal in dignity, and that the family is the natural and fundamental group in society that plays a fundamental and indispensable role in the protection and education of the child. The understanding of these two premises is important as it underscores the legal basis for the right to family life for children of imprisoned persons.

3.2. Scope of the Right to a Family Life

‘The family’ does not enjoy a universally accepted definition. Even so, all definitions concede that parents and children – whether biological or adopted – form one of the types of families.⁷³ This is the most pertinent definition for the purposes of this paper. Whether ‘family life’ exists or not is a question of fact that depends on the existence of close personal ties.⁷⁴ The right to family life therefore presupposes the existence of a family and does not extend to the right to found a family or the right to adopt.⁷⁵ The family is entitled to the care and the protection of the State under various national, regional and international instruments.⁷⁶ Since one of the foundational ingredients of family life is the right to live together so that family relationships may grow and flourish, the State is also prohibited from interfering with an individual’s private and family life.⁷⁷

However, the right to family life may be subject to limitations prescribed by law, and reasonable and justifiable in an open and democratic society.⁷⁸ Therefore, state-sanctioned interference, such

⁷³ <https://www.merriam-webster.com/dictionary/family>; HRC General Comment No 16, Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, 8 April 1988, Para. 5.

⁷⁴ *Paradiso and Campanelli v Italy* [GC], ECtHR Judgement of 2017, para. 140.

⁷⁵ European Court of Human Rights, Guide on Article 8 of the *European Convention on Human Rights*, 67, Para. 280.

⁷⁶ Article 45 (1), *Constitution of Kenya (2010)*; Article 18 (1), *The African Charter on Human and Peoples' Rights*; Article 16, *Universal Declaration of Human Rights*; Article 23, *International Covenant on Civil and Political Rights*; Article 10, *International Covenant on Economic, Social and Cultural Rights*.

⁷⁷ *Marckx v Belgium*, ECtHR Judgement of 1979, para. 31.

⁷⁸ Article 24 (1), *Constitution of Kenya (2010)*.

as imprisonment may interfere with this right.⁷⁹ When the result of such an interference is the separation between a child and one of both parents, State Parties are required to ensure that such a child is allowed to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.⁸⁰ Conversely, their parents in prison retain all their fundamental freedoms that remain compatible with their detention,⁸¹ including the right to respect for family life through visitation or correspondence in writing, telephonically and through any other means at regular intervals.⁸²

The right to family life for children of imprisoned persons includes the prohibition from arbitrary interference with the right to visit or correspond with their parents, and the right to assistance by the State to visit and correspond with their parents. The second part connotes a bigger, more proactive role for the State in, among other things, ensuring that proximity of children to the prisons housing their incarcerated parents, providing a budgetary allowance to ensure that costs of communication, transport and accommodation are covered during visitation, and making visitation areas more child-centred and friendly.⁸³ These two limbs must be interpreted conjunctively if the right to family life for children of imprisoned persons is to be safeguarded.

3.3. Foundations of the Right to a Family Life

3.3.1. Human Dignity

Right from its Preamble, the Universal Declaration of Human Rights (UDHR) recognizes that human beings have dignity and equal and inalienable rights that are inherent in them from birth.⁸⁴ Human dignity is the basis of all human rights.⁸⁵ The Constitution of Kenya (The Constitution) indeed recognizes that human rights and fundamental freedoms are recognized and protected with a view to preserving every person's inherent human dignity.⁸⁶

⁷⁹ Article 9 (4), *Convention on the Rights of the Child*.

⁸⁰ Article 9 (3), *Convention on the Rights of the Child*.

⁸¹ Article 51 (1), *Constitution of Kenya (2010)*.

⁸² European Court of Human Rights, Guide on Article 8 of the *European Convention on Human Rights*, 83, Para. 428.

⁸³ *Committee on the Rights of the Child*, Report and recommendations of the Day of General Discussion on "Children of incarcerated parents", 30 September 2011, 5, Para. 22 – 24.

⁸⁴ Preamble, Article 1, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁸⁵ Preamble, *International Covenant on Civil and Political Rights*; Preamble, *International Covenant on Economic, Social and Cultural Rights*; Preamble, *The African Charter on Human and Peoples' Rights*.

⁸⁶ Articles 2 and 28, *Constitution of Kenya (2010)*.

This dignity is not conferred to man by human will, a concession by public authorities, or by a product of cultures, rather, it emanates from man's essence.⁸⁷ Thus, by virtue of being human, the child too has inherent dignity.⁸⁸ As such, the child has been recognized as an individual right-holder, who 'cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.'⁸⁹ The sins of parents should therefore not lead to an automatic limitation of the rights of the children such as deprivation of family ties with their parents because this would be by extension, undue punishment to the children, and a violation to their right to a family life.

Conversely, prisoners have the right to be treated in a way that preserves their dignity.⁹⁰ Since dignity is a birth right, it can neither be achieved nor can it be lost.⁹¹ It remains due to everyone "no matter what they do".⁹² Therefore, even where offenders and criminals are concerned, a distinction should be drawn between the person, who still deserves respect, and the person's actions, which may or may not deserve respect.⁹³

Further, everyone is equal in rights and therefore these rights cannot be limited on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".⁹⁴ For children of imprisoned persons, the import of this provision is that the right to family life or parental care and protection that is due to every child⁹⁵ is also due to them. Children are vulnerable members of society,⁹⁶ and for children of imprisoned persons, their heightened level of vulnerability necessarily denotes a bigger role on the part of State officials to protect their rights and fundamental freedoms. For prisoners, equality undergirds the retention of all their rights and fundamental freedoms that are not incompatible with their incarceration.

⁸⁷ Pontifical Council for the Family, *The Family and Human Rights*, 2000, Para. 20.

⁸⁸ Preamble, *Convention on the Rights of the Child*; Preamble, *The African Charter on the Rights and Welfare of the Child*.

⁸⁹ *S v M*, Constitutional Court of South Africa (2007), Para. 18.

⁹⁰ Rule 1, *The United Nations Standard Minimum Rules on the Treatment of Prisoners*.

⁹¹ Spiegelberg, H, 'Human dignity: A challenge to contemporary philosophy' 9 (1) *World Future*, 1972, 54.

⁹² Hicks D, *Dignity: Its essential role in resolving conflicts*, Yale University Press, New Haven, Connecticut, 2011, 4 – 5; Saint John Paul II, Encyclical Letter *Evangelium*, 1995, 411 - http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html accessed on 15 November 2020.

⁹³ Hicks, *Dignity: Its essential role in resolving conflicts*, 4 – 5.

⁹⁴ Rule 2, *The United Nations Standard Minimum Rules on the Treatment of Prisoners*.

⁹⁵ Article 53, *Constitution of Kenya (2010)*.

⁹⁶ Article 21, *Constitution of Kenya (2010)*.

3.3.2. The Family as the Natural and Fundamental Group of Society

The family has been recognized as the natural and fundamental unit of society in the UDHR, and in subsequent human rights instruments.⁹⁷ It is within a family that a married couple bring children into this world and give them a home in which they can grow and develop.⁹⁸ It is the institution that allows an individual to exist ‘for himself’. The family has been recognized as the irreplaceable ‘sanctuary of life’ where all the rights that are necessary for the full development of children are realized in the most effective way.⁹⁹

For children, the family environment allows them to flourish, mature and acquire values that have a great impact on social life as a whole. Within the family, children are taught, among other things, how to respect authority and how to live in harmony with others in society.¹⁰⁰ The family, then, is the primary teacher and custodian of values and parents have the ‘original, primary and inalienable right’ to educate their children as they have conferred life onto them.¹⁰¹ As the custodian of traditional values, the family should be protected by the State.¹⁰² The CRC as a whole, is based on this philosophy that parents bear the primary responsibility for ensuring the survival and development of the child, and States must assist them with the fulfilment of this responsibility.¹⁰³

Children who are raised by their biological parents have been found to have better qualities – such as patience, love and self-control – than those raised in broken families. The latter have a heightened risk of juvenile delinquency and other forms of destructive behaviour.¹⁰⁴ Moreover, as these parents have conferred life on their children, their mandate to inculcate values and responsibility into the children is not extinguished in the event of their imprisonment.¹⁰⁵ Therefore,

⁹⁷ Article 45 (1), *Constitution of Kenya (2010)*; Article 18 (1), *The African Charter on Human and Peoples' Rights*; Article 16 (3), *Universal Declaration of Human Rights (1948)*; Article 23, *International Covenant on Civil and Political Rights (16 December 1966, UNTS, vol. 999)*; Article 10, *International Covenant on Economic, Social and Cultural Rights (16 December 1966, UNTS vol 993)*; Preamble, *Convention on the Rights of the Child*.

⁹⁸ John Paul II, Letter to Families *Gratissimam Sane*, 2294, 7.

⁹⁹ John Paul II, Letter to Families *Gratissimam Sane*, 2294, 11.

¹⁰⁰ C Burke, Man and Values, 2013 – <http://www.cormacburke.or.ke/node/2453>

¹⁰¹ Article 5, *Charter on the Rights of the Family (22 October 1983)*.

¹⁰² Article 18 (3), *African Charter on Human and People's Rights*.

¹⁰³ Novak M, *A Commentary on the United Nations Convention on the Rights of the Child, Article 6: The right to life, survival and development*, Martinus Nijhoff Publishers, Leiden, Boston, 2005, 38, para. 61.

¹⁰⁴ Witherspoon Institute, *Marriage and the public good: Ten principles*, Princeton, New Jersey, 2006, 25.

¹⁰⁵ Phillbrick K, Ayre L, Lynn H, *Children of imprisoned parents*, 73.

whether or not the State places the child under alternative care, it must not disregard its obligation to allow the child to maintain contact with one or both parents, if it is in their best interests.

3.4. Conclusion

These two premises provide a legal basis for protecting the right of children of imprisoned persons to a family life in Kenya, and across the world.

CHAPTER 4: THE RIGHT TO A FAMILY LIFE FOR CHILDREN OF IMPRISONED PERSONS IN KENYA: A DUAL PERSPECTIVE

4.1. Introduction

This chapter focuses on the legal framework governing the protection of the rights of children with imprisoned persons to family life in Kenya. The first part looks at the laws from the lens of a child's rights, while the second part looks at the law from the lens of prisoner's rights. This juxtaposition is aimed at bringing to light the consequences of the different framing of this right. It then gives an overview of the situation of children of imprisoned parents in order to highlight the need for a policy change.

4.2. A Child's Rights Perspective

Children's rights are enshrined in, *inter alia*, the CRC, the Children's Charter, the Children Act (2001) and the Children Bill (2017). The CRC and the Children's Charter both recognize the child as a vulnerable member of society who needs special safeguards and care and requires to grow up in a family environment for the full and harmonious development of his or her personality.¹⁰⁶ The CRC does not specifically contemplate children of imprisoned persons, except to guarantee them the right to information on their parents whereabouts.¹⁰⁷ However, its provisions still create a legal basis for the rights of children of imprisoned parents to a family life. The Children's Charter recognizes that children's rights are often violated when mothers, and other primary caregivers,¹⁰⁸ are incarcerated and calls for, *inter alia*, consideration of non-custodial sentences and alternative institutions for holding primary caregivers in conflict with the law.¹⁰⁹ The Children's Act and Children's Bill recognize that these children are vulnerable and in need of care and protection.¹¹⁰

The UN Committee and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) articulated four guiding principles for the interpretation of the CRC and the Children's

¹⁰⁶ Preamble, *Convention on the Rights of the Child*; Preamble, *The African Charter on the Rights and Welfare of the Child*.

¹⁰⁷ Article 9 (4), *Convention on the Rights of the Child*.

¹⁰⁸ ACERWC, *General Comment No. 1*, para. 13.

¹⁰⁹ Article 30, *The African Charter on the Rights and Welfare of the Child*.

¹¹⁰ Section 119 (1) (c), *The Children's Act (2001)*; Section 132 (1) (c), *The Children Bill (2017)*.

Charter respectively:¹¹¹ the principle of equality and non-discrimination; the principle of the best interest of the child; the life, survival and development principle; and the principle of participation.¹¹² Jointly, these principles convey the general perception of children’s rights,¹¹³ and shall therefore be the yardstick for the analysis of the laws governing the protection of the child’s right to a family life in Kenya.

4.2.1. The principle of equality and non-discrimination

The guiding principle of equality and non-discrimination draws from the premise that all human beings are equal in dignity and rights, as discussed in Chapter Three and as recognized in the CRC and in the Constitution.¹¹⁴ All children are entitled to parental care and protection,¹¹⁵ and if a separation occurs between the child and one or both the parents, the child is entitled to maintain personal relations and direct contact with both parents on a regular basis.¹¹⁶ These, and all other children’s rights, must be respected without discrimination of any kind,¹¹⁷ including discrimination based on the attributes, actions, and status of their primary caregivers and other family members.¹¹⁸ States are mandated to take appropriate measures to ensure that the child is protected from such discrimination and to ensure equal and effective opportunities for each child to enjoy their rights.¹¹⁹

Under the Constitution, the State is prohibited from both *direct discrimination* and *indirect discrimination* on any ground.¹²⁰ While the former focuses on the reasons underlying the action in

¹¹¹ CRC, *General guidelines regarding the form and content of initial reports to be submitted by States Parties under Article 44, paragraph 1(a), of the Convention*, 15 October 1991, para. 13; CRC, *General Guidelines for Periodic Reports*, 11 October 1996, para. 40; ACERWC, *General Comment No. 1*, para. 17.

¹¹² Articles 2, 3 (1), 6, and 12 (1), *Convention on the Rights of the Child*.

¹¹³ Morag T, The principles of the UN Convention on the Rights of the Child and their influence on Israeli Law, 22 (2) *Michigan State International Law Review*, 2014, 536.

¹¹⁴ Preamble, *Convention on the Rights of the Child*; Article 28, *Constitution of Kenya* (2010).

¹¹⁵ Article 7 (1), *Convention on the Rights of the Child*; Article 19, *The African Charter on the Rights and Welfare of the Child*, Article 53, *Constitution of Kenya* (2010).

¹¹⁶ Article 9 (3), *Convention on the Rights of the Child*; Article 19 (2), *The African Charter on the Rights and Welfare of the Child*.

¹¹⁷ Article 2 (1), *Convention on the Rights of the Child*; Article 3, *The African Charter on the Rights and Welfare of the Child*; Article 27, *Constitution of Kenya* (2010); Section 5, *The Children Act* (2001); Section 6, *The Children Bill* (2017).

¹¹⁸ Besson S, ‘The principle of non-discrimination in the Convention on the Rights of the Child’, 13 (1) *International Journal of Children’s Rights*, 2005, 446.

¹¹⁹ Articles 2 (2), *Convention on the Rights of the Child*; CRC, *General comment No. 14, The right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, 11, Para. 41.

¹²⁰ Article 27 (4), *Constitution of Kenya* (2010).

question, the latter looks at the results or effects of the action or practice in question.¹²¹ What would otherwise be considered neutral treatment will constitute indirect discrimination if its effects produce inequalities of treatment between different groups of people.¹²² For children of imprisoned parents, any policy or practice that indiscriminately makes contact visitation difficult or impossible for the majority of children with incarcerated parents violates their right to maintain contact with their parents. Where such equal treatment yields unequal results, this calls for reverse discrimination by the State by enacting equitable measures to promote equality.¹²³

In realizing the rights of children, the State is mandated to undertake appropriate measures to the maximum of available resources.¹²⁴ The UN Committee has interpreted this provision in light of public budgeting and resource allocation, stating that the State is mandated to ensure that public budgeting should be geared towards full realization of a child's rights.¹²⁵ It should take place in an equitable manner geared towards the removal of discriminatory barriers faced by children in accessing their rights.¹²⁶ Therefore, groups of children who qualify for special measures should be identified and proper measures should be taken to properly uphold their rights. For children of imprisoned persons, funds could be geared towards easing financial barriers which limit visitation, funding halfway houses within communities to accommodate non-violent offenders with children in order to eliminate geographical barriers, and toward improving visitation areas.¹²⁷

4.2.2. The principle of the best interest of the child

In all actions concerning children, various private and public actors are required to take their best interests of the child as the primary consideration.¹²⁸ The CRC explicitly refers to the child's best

¹²¹ Ibarolla JS, Bhatia G, Direct and indirect discrimination, Max Planck Encyclopedia for Comparative Constitutional Law, 2020, Para. 5, at <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e694#law-mpeccol-e694-div1-4>.

¹²² Ibarolla JS, Bhatia G, Direct and Indirect Discrimination, Para. 11 – 12.

¹²³ Kutsar D, Warning H (eds), *Children and Non-Discrimination*, University Press of Estonia, Estonia, 2014, 20.

¹²⁴ Article 4, *Convention on the Rights of the Child*; Article 1, *The African Charter on the Rights and Welfare of the Child*; Section 3, *The Children Act (2001)*; Section 4, *The Children Bill (2017)*.

¹²⁵ *CRC, General comment No. 19, Public budgeting for the realization of children's rights (art. 4)*, 20 July 2016, para. 18.

¹²⁶ *CRC, General comment No. 19*, Para. 61.

¹²⁷ *ACERWC, General Comment No. 1*, Para. 52.

¹²⁸ Article 3, *Convention on the Rights of the Child*; Article 4, *The African Charter on the Rights and Welfare of the Child*; Section 4 (2), *The Children Act (2001)*; Section 5 (2), *The Children Bill (2017)*; Article 53 (2), *Constitution of Kenya (2010)* elevates it further and states that the best interests are to be of paramount importance.

interests in various articles relevant to children of imprisoned persons; including parental responsibilities, separation from parents, and subsequent family reunification.¹²⁹ ‘*In all actions*’ covers the broad spectrum of decisions, actions, inactions, conducts, proposals and procedures relating to the child. ‘*Concerning*’ imposes a legal duty to evaluate their interests in both actions that directly and indirectly affect children.¹³⁰ The phrase ‘*shall be*’ means that the State’s legal obligation to consider their best interest is mandatory.¹³¹ The expression ‘*primary consideration*’ accords children a consideration of a higher level because of their heightened vulnerability.¹³² Moreover, all actors on whom this obligation lies are required to balance competing interests and come up with a possible compromise that still gives due primacy to the child’s interests.¹³³

The best interest principle has been interpreted as a tripartite concept that includes a substantive right, a legal principle, and a rule of procedure.¹³⁴ As a substantive right, it creates an obligation for States to ensure that where different interests are being considered in order to reach a decision that will affect children, the best interest of the child has primacy over all other interests. As a legal principle, it dictates that where a legal provision is open to more than one interpretation, States should choose the interpretation which best favours the interests of the child. Finally, as a rule of procedure, it mandates States to evaluate the child’s interests in any decision-making process on matters affecting the child.¹³⁵ These include any formulation of contact and visitation policies that affect the frequency and ease of maintaining contact with their imprisoned parents.¹³⁶

Some elements to be taken into consideration when assessing the child's best interest include: the child’s views; the child's identity; the need to preserve the family environment and maintain family relations; the care, protection and safety of the child; the situation of vulnerability, among others.¹³⁷ For children of imprisoned parents, the best interest can only be truly upheld when the standards

¹²⁹ Articles 18, 9 and 10, *Convention on the Rights of the Child*.

¹³⁰ *CRC, General comment No. 14*, Para. 17 -20.

¹³¹ *CRC, General comment No. 14*, Para. 36.

¹³² *CRC, General comment No. 14*, Para. 37.

¹³³ *CRC, General comment No. 14*, Para. 39.

¹³⁴ *CRC, General comment No. 14*, Para. 6.

¹³⁵ *CRC, General comment No. 14*, Para. 6.

¹³⁶ *ACERWC, General Comment No. 1*, Para. 24 (e).

¹³⁷ *CRC, General comment No. 14*, 13 – 17. In its *Eighth Schedule*, the Bill gives a more expansive and non-exhaustive list of considerations when determining the best interest of the child including, *inter alia*, age, stage of development of the child, gender, the prior relationship of the child with their primary caregivers, the effect of being raised by a single parent.

of protection apply to children of either or *both parents* regardless of the gender.¹³⁸ The best interest principle is flexible and adaptable to the needs of every child and therefore needs to be determined on a case by case basis. Implementation of measures and policies securing the child's best interest thus require child rights impact assessment to predict the impact of any proposed law, policy or budgetary allocation on children, and a child rights impact evaluation to determine the actual impact of implementation.¹³⁹

4.2.3. The life, survival and development principle

States are required to recognize every child's inherent right to life and to ensure their maximum survival and development.¹⁴⁰ The right to life, survival and development is one of the most fundamental of all human rights as the fulfilment of all other human rights is hinged upon the safeguarding of this right.¹⁴¹ Of particular importance to children of imprisoned persons is the *right to development* that is founded on both premises discussed in Chapter Three. Development has been interpreted as a holistic concept, encompassing the child's physical, mental, spiritual, moral, psychological and social development.¹⁴² It connotes the right of a child to grow up in a healthy environment, protected able to develop their personalities, talents and abilities to enable them to reach their full potential.

The most pertinent content of the right to development for this paper is the right to parental care and protection,¹⁴³ which includes an equal and common responsibility of both parents for the upbringing and of their child.¹⁴⁴ State parties are mandated to respect the rights and duties of parents to provide, in a manner consistent with evolving capacities of children.¹⁴⁵ To properly and fully guarantee these rights, they are mandated to render assistance to primary caregivers in the

¹³⁸ Halton L, Townhead L, Children of incarcerated parents: International Standards and Guidelines, Quaker United Nations Office, 2020, 8.

¹³⁹ CRC, *General comment no. 5, General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, Para. 45.

¹⁴⁰ Article 6, *Convention on the Rights of the Child*; Article 5, *African Charter on the Rights and Welfare of the Child*; Section 4 (1), *The Children Act (2001)*; Section 5 (1), *The Children Bill (2017)*.

¹⁴¹ Novak M, *A Commentary on the United Nations Convention on the Rights of the Child*, para. 1.

¹⁴² CRC, *General comment no. 5*, Para. 12.

¹⁴³ Novak M, *A Commentary on the United Nations Convention on the Rights of the Child*, 2, Para. 11.

¹⁴⁴ Article 18 (1), *Convention on the Rights of the Child*; Article 19, *The African Charter on the Rights and Welfare of the Child*; Article 53 (e), *Constitution of Kenya (2010)*; Section 6, *The Children Act (2001)*; Section 8, *The Children Bill (2017)*.

¹⁴⁵ Article 5, *Convention on the Rights of the Child*.

performance of their responsibilities towards their children. They are also mandated to afford children opportunities and the facilities required for their full and wholesome development, through laws or other means.¹⁴⁶

The parental role in the mental, moral, social, and psychological development of the child¹⁴⁷ does not cease on incarceration, therefore, the State has a duty to facilitate the performance of this duty by imprisoned parents.¹⁴⁸ States must also consider the varying needs of children in relation to their stage of development and take appropriate measures for the realization of their right to development.¹⁴⁹

States are meant to protect this right to the maximum extent of their available resources.¹⁵⁰ This is neither meant to subordinate this obligation to others nor alter its immediacy. Resource constraints alone cannot justify an action or inaction since implementation of these obligations is not a 'charitable process'. In the event of resource constraints, the needs of the most vulnerable members of society should be prioritized.¹⁵¹ Therefore, the importance of the State in fulfilling this mandate is directly proportional to the vulnerability of the children in question. Children of imprisoned persons have been recognized as one of the groups of vulnerable children in need of care and protection.¹⁵² Under-investment would be detrimental to their development.

4.2.4. The principle of participation

Every child capable of expressing his or her own views should be afforded the platform to do so, either directly or indirectly, in all matters affecting them.¹⁵³ This provision recognizes that while children may lack the full legal autonomy that adults possess, they are still individual right-holders who have rights that influence their lives.¹⁵⁴ In this sense, this principle is founded on the inherent dignity of human beings.

¹⁴⁶ Principle 2, *UN Declaration of the Rights of the Child (1959)*.

¹⁴⁷ *CRC, General Guidelines for Periodic Reports*, 11 October 1996, para. 40.

¹⁴⁸ Phillbrick K, Ayre L, Lynn H, *Children of Imprisoned Parents*, 73.

¹⁴⁹ *CRC, General comment No. 19*, Para. 49.

¹⁵⁰ Article 4, *Convention on the Rights of the Child*; Article 2(1), *International Covenant on Economic, Social and Cultural Rights*.

¹⁵¹ *CRC, General comment no. 5*, Para. 11.

¹⁵² Section 119 (1) (c), *The Children's Act (2001)*; Section 132 (1) (c), *The Children Bill (2017)*.

¹⁵³ Article 12, *Convention on the Rights of the Child*; Article 7, *The African Charter on the Rights and Welfare of the Child*. Neither the *Children's Act* nor the *Children's Bill* make such a provision for all children.

¹⁵⁴ *CRC, General comment no. 12, The right to be heard*, 20 July 2009, Para. 1.

The CRC provides that the State ‘*shall assure*’ which leaves no avenue for the State to exercise its discretion in the realization of this right.¹⁵⁵ The child has the right to express those views ‘*freely*’ which means that they should be from the child’s own perspective.¹⁵⁶ ‘*In all matters affecting the child*’ denotes the intention of the drafters to consider children’s views in all social processes of the society. These views must be ‘*given due weight in accordance with the age and maturity of the child*’ which mandates States to listen to their views and accord them due consideration.¹⁵⁷

Separation of a child from his or her parents is an action that undoubtedly affects the child. The CRC therefore accords children the right to express their views in any proceedings that are likely to separate them from their parents.¹⁵⁸ This right also extends to children in alternative care to express their views on matters affecting their daily lives.¹⁵⁹ Maintaining contact with their imprisoned parents would fall under the scope of matters affecting their daily lives and thus their views must be given due consideration. Furthermore, any policy geared towards the maintenance of contact between such children and their imprisoned parents must take into consideration the views of these children.

4.3. A Prisoner’s Rights Perspective

Prisoners and detainees retain all the fundamental human rights and freedoms that are not incompatible with their detention or imprisonment, including, *inter alia*, the right to maintain contact with the outside world. This right is protected with more specificity than that with which the right of children to maintain contact with their imprisoned parents is safeguarded. Therefore, it is no surprise that the children of imprisoned persons rely on the right of prisoners to contact with the outside world to maintain family ties with their parents. The framing of this right therefore invariably affects children’s right to visit their parents. This part of the paper therefore discusses the right to maintain contact from the lens of a prisoner’s right. It aims to show how the framing of this right as a privilege, specifically in Kenya, is not only inconsistent with international standards, but also negatively affects the realization of the child’s right.

¹⁵⁵ CRC, *General comment no. 12*, Para. 19.

¹⁵⁶ CRC, *General comment no. 12*, Para. 22.

¹⁵⁷ CRC, *General comment no. 12*, Para. 27 - 29.

¹⁵⁸ Article 9 (2), *Convention on the Rights of the Child*.

¹⁵⁹ CRC, *General comment no. 12 (2009)*, Para. 97.

4.3.1. Treaty and Charter-Based Norms

The ICCPR, the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (hereafter ‘UNCAT’), and the Banjul Charter prohibit State parties from subjecting anyone to torture or to cruel, inhuman and degrading treatment,¹⁶⁰ with a view to respecting the inherent dignity of man.¹⁶¹ Actions like being held in solitary confinement or incommunicado, have been held to amount to cruel and inhuman treatment.¹⁶² Specific to prisoners, the ICCPR provides that pre-trial detainees are to be segregated from convicted persons and should be treated according to their status, and that the aim of the penitentiary system is the treatment and rehabilitation of prisoners.¹⁶³

4.3.2. Declarations, Guidelines and Rules¹⁶⁴

The United Nations Standard Minimum Rules on the Treatment of Prisoners, (Nelson Mandela Rules), are the most comprehensive guidelines on the treatment of prisoners and constitute an authoritative guide to binding treaty standards. On visitation and contact, the Nelson Mandela Rules provide that prisoners shall be allowed to communicate with their families through correspondence and through visits, under necessary supervision.¹⁶⁵ Moreover, family contact cannot be prohibited as disciplinary sanction, and can only be restricted for a limited period and only for the maintenance of security and order.¹⁶⁶

The Nelson Mandela Rules are supplemented by the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).¹⁶⁷ The

¹⁶⁰ Article 7, *International Covenant on Civil and Political Rights*; Articles 2 and 16, *United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85; Article 5, *African Charter on Human and Peoples’ Rights*.

¹⁶¹ Preamble, Article 10 (1), *International Covenant on Civil and Political Rights*; Preamble, *United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*; Article 5, *African Charter on Human and Peoples’ Rights*.

¹⁶² Kenya National Commission on Human Rights, *Implementation of the United Nation Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 2.

¹⁶³ Article 10, *International Covenant on Civil and Political Rights*.

¹⁶⁴ Declarations, guidelines and rules represent internationally or regionally accepted legal standards on the treatment of prisoners. Though non-binding, the contents of these instruments have been incorporated into various international, regional and national laws.

¹⁶⁵ Rule 58 (1), *The United Nations Standard Minimum Rules on the Treatment of Prisoners*, 8 January 2016, A/RES/70/175.

¹⁶⁶ Rule 43, *The United Nations Standard Minimum Rules on the Treatment of Prisoners*.

¹⁶⁷ *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, 21 December 2010, A/RES/65/229.

Bangkok Rules provide that visits to women prisoners by their families should be encouraged and facilitated where possible.¹⁶⁸ For women who are detained in institutions far from their homes, measures should be taken to counterbalance the disadvantages they face. These include measures such as extending the length of visits, synchronizing visiting hours of children with their school hours, providing transport and logistical assistance, and facilitating non-contact communication.¹⁶⁹

They also provide that visits involving children should be in child-friendly environments that allow open contact between the mother and the child and encourage longer visits where possible.¹⁷⁰ They prohibit disciplinary sanctions that include a restriction on family contact.¹⁷¹ They also provide for options such as home leaves and half-way houses to help women re-establish contact with their families.¹⁷² Under other guidelines, provisions for pre-trial detainees to be visited and to correspond with their family members have been made.¹⁷³ Finally, the conditions under which prisoners are kept should never aggravate their suffering.¹⁷⁴

4.3.3. Constitutional and Statutory Framework in Kenya

The Constitution recognizes that man has inherent dignity that should be protected and respected by all persons including State and public officers.¹⁷⁵ It provides that people deprived of their liberty retain all their rights and fundamental freedoms that are not incompatible with their imprisonment and that they should be treated with humanity, considering all relevant human rights instruments.¹⁷⁶

¹⁶⁸ Rule 26 and Rule 43, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*.

¹⁶⁹ Rule 26 and Rule 43, *Commentary to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, UNDOC, 23 – 26 November 2009.

¹⁷⁰ Rule 28, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*.

¹⁷¹ Rule 23, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*.

¹⁷² Rule 45, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*.

¹⁷³ Article 31, *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 17 - 23 October 2002*; Article 27, *The Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa, 28 April - 12 May 2014*; Principle 19, *Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment*.

¹⁷⁴ Preamble, *The Kampala Declaration on Prison Conditions in Africa.*, 19-21 September 1996.

¹⁷⁵ Article 28, *Constitution of Kenya (2010)*; Article 10 (2) (b), *Constitution of Kenya (2010)*.

¹⁷⁶ Article 51, *Constitution of Kenya (2010)*; Fifth Schedule, *Kenya National Police Service Act (2001)*.

The Prisons Act defines a prisoner as any person under detention in any prison whether convicted or not.¹⁷⁷ Further, the Prison Rules established under Rule 74 of the Prisons Act provides for visitation and letters, categorically stating that the reception of visits and communication is a *privilege*, subject to postponements as a disciplinary sanction, but not to total prohibition.¹⁷⁸ Moreover, varying levels of this privilege accrue to different types of prisoners. First and second stage prisoners are entitled to write and receive one letter every four weeks and receive a twenty-minute visit every four weeks. Third stage prisoners are entitled to write and receive a letter every three weeks and receive a twenty-minute visit every four weeks. Second stage prisoners may write and receive a letter every two weeks, and to receive a thirty-minute visit every four weeks. A special stage prisoner may receive letters without restriction, and write one every week, and may also receive a thirty-minute visit biweekly.¹⁷⁹ This varying treatment leads affects the frequency with which children may maintain contact with their imprisoned parents, and this amounts to indirect discrimination.

4.4. Children of Imprisoned Persons in Kenya: Current Status of Protection of their Right to Family Life

4.4.1. Background: Trends in Visitation and Contact

Historically, prisons in Kenya were cited as some of the most inhumane and overcrowded in the entire world.¹⁸⁰ They were also closed institutions that denied access to both visitors and human rights agencies.¹⁸¹ It was not until 2008, that an investigation into the deplorable conditions of prisons catalysed prison reforms in Kenya. Initial reforms saw prisons adopting ‘open-door’ policies which allowed for more contact, accessibility and scrutiny into the affairs.¹⁸² Since then, reform initiatives, in response to the dire situation and to international standards, have led to great

¹⁷⁷ Section 2, *The Prison's Act (Cap 90)*.

¹⁷⁸ Section 53 (1) and Section 55 (1), *The Prison Rules*.

¹⁷⁹ Section 53 (2), *The Prison Rules*.

¹⁸⁰ Dissel A, ‘Prison Conditions in Africa’, Research Report written for the Centre for the Study of Violence and Reconciliation, 2001, 1.

¹⁸¹ Hackett T, Njoga B, Ounsted J, ‘Human rights are good corrections: A partnership between the Kenya Prisons Service and the Raoul Wallenberg Institute’, 3 *Advancing Corrections: Journal of the International Corrections and Prisons Association*, 2017, 2.

¹⁸² Hackett T, Njoga B, Ounsted J, ‘Human rights are good corrections’, 2.

improvements in prisons in Kenya, including open visits and other means of family contact, training sessions for prison staff, among others.¹⁸³

Indeed, some of these notable good visitation practices in Kenya include the open-days introduced in prisons such as Kamiti Maximum Prison and Shimo La Tewa Prisons. These, in addition to normal visiting hours, allow families to have whole-day visits with their families thrice a year, and provide a forum for remote parenting.¹⁸⁴ Similarly, Langata Women's Prisons also introduced child-friendly visits to improve family ties between the mothers in prison and their children.¹⁸⁵ Langata Women's Prison has also been hailed for affording the inmates and their children adequate visitation time during the weekend visits to ensure quality bonding.¹⁸⁶

4.4.2. Challenges facing visitation and contact in Kenya

Despite these positive strides, visitation is still subject to many restrictions such as bureaucratic obstacles which may provide an avenue for the solicitation of bribes.¹⁸⁷ For pre-trial detainees, visits from families are subject to time limitations, with prison officials granting as little as ten minutes in Kakamega Prison and five in Meru Women's Prison. Moreover, these prisons can only accommodate a visitor at a time therefore the visitation is both time-consuming and does not allow enough time for proper bonding. Visitations are also restricted as a disciplinary sanction where detainees are in solitary confinement in Meru Women's Prison.¹⁸⁸ Prisons are still marred by overcrowding which makes the visitation areas inadequate for the visitors. For example, in Nakuru Women's Prison, there is no visiting area and visitation occurs at the entrance gate, while in Kakamega Women's Prison, the visiting area has been converted into a cell due to overcrowding.¹⁸⁹

In a previous study carried out in Langata Women's Prisons, Shimo La Tewa Women's Prison and Eldoret Women's Prison, children of imprisoned mothers indicated that visitation was inadequate,

¹⁸³ Hackett T, Njoga B, Ounsted J, 'Human rights are good corrections', 5.

¹⁸⁴ Kinyanjui S, Actualizing penal reforms, 26.

¹⁸⁵ Cyrus R. Vance Center for International Justice, 'Women in Prison', African Regional Initiative, 2019, 23.

¹⁸⁶ Ndunda E, Rights of children of imprisoned mothers, 65.

¹⁸⁷ United States Department of State, 2019 Country Report on Human Rights Practices – Kenya, 2019, 8 - <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/kenya/> on 29 November 2020.

¹⁸⁸ National Council on Administration of Justice, 'Criminal Justice System in Kenya', 366.

¹⁸⁹ National Council on Administration of Justice, 'Criminal Justice System in Kenya', 367.

with some visiting once a month and others one in two months.¹⁹⁰ They also indicated that the means of communication, which was primarily through letters and occasionally through phone calls was subpar. The imprisoned mothers also indicated that visitations were insufficient due to the exorbitant transport costs and time consumption of travelling to the facilities. The women indicated that the proximity to their children was not factored in when deciding on the prison facility to commit them because of the limited number of women's prisons across the country.¹⁹¹ Moreover, for open days, only smaller prisons such as Shimo La Tewa Women's prison are able to organize them for all inmates, with larger prisons citing security reasons as the basis for limiting open days to a few prisoners on the basis of their character.¹⁹²

4.4.3. Children of imprisoned persons in Kenya

Children of imprisoned persons are vulnerable members of society in need of care and protection.¹⁹³ When such children are separated from their parents, the State must, in line with the child's best interests, assume its twin obligations of ensuring the child is placed under alternative care where the child has been separated from both parents and to ensure the child is able to maintain contact with his or her incarcerated parent.¹⁹⁴ Such facilitation would require both favourable visitation and contact policies specific to children of imprisoned persons, and financial support from the State. Such a mandate would fall under the purview National Council for Children's Services (NCCS), established under the Children Act.¹⁹⁵ The NCCS is tasked with, among other things, formulating policy on the planning, financing and coordination of child welfare activities, and ensuring the best interests of unaccompanied children held in care.¹⁹⁶

Yet thus far, there is no record of the State support towards such children to maintain contact with such mothers.¹⁹⁷ Efforts to facilitate and enhance contact are usually by non-governmental organisations such as Muslims for Human Rights (MUHURI) and Mavuno Church, which offer

¹⁹⁰ Ndunda E, Rights of children of imprisoned mothers, 65.

¹⁹¹ Ndunda E, Rights of children of imprisoned mothers, 66.

¹⁹² Kinyanjui S, Actualizing penal reforms, 27.

¹⁹³ Article 21, *Constitution of Kenya (2010)*; Section 119 (1) (c), *The Children's Act (2001)*; Section 132 (1) (c), *The Children Bill (2017)*.

¹⁹⁴ Articles 20 and 9 (3), *Convention on the Rights of the Child*.

¹⁹⁵ Section 30, *The Children's Act (2001)*.

¹⁹⁶ Section 32, *The Children's Act (2001)*.

¹⁹⁷ See Mutua J, Muya R, Otieno D, 'Child Budget Analysis in Kenya: National Government and Six County Governments', Institute of Economic Affairs, May 2015.

financial support for open days in Kamiti Maximum Prison and Shimo La Tewa Prisons.¹⁹⁸ Another non-governmental organisation that offers support to children of imprisoned persons to maintain regular contact with their parents is the Nest Children's Home, which houses approximately one hundred children of imprisoned mothers. It relies on private donations to support and care for these children, and to ensure they maintain contact with their parents.¹⁹⁹

4.5. Conclusion

The State, in fulfilment of its international obligations under the CRC, needs facilitate meaningful contact between children and their imprisoned persons. The limitations that children face when trying to maintain contact with their parents – including financial and geographical obstacles and poor prison visitation and contact policies – cannot be addressed if visitation remains a privilege and not a right. This final part of Chapter Four aimed to show how this dissonance in laws translates into the reality that these children face with the view to demonstrate that a good starting point to alleviate this plight is to reframe visitation and contact as a right due to children rather than as a prisoner's privilege.

¹⁹⁸ Kinyanjui S, *Actualizing Penal Reforms*, 27.

¹⁹⁹ The Nest - <https://www.thenesthome.org/en/childrens-home/> accessed on 29 November 2020.

CHAPTER 5: CHILD-CENTRED POLICY AND PRACTICES IN THE COUNCIL OF EUROPE

5.1. Introduction

This chapter draws a parallel between the existence of a child-centred policy on children of imprisoned persons and the Council of Europe's good practices in safeguarding the rights of these children to maintain a family life with their parents.

5.2. The Legal Framework

The Council of Europe is an international organization which comprises of forty-seven countries of Europe. Its main mandate is to protect human rights and the rule of law by agreeing on minimum legal standards and monitoring how they are applied across member states.²⁰⁰ In the Council of Europe, the child's rights have increasingly been given priority over the years.²⁰¹ Specific to needs and rights of children of imprisoned persons, the Committee of Ministers ratified the Council of Europe's Recommendation CM/ Rec (2018)5 Concerning Children with Imprisoned Parents (The Recommendation) in April 2018.²⁰²

Recommendations by the Council of Europe, while non-binding, nonetheless constitute legal instruments, whose legal significance can be assessed in light of the European Convention on Human Rights, domestic laws and any other international standards.²⁰³ The rights of children with imprisoned parents recognized under the CRC and Recommendation CM/Rec (2018)5 are safeguarded under the auspices of the Children of Prisoners Europe (COPE).²⁰⁴

COPE recognizes the considerable number of children affected by parental imprisonment in Europe, and that these children are vulnerable members of society. It also recognizes of the pivotal

²⁰⁰ The Council of Europe, 'The Council of Europe and the European Union' - <https://www.coe.int/en/web/portal/european-union> accessed on 30 November 2020.

²⁰¹ See Article 24, *Charter of Fundamental Rights of the European Union (2000)*; *Convention on Contact Concerning Children (2003)*; Council of Europe, Council of Europe Strategy for the Rights of the Child (2016 – 2021), Para. 13.

²⁰² Phillbrick K, 'The new Council of Europe Recommendation and children living with a parent in prison' in 'Bonding across barriers: Support for the infant-parent relationship within a carceral context' 7 (1) *European Journal of Parental Imprisonment*, 2018, 8.

²⁰³ Puppink G, 'Status of the recommendations of the Committee of Ministers in the legal field of the Council of Europe – Synthesis', *European Centre for Law and Justice*, 2012, 1.

²⁰⁴ Children of Prisoners Europe - <https://childrenofprisoners.eu/> accessed on 30 November 2020.

role professionals and other actors in the criminal justice system play in respecting the children's needs and rights to a family life, and the importance of promoting initiatives to protect the family life of these children. All of COPE's initiatives place children at the heart of decision-making.²⁰⁵

The Recommendation recognizes the previous absence of explicit obligations in the European Union on children with imprisoned parents that necessitated an inference of child's rights from the existing obligations under international instruments, such as the Nelson Mandela Rules and the Bangkok Rules. It is therefore a departure from a previous regime where children's rights were subsumed under the arrangements for their parents.²⁰⁶ It is also an acknowledgement that respecting children's rights is, and must be, compatible with prison rules. COPE intends to develop user-friendly guidelines with examples of good practices on the implementation of this Recommendation across Europe.²⁰⁷ The Recommendation is grounded in the four guiding principles discussed in Chapter Four.²⁰⁸ It acknowledges the necessity of an emotional and continuing bond between a child and his or her imprisoned parents for the development of the child. It places the duty on member states to put up measures that support parent-child relationships before, during and after detention of the parents.²⁰⁹

The Recommendation lays down a number of guidelines in respect for family life of children with imprisoned parents. Member States of the Council of Europe have, to varying degrees, taken steps to create home-grown initiatives to adopt these recommendations. This part of the chapter therefore seeks to highlight some of the child-centred practices regarding children of imprisoned parents across the Member States in light of some of these recommendations.

5.3. Child-centred Practices in the Council of Europe

5.3.1. Data Collection

To fill the statistical void about children of imprisoned parents, the Recommendation provides that when a parent is detained, prison authorities should collect and collate, and regularly update data regarding their children. This data, together with that from child welfare services, should be

²⁰⁵ Phillbrick K, Ayre L, Lynn H, *Children of Imprisoned Parents*, 11 – 23.

²⁰⁶ Phillbrick K, 'The new Council of Europe Recommendation and children living with a parent in prison', 8.

²⁰⁷ Council of Europe, Explanatory Memorandum to Recommendation CM/Rec (2018)5 concerning children with imprisoned parents, 2018, 26.

²⁰⁸ Appendix to Recommendation CM/Rec (2018)5, Council of Europe, 2018, 11.

²⁰⁹ Appendix to Recommendation CM/Rec (2018)5, Council of Europe, 2018, 12.

collected and published together with other information on children of imprisoned persons to facilitate research.²¹⁰ In Europe, approximately one third of European prison administrators actively collect such data. In Turkey, Slovakia, Greece and Croatia in particular, the prison social services also play a role in the collection of this data.²¹¹

5.3.2. Proximity of detention facility

Member States are mandated to protect the right of children with imprisoned parents to maintain contact with their parents without any geographic, financial or structural barriers.²¹² Detention facilities must be in close proximity to their children to allow for contact, and where the distance is great, families must be afforded the requisite financial and logistical assistance to enable them to maintain contact. Visits must take place in a flexible manner, especially where the child's parent is imprisoned far away from home.

In the UK, for example, financial aid to help children from low-income families to maintain contact with their imprisoned parents is offered through the Assisted Prison Visits Scheme.²¹³ In Cyprus, the prison administration has set aside a budget for transporting children to and from prisons. In Germany, prisoners who have been detained far away from their homes may be temporarily relocated to allow visitation from their families.²¹⁴

5.3.3. Frequency of visitation and disciplinary sanctions

In principle, visits must be organized once a week and in a manner that does not interfere with other elements of the child's life. Where weekly visits are not possible, less frequent visits must be proportionally longer. In addition to regular visits, child-parent visits should be extended to include special occasions, like Mother's and Father's Day.²¹⁵ Any restrictions imposed on parent-child contact must be implemented exceptionally and for the shortest period. Should the security

²¹⁰ Article 52, *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*, Council of Europe, 2018.

²¹¹ Children of Prisoners Europe, *Establishing baselines: Data collection towards better safeguarding children with a parent in prison*, 2018, 15.

²¹² Article 16, *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*.

²¹³ Phillbrick K, Ayre L, Lynn H, *Children of Imprisoned Parents*, 93.

²¹⁴ Phillbrick K, Ayre L, Lynn H, *Children of Imprisoned Parents*, 93.

²¹⁵ Articles 1, 18 and 28, *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*.

measures be so extreme as to bar contact visits, additional measures must be implemented to support the child-parent bond through non-contact visits.²¹⁶

Some countries, such as Finland and Slovakia, reserve weekends for family visits, while others such as Germany's Rhineland-Palatinate delegate a 'family day' every week.²¹⁷ On special occasions, French Prisons, through the *Relais Enfants Parents* offer children the opportunity to visit their parents on Mother's Day, Father's Day and Christmas.²¹⁸ In Italy, guidelines have been set to make leave for parents to be present at important moments in their children's lives such as birthdays, graduations, festivities, among others.²¹⁹ Any restrictions imposed on prisoners should leave room for parents and children to maintain contact, by phone or in person, unless it is incompatible with the best interests of the child.²²⁰

5.3.4. Use of Information and Communication Technology

Any use of technology such as video conferencing, mobile and other telephone systems can only be used to supplement face to face visits, but never to replace them. Where such means are used, they should not involve exorbitant costs, and imprisoned parents should be assisted with these costs if their means do not allow them to meet the costs.²²¹ In Sweden, prisoners are allowed fifteen minutes of free calls weekly and an extra five minutes for each child.²²² Skype has been introduced in prisons in Northern Ireland and Cyprus, with prisoners in the latter being allowed full access to the facility for a better part of their days.²²³

5.3.5. Nature of the visitation environment

The visits must take place in child-friendly environments, and where possible.²²⁴ The visitation areas must be capable of softening the harsh impact of stressful prison visits and also maximizing

²¹⁶ Articles 30 – 31, *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*.

²¹⁷ Children of Prisoners Europe, *Establishing baselines*, 6.

²¹⁸ EuroPris Family Relations Expert Group (2017), 30.

²¹⁹ Article 3(2), *Italian Memorandum of Understanding (2014)*.

²²⁰ Children of Prisoners Europe, *Implementation Guidance Document: Council of Europe Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*, 2019, 37.

²²¹ Article 25, *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*.

²²² Children of Prisoners Europe, *Implementation Guidance Document*, 31.

²²³ Phillbrick K, Ayre L, Lynn H, *Children of Imprisoned Parents*, 107.

²²⁴ Articles 20 – 22, *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*.

the avenue for quality bonding between the child and parent.²²⁵ For example, in Finland, all prisons are required to have special visiting rooms that resemble living rooms, where imprisoned parents can have ‘family visits’ up to a few days long.²²⁶ In Italy, child-visitation areas are painted yellow and filled with toys and activities that lessen the harshness of the prison premises.²²⁷

5.3.6. Remote Parenting

Member-states are also mandated to facilitate and support remote parenting – including communicating with school, health and welfare services – if it is in the child’s best interest.²²⁸ Remote parenting gives the parents an avenue to exercise their parental authority, while reinforcing the sense of belonging among their children. For example, in Scotland parents in prison are allowed to attend their children’s panel in school, or to talk to the teachers through telephone calls, and participate in the decision-making on their child’s welfare. Similarly, in Italy, prisoners can sometimes communicate with their children’s teachers via Skype.²²⁹

5.3.7. Staff Training

Staff who come in contact with children with imprisoned parents must also receive appropriate training to enable them to respect the needs and rights of both the children and the parents.²³⁰ Such training is important to mitigate the trauma and stress that is brought about by prison visits. In Denmark, for instance, specially appointed prison officers are trained to become ‘child officers’ by the Danish Prison and Probation Service. They are tasked with finding out prior family relations of the prisoners and cooperating with various organisations to ensure that such relationships are safeguarded.²³¹ In both Finland and Ireland, Family Liaison Officers support the preservation of

²²⁵ Children of Prisoners Europe, *Implementation Guidance Document*, 25.

²²⁶ EuroPris Family Relations Expert Group (2017), 5.

²²⁷ EuroPris Family Relations Expert Group (2017), 5.

²²⁸ Article 27, *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*.

²²⁹ Council of Europe (2018), *Explanatory Memorandum*, 8.

²³⁰ Articles 46 – 48, *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*.

²³¹ EuroPris Family Relations Expert Group (2017), 35.

healthy family relationships between prisoners and their children.²³² Moreover, in Sweden, children's ombudsmen in prisons are tasked with protecting the best interest of the child.²³³

5.3.8. Multi-Agency and Multi-Disciplinary Research Experts

Finally, the Recommendation tasks States with establishing multi-agency and multi-disciplinary expert groups on children with imprisoned parents to assess the situation, and suggest improvements to current policies and practices drawn from evidence-based research.²³⁴ This is evident in Norway, where the For Fangers Pårørende (FFP), in collaboration with prison staff and prison authorities, carries out awareness-raising and research on the impact of imprisonment on families.²³⁵ Similarly, The Scottish Prison Services (SPS) works in collaboration with other organisations such as the COPE member Families Outside to support prisoners' families.²³⁶

5.4. Conclusion

This chapter aimed at drawing a parallel between the existence of child-centred policies with the existence of some of the child-centred practices in the Council of Europe. Although there is still no data available on the impact these policies have had, one can expect that such policies and practices that encourage and facilitate contact between children and their imprisoned parents, to a great extent, buffer these children from the harsh consequences of parental imprisonment. For such children, spending momentous occasions such as Mother's and Father's Day with their imprisoned parents likely brings a semblance of normalcy into their lives. Budgetary allowances also alleviate the financial burdens incurred when trying to maintain contact by families whose finances may already be strained. Therefore, on these grounds, this paper proposes similar child-centred decisions, policies and practices for Kenya.

²³² EuroPris Family Relations Expert Group (2017), 39.

²³³ Muth B, Warner K, Gogia K, and Walker G, 'A Critique of the Prison Re-entry Discourse: Futurity, Presence and Common-sense', 96 (3) *The Prison Journal*, 2016, 395.

²³⁴ Articles 51 – 54, *Recommendation CM/Rec (2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents*.

²³⁵ EuroPris Family Relations Expert Group (2017), 13.

²³⁶ Children of Prisoners Europe, *Implementation guide: Italian memorandum of understanding on children with imprisoned parents*, 2017, 36.

CHAPTER 6: RECOMMENDATIONS AND CONCLUSION

6.1. Introduction

This chapter summarises the chapters and highlights key findings. It then makes pertinent recommendations and concludes the study.

6.2. Summary and Findings

6.2.1. Chapter One

Chapter one introduced the problem that children with imprisoned parents face while trying to maintain a family relationship with their imprisoned parents. The lack of child-centred laws and policies leaves children at the mercies of the laws and policies governing the prisoner's 'privilege' to contact and visitation. The paper proposed that this limits their ability to claim the requisite State support due to them by virtue of the CRC.

6.2.2. Chapter Two

Chapter two discussed the theoretical framework underpinning the study. It grounded the study in two theories – the attachment theory and the social learning theory. Under the attachment theory, the parent-child relationship is the foundation under which children can develop the love and warmth, from a tender age, which translates into their ability to form meaningful relationships in the future. The social learning theory recognizes the role of parents as the first educators and posits that this role does not diminish even with the inability to actively parent.

6.2.3. Chapter Three

Chapter three discussed the scope and basis of the right to family life for the children of imprisoned persons. It focused on state-sanctioned separation between children and their parents and defined the scope to family life as the right to have frequent and direct contact and visitation. It found that the right to contact and visitation imposes a duty of non-interference with the family life of children and their imprisoned parents and a duty to implement measures and adopt laws and policies that are geared towards the realization of this right. It acknowledged the right of prisoners to family life as well. The chapter also grounded the study on human dignity and on the fact that the family is the natural and fundamental unit of society.

6.2.4. Chapter Four

Chapter four investigated the status of the protection of the right to family life for children of imprisoned persons. The aim was to juxtapose the rights of these children with the privileges that accrue to their imprisoned parents. It found that while there is a robust legal framework governing the protection of children's rights in general, the laws and policies specifically governing children of imprisoned persons remain bereft in Kenya. In effect, these children remain victims to be given meagre provisions and 'privileges' at the will of prison officials.

6.2.5. Chapter Five

Chapter five discussed some of the child-centred laws and practices in the Council of Europe. It demonstrated the nexus between a child-specific instrument governing the rights of children of imprisoned persons with good practices, such as keeping active data files on these children, making visitation areas as friendly as possible, and providing a budgetary allowance to cover transport and logistics when children are visiting parents, with a view to making pertinent recommendations.

6.3. Recommendations

6.3.1. Creation of child-centred laws and policies on children with imprisoned parents

The State is mandated to facilitate parent-child contact where it is in the best-interest of the child, and Chapter five of the paper has highlighted a nexus between child-specific laws and State protection. Therefore, there is a need to enshrine the rights of children with imprisoned parents distinctly from those of their parents, which is the only way their rights will be fully safeguarded. This calls for the creation of child-centred laws and policies that safeguard the child's right to contact and visitation.

6.3.2. Data collection and management of children with imprisoned parents

Just as with data on other vulnerable children, most data on children of prisoners is missing at the entry point.²³⁷ Under the auspices of the Ministry of Labour and Social Services, the Child Protection Information Management System (CPIMS) is the database that facilitates and monitors child protection interventions in Kenya.²³⁸ It is tasked with collecting and keeping accurate and

²³⁷ NCAJ Special Task Force on Children Matters, Status Report on Children in the Justice System in Kenya, National Council on Administration of Justice, 2019, 30.

²³⁸ Child Protection Information Management System (CPIMS), <https://www.socialprotection.go.ke/children-protection-information-management-system-cpims/> accessed 30 December 2020.

timely child-protection data on vulnerable children. Children with parents in prison fall in this category. However, data on these children is severely scant, with some lacking vital information such as the ages of the children.²³⁹ Filling this statistical lacuna would aid in the formulation of budgetary allowances and allow researchers to infer trends and the impact of parental incarceration. It is paramount to stress that during the process of data collection, due regard should be given to the right to respect for privacy and data protection. Neither the children of imprisoned persons nor the prisoners themselves should be forced to disclose unnecessary information. Data must be stored and shared with due regard to data privacy laws. Finally, Kenya should adopt a universal system whereby accurate records are kept across the country to ensure that the rights of children of imprisoned parents are properly upheld.

6.3.3. Creation of a budgetary allowance for children with imprisoned parents

The State, through the NCCS,²⁴⁰ also needs to put in place a budgetary allowance to cover all transport and logistical expenses that go into visitation and contact between children and their imprisoned parents, and to facilitate non-contact communication such as phone calls, emails, and with time even video conferencing. Resources should also be allocated to improve visitation areas. In cooperation with the Treasury, the NCCS should therefore set aside a budgetary allowance for these children to ensure the maximum safeguarding of their right.

6.3.4. Creation of child-friendly visitation environments

Prisons and prison officials form part of the chain link in the child justice system for children in conflict with the law and children in contact with the law.²⁴¹ To safeguard the rights of children of imprisoned persons, therefore, prisons and prison's officials should provide child-friendly visitation environments that ensure maximum bonding. Visitation environments should be friendly and playful, and the attitudes of the staff that should be warm and welcoming. Prison staff dealing with children of imprisoned parents should receive special training on the needs and rights of these children to help buffer the prison hostilities.

²³⁹ <https://data.childprotection.go.ke/archive/#000/SCCI/2016/ALL> accessed 30 December 2020.

²⁴⁰ Article 30, *The Children Act (2001)*.

²⁴¹ NCAJ Special Task Force on Children Matters, Status Report on Children in the Justice System in Kenya, 11.

6.3.5. Further Research

Most available research does not factor in the views of the affected children. Thus, more inquiries as to children's views on maintaining contact with their imprisoned parents should be made and the findings should be used to inform further research and policies.

6.4. Conclusion

Children are vulnerable members of society who need the utmost protection from the State. Children also have a right to grow up in a happy family environment for their full development. Those separated from their parents retain the right to maintain contact with them, if it is in their best interest. This paper sought to discuss the role laws and policies play in influencing how this right is safeguarded. The current laws and policies on visitation and contact remain prisoner-centred, and the central thesis of this paper is that the shortfalls in protecting this right can be, to a great extent, attributed to the focus of the law.

In advancing this central thesis and in order to meet its particular objectives, the study has discussed the theories underpinning the right to maintain family life. It has set out the scope of the right and the foundations of the right. To highlight the main problem, it has analysed the laws governing the right to family life for children of imprisoned parents from a child-rights perspective and a prisoners-rights perspective and given a brief overview of how these laws translate into practice.

It has drawn from the child-centred policy and practice in the Council of Europe to advance the argument that a good starting point to realize this right is the formulation of laws and policies specific to the needs and rights of children with imprisoned parents. By giving the right to maintain family life through contact and visitation the legal weight of a law, which is a step higher than that of a privilege, children and other actors, have the impetus and avenue to agitate for this right, which leads to its utmost realization. The paper then concludes highlighting the findings of the study and makes pertinent recommendations from the study.

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